The inherent limits of the apology to the Stolen Generation

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Introduction

The apology of the Rudd government to Aboriginal and Torres Strait Islander peoples in Australia for laws which resulted in their forced separation from their families assumed that the State possessed the power to pass such laws. As a result the apology was limited to apologising for the consequences of the laws of removal, and in no way intimated that the State might have lacked the power to pass them. The laws were acknowledged to be bad, even evil in their conception, but they remained compatible with the fundamental principle of the rule of law which sustains parliamentary government. The paper challenges this explanation of the laws and considers the possibility that laws empowering the State to remove Aboriginal children from their families represented an exercise of exceptional power unsustainable within a liberal democratic framework.

According to Carl Schmitt, the clearest indication of the power of the sovereign is the ability to make decisions outside the normal law, in a state of emergency. The more exceptional the decision, in this sense, the more clearly does it demonstrate that the maker of the decision is sovereign. The work of Schmitt requires us to take seriously the possibility that the State has nothing to apologise for when passing extreme laws, as its power extends to the exception. Schmitt’s theory of sovereignty was developed around the structure of the Constitution in the Weimar republic in the 1930s. His focus was on a clause in the Constitution which empowered the President to declare a state of emergency. The exceptional power existed across time and was a permanent feature of the constitutional order. There is no such clause in Australian constitutions, but neither are there any express limits on the power of the Parliament to pass exceptional laws. The limits are assumed, but there articulation is buried deep in the theories of sovereignty of Hobbes, Locke and Dicey.

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1 Throughout the paper, the term ‘Aboriginal’ will be used to include Torres Islander people who were subject to policies of removal under Australian law.
The paper posits removal as an emergency response aimed at eliminating the Aboriginal other. In the settler-colonial context, the presence of Aboriginal peoples was no threat to the existence of the State, but it did threaten the ideological version of the State which governments were concerned to promote and preserve. The State responded to the emergency through passing and enforcing laws which were so against the principles of the liberal, democratic state, and so against the interests of Aboriginal peoples, that their enactment could only have occurred outside the normal law as an act of sovereignty. In other words, policies supporting the taking of Aboriginal children from their families and communities in Australia in the early 20th century were in response to the type of emergency which for Schmitt confirmed the power of the sovereign. Just as Carl Schmitt’s political philosophy is alleged to have provided the theoretical framework for Hitler’s ‘Final Solution’, so it can be used to make sense of policies of removal in Australia. This is not to suggest that policies of removal in Australia can be compared with German laws which resulted in the Holocaust. My claim is a more general one, about the possible extent of sovereign power. Once the removal of Aboriginal children is viewed as occurring outside the regular law, the extent of the State’s assertion of sovereignty can be fully appreciated, and the consequences of the assertion properly addressed.

Framing policies of removal in this way is not simply an exercise in semantics. If the State can pass laws forcing the assimilation of one cultural group into another as part of the regular law, then the State cannot guarantee that similar policies will not be repeated. Kevin Rudd can only be disingenuous, when he declares ‘we must make sure such policies never, never happen again’. ² But if policies of removal are understood as a response to an emergency outside the regular law, it is possible to account for them in one of two ways. Either, as Schmitt suggests, the sovereign can implement the policies no matter how exceptional, and there is either no need to apologise, or as with the Rudd apology, the State can and ought to only apologise for the consequences of its policies. Only if the State recognises that its power did not extend to implementing such policies does it need to account for the excess use of power in the past.

Without accounting for the extent of its power, the State’s apology perpetuates an assumption of sovereignty which made possible the forced removal of Aboriginal children in the first place. There are clear examples of the State’s failure to account for the limits of its power in the terms of the apology itself. First, there is no provision in the apology for an acceptance – it is simply required or assumed. Second, the Prime Minister can offer no more than a personal pledge that similar policies will not be implemented again. Finally, a reassessment of sovereignty also has implications for how the State must account for its actions following an apology. The response cannot be left to the regular law. It must emanate from the government, and must address questions of reparation for those who suffered from the State’s actions that were beyond power, regardless of the extent of individual suffering under the removal laws.

The paper begins by revisiting the origins of State sovereignty observing that there has always been a difficult question of the extent to which the sovereign State can

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control the lives of individuals and communities. It then introduces Carl Schmitt’s theory of political unity, and what it suggests about the power of the State to pass extreme laws, and how this might be used to present a political justification for policies of removal. The paper then responds to this suggestion by challenging the assumption of a unitary sovereignty within Schmitt’s work. It posits a different version of sovereignty, which opens the way for a consideration of Aboriginal sovereignty in the Australian context. The paper then focuses on the Rudd apology to the Stolen Generation. It demonstrates how the apology assumes the absolute sovereignty of the State, and how this assumption limits its extent, in key respects; namely, its ability to guarantee policies of removal will never happen again, and its preparedness to wait for an acceptance as part of the structure of the apology. The paper concludes with a brief consideration of the issue of reparation, arguing that if the State is to truly resile from the laws of removal for which it has apologised, it must take responsibility for compensating those affected by the laws, and not just leave it to the courts under existing law.

Sovereignty and policies of removal

There are numerous theories of sovereignty that underpin the power of the State. The classic liberal theory has its origins in the work of Thomas Hobbes who argued that the only way out of a ‘state of nature’ was unconditional obedience to a legally unconstrained sovereign.\(^3\) It is important to note that although obedience to the sovereign must be unconditional according to Hobbes, the sovereign should only assume the power necessary to secure a civilised existence. There existed outside the sovereign’s power, a significant place for individual self-determination. Two significant assumptions underpin Hobbes theory. First, Hobbes analysis relies on the good faith of the sovereign to refrain from assuming more power than it needs, and thus to maintain the liberty of the individual. Second, there is an assumption that the sovereign will uphold the morality of society through the positive law.\(^4\)

Later theorists have grappled with how limits can be placed on the sovereign power to ensure liberal values are upheld. Dworkin relies on the practical reason of judges to uphold fundamental rights when they are threatened by State action. This limit on the law making power of the sovereign assumes an ability of those whose rights are affected to access the courts, which was manifestly not the case for Aboriginal communities subject to policies of removal. John Rawls uses practical reason in a different way. For Rawls a community can arrive at fundamental communal values such as equality, freedom and the promotion of well-being. These values will then condition relations in a society, including the determination of the limits of the power of the State to encroach on these values. From an Indigenous perspective, the obvious retort to this approach to determining the boundaries of the State is that the values arrived at are not necessarily universal values. Duncan Ivison has argued that Rawls’ theory cannot adequately account for conditions in a settler colony where the differences in values between the settler and Indigenous communities are profound, such that their public reason is grounded in a different epistemology.\(^5\)

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The social contract theories of Jacques Rousseau and John Locke understood the basis of civil government to be the consent of each individual to abide by the rules of the community. For Locke, the government protected people’s inalienable rights, which included their rights to property, life and liberty. The government was constrained to act within the power conferred upon it by the people, and could not therefore act arbitrarily, as to do so would be to wield more power than the people individually and collectively had the power to confer. Basic human rights were, then, inalienable, because no one could surrender them to an absolute ruler. ⁶ For Rousseau, individuals gave themselves up to the ‘general will’ of the society. “Each puts his person and all his power in common under the supreme direction of the general will.”⁷ Society was driven by the common good, and where individuals consistently agreed with the common good, they might be ‘forced to be free’.

Although all these theories consider the boundaries of the legitimate power of the State, they spend little time theorising the extreme exercise of power. The value of Carl Schmitt is that he explains and justifies the exercise of power outside of the accepted values of the community. When could a sovereign act towards a person or group in a society in a way that contradicted the agreed values? Schmitt’s answer was to attribute to the sovereign the power to determine who was in and who was out of the State. For Schmitt, the limits of sovereign power do not lie in the values which the sovereign can or cannot promote, but in the extent to which the sovereign can persuade the majority to accept his or her decision. Central to Schmitt’s thesis is a distinction between ‘friends’ and ‘enemies’.⁸ According to this distinction, once a group is defined outside of the public, the sovereign is unconstrained in his/her action towards that group. This identification of who is in and who is out allows for the eradication of difference. In the preface to The Crisis of Parliamentary Democracy, Schmitt states, “Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires, therefore, first homogeneity and second – if the need arises – elimination or eradication of heterogeneity.”⁹ For Schmitt, then, the primary concern of the State is political unity and the eradication of difference is, in itself, a positive political aim. Political unity facilitates the equal treatment of citizens and their exercise of democratic rights. The sovereign in Schmitt’s sense would have no trouble justifying policies of removal, or in taking extreme measures to implement them.

Most explanations for removal policies in the 19⁰ and 20¹ centuries in Australia avoid the possibility that policies of removal were asserting an extreme power to eliminate the Aboriginal other, and therefore do not need to account for the possible existence of such a power. Instead they focus on a fundamental misconception of the place of Aboriginal people in the order of the State. Those wielding power were under the impression that they were doing so in furtherance of a legitimate constitutional objective. The mistake was not in the availability of power, but in the construction of erroneous terms for its operation. For example, laws passed contrary to the interests of Aboriginal people are explained as being based on the inherent racism of colonial

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⁶ Locke, Essay Concerning Human Understanding, Ch 2.
governments and white settlers, on the strength and pervasiveness of social evolutionary theories and perceptions of Aboriginal peoples as a dying race, and on a fundamental misconception of Aboriginal difference and social organisation. There are a range of explanations for why these white attitudes existed, ranging from cultural ignorance, to fear and greed.

Once the Aboriginal other is reduced to a lesser being, culturally and politically, laws which stripped Aboriginal people of their land, livelihood, families and culture can be explained as regular laws, and present explanations of these laws can understand them as misconceived rather than as exceptional. The laws can be understood as decisions of colonial and later State and Commonwealth Parliaments within the scope of their law making power which followed a rational and deliberative democratic process. A fundamental shift occurred in Mabo in 1992 when Aborigines were belatedly called into political existence. Nevertheless, the explanation for colonisation continued to be based on the existence of a fundamental misconception, this time described as the doctrine of ‘terra nullius’. Terra nullius once again highlighted the political non-existence of Aborigines in the face of colonial legal expansion. The genius of Mabo was that it achieved the resurrection of Aboriginal rights, at least to land, without challenging the legal basis upon which those rights were removed in the first place.

The historical reduction of Aboriginal people and their political strength means that traditional theories of sovereignty adequately account for the laws and policies of the State which progressively dispossessed Aboriginal people. According to Dicey, sovereignty lies in the processes of Parliament. There is no limit to the laws the Parliament can pass. Controls exist outside the law in the operation of the administrative state and through the will of the people in the democratic process. Faced with an example of these mechanisms failing to prevent Parliament passing an extreme law, such as the example used by Leslie Stephen of killing blue-eyed babies, Dicey, following Stephen, simply dismisses the possibility of such a law on the basis that ‘legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it’. In light of policies of removal, their rationale and their impact, this dismissal of extreme laws is too easy. If what the sovereign is doing is extreme, although not recognised as such by the people (idiotic or not) then we have to account for not only the unexceptional law making power of the sovereign, but also the exceptional assertion of power of a sovereign body outside of the law. The justification for action is no longer that of Dicey and other liberal theorists, but that of Schmitt, in which the power of the sovereign is more fundamental than simply to make the law.

What is extraordinary from the perspective of the present is that the policies of removal might not have been understood as extreme and exceptional in the Parliaments in which they were enacted. And yet this has been the oft stated cry of present governments – you must judge past actions against the standards of the past. Any suggestion that policies were contrary to past standards is vulnerable to historical relativism. For example, in an action for damages for their forced removal of Laura

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11 Although historians have pointed out that there was copious evidence of the fundamental role of families in the healthy and happy up-bringing of children. See, generally, McCalman and McGrath (eds), Proof and Truth: The Humanist as Expert (2003).
Cubillo and Peter Gunner, the applicants attempted to put before the court historical evidence suggesting that the policies under which they were removed were highly controversial and against the accepted wisdom of what was in the best interests of children at the time.\(^\text{12}\) This evidence was held to be inadmissible in the action.\(^\text{13}\)

It is highly contestable whether the actions of governments in the past ought only to be judged against the standards of the time. If past laws produce tangible harm in the present, and those laws are now understood to be wrong, there are good reasons to acknowledge and address any harm caused according to present standards.\(^\text{14}\)

However, whether or not the case for addressing historical injustices is accepted, a question remains whether the State can nonetheless justify its actions on the basis of an unconstrained sovereignty. That is, can the State act outside of fundamental principles of morality and law with impunity and without being called to account for its actions? This question is very much alive in relation to the response of the Federal government to policies of forced removal of Aboriginal children from their families. Can the State, for example, choose whether and how to respond to these policies? If it can, its sovereignty, in Schmitt’s sense, is confirmed.

Schmitt’s theory of political unity is helpful in understanding a political justification for policies of removal; that is, the need to eliminate the radical and threatening difference of the Aboriginal other. This is not a new idea. In a study of the role of anthropology in facilitating the ideology of assimilation, Patrick Wolfe has stated that ‘Aborigines signified a differently grounded rival memory which contradicted the national narrative upon which a homogenous citizenship was predicated …In taking children away, therefore, the Australian state sought to remove a primary obstacle to its own legitimation.’\(^\text{15}\)

Many studies focus on how the colonial mindset could have justified extreme policies, such as policies of removal. They explain how perceptions of the landscape,\(^\text{16}\) ways of writing history,\(^\text{17}\) the formation and entrenchment of social memory,\(^\text{18}\) perceptions of Aborigines as savages and artefacts,\(^\text{19}\) facilitated conditions in which colonial Parliaments could have passed laws legitimating colonial expansion. Scholars have been motivated to find explanations for colonial policy because there has been a not unreasonable assumption that colonial governments could not possibly have justified some of the more extreme policies without fundamentally misconceiving the Aboriginal other, or at least, strategically positioning Aboriginal people in a particular light, to be able to legislate them out of existence. Schmitt’s theory of sovereign power challenges us to put all such explanations aside (as compelling as they may be), and to confront directly the question whether policies of removal are a legitimate response to eliminating an enemy with a threatening political and cultural stature.


\(^{13}\) For a discussion of this point in Cubillo, see Curthoys, Genovese and Reilly, Rights and Redemption (2008), chapter 6.

\(^{14}\) This is discussed further in relation to the responsibility of the government after the apology. See eg, Janna Thompson, Taking Responsibility for the Past (2002).

\(^{15}\) Patrick Wolfe, Settler Colonialism and the Transformation of Anthropology (1999), at 34.


\(^{17}\) Paul Carter, The Road to Botany Bay (1987).

\(^{18}\) Chris Healy, From the Ruins of Colonialism: History as Social Memory (1997).

\(^{19}\) Patrick Wolfe, Settler Colonialism and the Transformation of Anthropology (1999).
Whether there was a conscious decision to eliminate Aboriginal people in Australia has been raised in the context of debates about genocide. Prior to the Human Rights and Equal Opportunity Commission report into the separation of Aboriginal children from their families, the *Bringing Them Home* report, there had been sporadic consideration of this question. The finding that removal policies did satisfy the definition of genocide within the *Bringing Them Home* report itself sparked a vigorous debate about whether the Australian government had ever had the ‘intent’ to commit genocide. The debates have been premised on the understanding that genocide could never be justified in a liberal democracy. As a result, the debates have tended to focus on a number of key semantic questions – of whether destroying a cultural group amounted to genocide, what level of specific intent was required, and how the definition of genocide and the motivation for policies of removal had changed through the 20th century.

Dirk Moses has managed to transcend these legal and technical questions to propose a more structural approach to the genocide question in settler societies. Influenced by Wolfe’s insight that settler societies have as their very premise the elimination of difference, Moses points to the consciousness of the settlers in Australia that colonisation was apparently leading to the extinction of Aboriginal Australians. He constructs the failure to attempt to alter the progress or method of colonisation as a form of intention. “The fact is that European colonial powers knew the outcome of their settler projects. They were well aware of the choices, and were prepared to countenance their consequences.” Furthermore, Moses points out, it was when extinction of Aboriginal people no longer seemed inevitable that policies became more explicitly aimed at assimilation.

Just as Schmitt’s theory of political unity provides a possible justification for policies of removal, critiquing his political theory enables us to recognise the excesses of political action that assumes the absolute sovereignty at the heart of his political theory. Neil MacCormick argues that rather than there being an necessary and inevitable antagonism between different groups and their normative systems, and sovereignty having to be located within only one normative system, sovereignty is properly located in the interaction between the systems. For MacCormick, the tenuousness of locating sovereignty within one system is evident when that system is overstretched and its validity is necessarily called into question. Policies of removal are an example of the particularity of sovereignty in Australia being overstretched. In the Canadian context, James Tully discusses the development of constitutional conventions in the relationship between the State and Indigenous peoples established through the development of mutual understanding in dialogue. Duncan Ivison

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23 Moses at 30.
24 Moses at 29-35.
develops this further to discuss a post-colonial theory of the State developed from a public reason based on disagreement between settler and Indigenous peoples. 27 The attraction of a public reason based on disagreement is that it allows for an oppositional Indigenous voice not only to exist but to be fundamentally involved in the formation of the principles underpinning the State.

The existence of the Indigenous other with a separate normative existence is assumed in these theories, and points inevitably to a consideration of Aboriginal sovereignty. In Australia, discussion of Aboriginal sovereignty is assiduously avoided in official public discourse, and yet it is essential to properly understand the iniquity of policies of removal. An important component of settler discourse is that Aboriginal people are seen as passive victims of a process. Colonisation happens to them. In light of this, Aboriginal resistance is deeply confronting to the colonial mindset.

In response to claims of the State to regulate the lives of Aboriginal communities, Aboriginal sovereignty has two distinct meanings. First, Aboriginal sovereignty is a competing claim to legal authority in the Australian State. This is the sense of sovereignty used by Henry Reynolds and others to explain the true authority behind native title, and to argue that Aboriginal sovereignty supports other rights to self-government. 28 Second, as opposed to being a claim to Aboriginal legal and political power, sovereignty is a claim to be free of the legal and political power of others. In this sense, Aboriginal sovereignty is linked to the Hobbesian idea of limited government – that government only exists to preserve the autonomy of the individual. Along these lines, Larissa Behrendt has expressed the idea of Aboriginal sovereignty as a claim for ‘the recognition of the uniqueness of individual identity and history’. 29 This second conception of Aboriginal sovereignty does not involve a claim to being unique. The uniqueness of Aboriginal identity and history is the premise of sovereignty. The claim is that the sovereignty of the State is inherently limited, and as such it raises the same theoretical question, albeit from a different starting point, as liberal theories of sovereignty and their critiques.

The work of Aboriginal scholars has been important in construing the colonial relationship from a distinct ontological position which assumes an equal Aboriginal sovereignty. 30 Eileen Moreton-Robinson has recently explained non-Aboriginal attitudes to Aboriginal sovereignty in terms of an ‘anxiety of dispossession’. 31 She extends Ghassan Hage’s idea of ‘paranoid nationalism’ in which he explains Australian nationalism as being attached to a set of core values that are imagined to

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exist, are being eroded by the encroachment of others and need to be restored.\textsuperscript{32} Moreton-Robinson argues that the nation is perceived to be constituted as a white possession, based on an original racial contract, and that the white nation now does what it can to preserve itself. Policies of assimilation can be seen as a political response to the existence of a non-white other who threatens the white possession of the nation. Patrick Wolfe, in distinguishing settler colonialism from franchise or ‘dependent’ colonies, makes the point that the ideological premise of the settler colony is that the settler subsumes the other, and that therefore, the political presence or absence of the other is the very issue open to contest. “The threat that Aborigines posed to the nation-state was not primarily physical. … rather Aborigines signified a differently grounded rival memory which contradicted the national narrative upon which and homogenous citizenship was predicated.”\textsuperscript{33}

If, at a political level, the existence of the Aboriginal other is construed as the point of dispute, and this existence is perceived as a threat to the ideological purity of the State, then policies of removal are a rational response to eliminating this threat, and the question is a political and not an historical one. That is, the question is not how, historically, the policies might be understood, and having understood them, determining how to apologise for past actions that do not reflect the values of today. The question is whether the State abides by a political agenda of elimination of the Aboriginal other, and if not, how it can adequately respond to any such agenda.

If the sovereignty of the State is understood as limited by Aboriginal sovereignty as proposed above this has direct ramifications for the government’s response to policies of removal. As will be seen from the analysis that follows, the apology of the Rudd government construed its response to policies of removal as a question of accounting for historical injustice, and framed the apology for wrongful acts of the past. The apology focused exclusively on the consequences of the policies of removal, without considering how it was that the State could have implemented the policies in the name of the law. There was no reflection, therefore, on the nature of government power, or on the extent of the State’s sovereignty – these were assumed. In the following section, the paper analyses the terms of the apology, identifying its assumptions and limitations, and notes how the assumption of an absolute State sovereignty at the heart of the apology starts to fracture within the terms of the apology itself.

**State Apologies to Indigenous Peoples**

The late 20\textsuperscript{th} and early 21\textsuperscript{st} centuries have witnessed a great number of State apologies for a wide range of actions by the State in relation to policies which have disadvantaged particular groups in the community.\textsuperscript{34} Apologies to Indigenous peoples have been prominent among these expressions of State regret and sorrow. In 1993, the US Congress apologised to native Hawaiians for the role of the US in the overthrow of the government of Hawaii 100 years earlier. The apology was directed at the loss of sovereignty and self-determination of the Hawaiian people, and expressed its commitment “to acknowledge the ramifications of the overthrow of the Kingdom of

\textsuperscript{32} Ghassan Hage, *Against Paranoid Nationalism* (2003), 74-78.
\textsuperscript{33} Wolfe, *Settler Colonialism*, at 3.
Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people”. In 1997, King Harald V of Norway apologised to the Sami peoples of Norway at the opening of the Sami Parliament for “the injustice committed against the Sami people through the harsh policy of Norwegianization”.

In New Zealand there have been three State apologies to separate Maori tribes as part of a wider settlement process with these tribes which includes the granting of land and compensation. In 1995, Queen Elizabeth II gave Royal Assent to legislation which contained an apology to the Waikato-Tainui people of the North Island of New Zealand for historical injustices committed during the colonisation of New Zealand. In 1997, the Prime Minister Jenny Shipley apologised to a South Island tribe, Ngai Tahu, recognising that the Crown had breached its obligations under the Treaty of Waitangi and that it had “failed to act towards Ngai Tahu reasonably and with the utmost good faith in a manner consistent with the honour of the Crown.” Compensation of $160 million followed the formal acknowledgment of the Crown’s wrong-doing. Finally, in 2004, New Zealand Prime Minister Helen Clark apologised to the Te Uri o Hau tribe at a traditional ceremony to conclude a settlement between that tribe and the New Zealand government. The Te Uri o Hau historical claims were settled with the passage of legislation in 2002 and a payment of $15 million.

A notable feature of the NZ apologies is that they have been made directly to the tribal groups affected by the policies of the Crown and not to the Indigenous peoples of New Zealand as a whole. They are part of the settlement process under the treaty of Waitangi. The apologies have covered both specific actions and apologies, and have also expressed sorrow and regret for the overall impact of colonisation, including its impact on Maori sovereignty and the breach of trust that occurred in failing to abide by the Treaty of Waitangi. There is an acknowledgement at the end of the Shipley apology of a desire to atone, but also a recognition that full atonement is not possible. “The Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as that is now possible, and, with the historical grievances finally settled as to matters set out in the Deed of Settlement signed on 21 November 1997, to begin the process of healing and to enter a new age of co-operation with Ngai Tahu.”

Most recently, in June 2008, the Harper Government in Canada apologised to students of Indian residential schools. This apology followed the implementation of the Indian Residential Schools Settlement agreement which began in September 2007. The apology outlined the purpose of the residential schools policy, the many acts of cruelty that were perpetrated under them, and concluded with an apology in the following terms: “The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a government, and as a country. There is no place in Canada for the attitudes that inspired the Indian residential schools system to ever again prevail. … The government of Canada sincerely apologizes and asks the

35 UNITED STATES PUBLIC LAW 103-150, 103d Congress Joint Resolution 19, 23 Nov 1993, “To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.”

forgiveness of the aboriginal peoples of this country for failing them so profoundly. We are sorry.”

The Rudd apology

The Rudd apology was delivered in a very particular context which explains both its importance and the terms in which it was delivered. In 1995, the then Labor government commissioned the Human Rights and Equal Opportunity Commission (HREOC) to inquire into the separation of Aboriginal and Torres Strait Islander children from their families. The inquiry was to:

- a. “trace the laws, practices and past policies which resulted in the separation of children from their families,
- b. examine the adequacy of current laws
- c. examine the principles relevant to determining the justification for compensation for persons and communities affected by such separations.”

HREOC’s report, Bringing Them Home, was presented to the Attorney-General of the new Liberal government in April 1997. The report used empirical evidence and personal stories allegorically to present a devastating account of the impact and extent of policies of removal. The report recommended that the State respond to the policies of removal with five reparatory measures:

1. acknowledgement and apology,
2. guarantees against repetition,
3. measures of restitution,
4. measures of rehabilitation, and
5. monetary compensation.

In relation to an apology, the report recommended that:

“All Australian Parliaments

1. officially acknowledge the responsibility of their predecessors for the laws, policies and practices of forcible removal,
2. negotiate with the Aboriginal and Torres Strait Islander Commission a form of words for official apologies to Indigenous individuals, families and communities and extend those apologies with wide and culturally appropriate publicity.

The report also recommended that arrangements be made for a “national ‘Sorry Day’ to be celebrated each year to commemorate the history of forcible removals and its effects.” In response to this recommendation the community-based organisation the National Sorry Day Committee was formed, and Sorry Day has been celebrated on 26 May each year since 1997.

In December 1997, the Federal Government announced its formal response to the Bringing Them Home report. The response questioned the report’s methodology and a
number of its findings and recommendations, and adopted recommendations that were in line with its own philosophy of ‘practical reconciliation’. The response included the allocation of $63 million over four years for practical assistance for children separated from their families under removal policies.\footnote{Senate Standing Committee on Legal and Constitutional Affairs, \textit{Inquiry into Stolen Generation Compensation Bill 2008}, p3.} Although the government was prepared to respond to existing Aboriginal disadvantage, including the legacy of policies of removal, it took the position that present generations had no responsibility for government policies in the past. John Howard expressly rejected the existence of ‘intergenerational guilt’.\footnote{Prime Minister, Mr Howard, Commonwealth Parliament, Hansard, 30 October 1996, p6158.} On 26 August 1999, in response to mounting pressure to respond to the Recommendations in the Bringing Them Home report in relation to the issue of an apology, John Howard made a statement to the Commonwealth Parliament titled ‘Reconciliation between Aboriginal and non-Aboriginal Australians’. The statement reaffirmed a commitment to reconciliation, recognised the achievements of the nation in general, reaffirmed the importance of practical measures to address Aboriginal disadvantage, and acknowledged past mistreatment. Part of the statement was a careful set of words expressing regret, rather than sorrow in relation to policies of removal. It stated:

“(f) [This House] expresses its deep and sincere regret that Indigenous Australians suffered injustices under the practices of past generations and for the hurt and trauma that many Indigenous people continue to feel as a consequence of those practices.”\footnote{Commonwealth Parliament, House of Representatives, \textit{Hansard}, 26 August 1999, p9165.}

In response to the statement, the Leader of the Opposition, Mr Beazley moved an amendment to omit paragraph (f) and substitute:

“(f) [This House] unreservedly apologises to Indigenous Australians for the injustice they have suffered, and for the hurt and trauma that many Indigenous people continue to suffer as a consequence of that injustice.”

The failure of the Howard government to unreservedly apologise was considered a fundamental impediment to reconciliation during the term of the Liberal government. No further steps were taken towards an apology until the Rudd apology in 2008.

The apology to the Stolen Generations was the first piece of substantive business conducted in Parliament by the Rudd government. Members of the Stolen Generation and Aboriginal leaders from around the country attended Parliament to hear the apology, and Kevin Rudd greeted them all personally at its conclusion. The apology began with a call to reflection on ‘the mistreatment of those who were the Stolen Generations.’\footnote{Kevin Rudd, ‘Apology to Australia’s Indigenous Peoples’ \textit{Hansard}, Wednesday 13 February 2008, p167.} This call to reflection was followed by a direct statement of apology for the consequences of the laws and policies of previous Australian governments that had led to this mistreatment. The Prime Minister said sorry for the pain, suffering and hurt caused to them by government policies, for breaking up families, and for the indignity policies of removal inflicted on Aboriginal people and their cultures. He said sorry on behalf of the government and of the Parliament.
The apology admitted that policies of removal were fundamentally wrong and even evil in their conception. In this sense, the apology reinforced the liberal values of the State, and the constraint of the rule of law. The apology avoided a consideration of the limits of the State’s power by casting the policies as an historical injustice and personalising their impact. “Some have asked, ‘Why apologise?’ Let me begin to answer by telling the parliament just a little of one person’s story.” This focus on personal stories, as moving and compelling as they were, meant the apology was able to avoid the full extent of its political impact, that is, recognising the impact on Aboriginal communities, their laws and customs, their language, their land ownership, and ultimately, their sovereignty.

The Prime Minister took time to reflect on the scope of removal policies and their racist motivation. He pointed to the need to ‘acknowledge these facts if we are to deal once and for all with the argument that the policy of generic forced separation was somehow well motivated, justified by its historical context…. This is not, as some would argue, a black-armband view of history; it is just the truth: the cold, confronting, uncomfortable truth – facing it, dealing with it, moving on from it.”

Having confronted the uncomfortable truth of past wrong doing, the rest of the apology followed axiomatically. The apology set a simple linear path to resolving the historical injustice, a path which was fully controlled by the government doing the apologising. The government does the dealing with, and determines when the dealing with is done. It is the government, then, which decides when we must all move on.

At no point does the apology resile from the power of the State to enact laws of removal or its power to enforce them. In fact, the apology confirms the power of the State to pass the laws. ‘The uncomfortable truth for us all is that the Parliaments of the nation, individually and collectively, enacted statutes and delegated authority under those statutes that made the forced removal of children on racial grounds fully lawful.” The apology focused exclusively on the consequences of the policies of removal, without considering how it was that the State could have implemented the policies in the name of the law. There was no reflection, therefore, on the nature of government power, or on the extent of the State’s sovereignty – these were assumed. The control the government maintained over the apology reinforced its claim to sovereignty. But at the same time, the apology reveals the tenuousness of the sovereignty upon which it rests. Most obviously, the very act of apologising is not the act of an absolute sovereign. The absolute sovereign does not need to apologise since, as Carl Schmitt puts it in Political Theology, the sovereign decides the “very normality of social reality.” Sovereignty is above the law; an authority without foundation. Conversely, it is a decision maker’s power to decide that confirms its sovereignty. The apology, then, presents a dilemma for the State: to be genuine, the apology requires a certain loss of sovereignty. Without acknowledging the limits of the State’s sovereign power, the apology remains deficient in several key respects.

45 Apology, pp 169 and 170-1.
46 Rudd Government Apology, p170.
The inherent limits of the apology

There is a considerable and growing literature on the purpose of apologies. In recent apologies there is a greater degree of consciousness of the process of healing to which they contribute.  

An apology must offer victims “a moral recognition or acknowledgement of their human worth and dignity”. They must “acknowledge a wrong, admit guilt, take responsibility, and recognise suffering.” In addition, they must “re-establish trust, … and end cycles of resentment.” Matt James has judged several apologies of the Canada government against five requirements he argues are necessary for an authentic apology. First, the wrong must be clearly named. In relation to historical injustices, Janna Thompson adds that there needs to be an acceptance and endorsement of historical accounts which reveal and acknowledge the wrongs of the past. The Rudd apology distinguished itself from the position of the Howard government by accepting that the policies were in no way well-motivated. Second and third, the apology must take responsibility for the wrong and express regret. As I have argued above, although the apology took responsibility for creating and implementing policies of removal that were wrongly motivated, and caused extreme harm to Aboriginal children, families and communities in their implementation, the apology did not address a more fundamental wrong, the failure to recognise the harm caused by asserting an absolute sovereignty over Aboriginal children.

James’ final two requirements for an authentic apology are that the apology must promise non-repetition and must refrain from demanding forgiveness. It is argued below, that because of the position adopted by the Rudd government in relation to its sovereignty, the apology was unable to fulfil these requirements.

The request for acceptance

An important characteristic of a real apology is that it may be rejected. “Although apology calls for someone to issue it, until the individual to whom it is directed is willing to receive and accept it, apology remains incomplete … the fate of the apology and that of the one issuing the apology depends on the victim’s willingness to accept it.” Although acceptance is crucial for the success of an apology, there can be

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51 Matt James, “Wrestling with the Past: Apologies, Quasi-apologies and non-Apologies in Canada” in *The Age of Apology* at 138. The apologies James has judged against the five criteria included an apology to Japanese Canadians for their internment and treatment during WWII in September 1988; and a “Statement of Reconciliation” to Canada’s Aboriginal peoples in January 1998. The paper was written before the Harper apology was delivered in June 2008.
53 Coicaud and Jonsson, p79.
no expectation placed on the person or group who are the subjects of the apology to accept it. Michael Freeman goes so far as to argue that there are wrongs for which apologies are inappropriate, such as genocide. Jacques Derrida, on the other hand, has suggested that the seeming impossibility of an apology for the unforgivable wrong is the point at which the challenge of the apology and its potential value are at their highest.

The need for acceptance has direct implications for the sovereignty of the State. An apology is not complete without acceptance, and the State has no control over acceptance. This is the high point of the State’s vulnerability. Through making itself vulnerable, the State opens up the possibility for the development of trust. The State trusts that Aboriginal Australians will receive the apology, and that the effort of making the apology will be worthwhile, but also that the relationship will survive rejection, should it occur. The hope is that trust will be engendered in the victim through the State’s act of making itself vulnerable. Apologising is, then, a way of earning trust.

Through an apology, the State acknowledges the separate status of Aboriginal peoples and empowers them to accept or reject it. “Originally having the power to hurt, the offender now gives the power to forgive or not forgive to the offended party.” The risk is that Aboriginal people, empowered by this recognition, will use it to reject the apology and embarrass the State. The possibility of rejection is crucial to the very structure of an apology. Without it, the State has risked nothing. “What makes an apology work is the exchange of power between the offender and the offended. By apologising you take the shame of your offence and redirect it to yourself. You admit of hurting and diminishing someone, and, in effect, say that you are really the one diminished.”

The Rudd apology carefully avoided the risk of rejection. The Prime Minister requested that the apology be accepted ‘in the spirit in which it is offered as part of the healing of the nation’. The structure of the apology, as an official speech to the nation, did not allow for or require an acceptance. In fact, the only ‘acceptance’ officially recorded was that of the Opposition in the speech of Brendan Nelson. Although the public gallery was full of Aboriginal people witnessing the apology, the success of its delivery and its acceptance did not depend on their presence. They were passive witnesses to a performance.

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54 Michael Freeman, “Historical Injustice and Liberal Political Theory” in The Age of Apology, p45.
56 Pablo deGreiff, “The Place of Apologies in National Reconciliation Processes” in Gibney et al, The Age of Apology at 127. The State’s vulnerability must, of course, be kept in perspective. The power imbalance between the State and Aboriginal people is far greater than between individuals, no matter what the status of their relationship, and the apology can only be directed to altering the balance of power in a peripheral way. The risk to the State of having the apology rejected is minimal. A State apology is a public show of good will, and rejection reflects poorly on the victims. This is particularly the case in circumstances surrounding the Rudd apology in which the previous government had been so heavily criticised for its failure to apologise and in which there had been such a wide cross section of Australian society and particular among Aboriginal peoples.
59 Rudd Apology p 167
What form would an apology take which took seriously the need for an acceptance of its terms? First, it is hard to see how it could be delivered to the nation from the dispatch box of the Federal Parliament. There is an interesting comparison to be drawn between the Rudd apology and the three apologies to Maori tries in New Zealand which were all delivered on Maori land or in the Maori parliament, one again reinforcing the sovereignty of the victims. Second, an apology would have been more cognisant of the need for acceptance and as a result might have paid greater attention to whom it was being directed. Who is in a position to accept a State apology? Individuals? Communities? National leaders? The New Zealand example points clearly to communities or tribal groups as the appropriate recipients. The Rudd apology however focuses firmly on individuals and Aboriginal Australians as a whole. The apology drew on the individual story of Nanna Nungala Fejo (without identifying her tribal connection) and was extended to victims of laws across the nation to people identified as ‘Aboriginal’ in a national sense. The removal laws themselves made no distinction between tribal groups, and this blindness was a symptom of the mindset which allowed the State to ignore Aboriginal sovereignty in the first place. Failing to identify the impact on communities perpetuates this blindness.

Third, an apology that took seriously the need for acceptance would need to identify people, hear their stories, and extend a personal apology. This was done in a symbolic way by relating the story of Nanna Nungala Fejo. In a broader sense, the Bringing Them Home report was the former Labor government’s attempt to give a voice to those who suffered under policies of removal. The temporal gap between the apology and the Bringing Them Home report was most unfortunate for personalising the apology. Had an apology followed soon after the tabling of that Report, it would have been more personal in effect.

An apology that truly requested acceptance of its terms must allow space for a response, and must accept that the response may not be positive. A response could only be heard, however, if there is a recognition that Aboriginal people control the response. Such a recognition requires attributing agency to Aboriginal people. The apology cannot just be for what the State did. It must be for what the State did to whom. The absence of Aboriginal agency in the apology is yet another indicator of the government’s assumption of an absolute sovereignty. To the extent that Aboriginal people were provided with the agency to accept (or not) the apology, they remain an undifferentiated other. There was no recognition of cultural, language or political differences between Aboriginal communities. In fact, the apology reinforces the attempted erasure of such differences.

Guaranteeing policies of removal will never happen again.

The terms of the apology to the Stolen Generations accepted that the acts of violence under which removals took place were sanctioned by the law, albeit bad laws, but did not resile from the power of the law to commit these acts of violence. It would seem then that the same laws could be passed again and that future apologies may be necessary. Here we encounter the paradox at the heart of sovereignty. The absolute

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60 ‘The problem lay with the laws themselves.’ P170.
sovereign cannot bind itself for the future. So the Prime Minister can only offer a personal pledge that policies of removal must ‘never, never happen again’. By failing to consider how such abuses can be guaranteed not to happen again, or even to explain how they will be prevented in the future, the Prime Minister leaves open the possibility that they may be reproduced. Confronted with a past exceptional use of power by the institution which he leads, rather than recognise a constitutional limit on this power, the Prime Minister avoids confronting these limits altogether.

There is a strange dichotomy in the apology. It reveals a deep understanding of the horrors of past policies and that these horrors require us to ‘wrestle with our soul’, but avoids the very questions that these horrors and our psychological response to them should give rise. Although there is a genuine attempt at empathy in the apology - ‘I know there is nothing I can say today that can take away the pain you have suffered personally’ - this empathy is a step on the path to moving on. It does not require lingering, staying with the pain, let alone living with it. In the same paragraph in which the Prime Minister asks us non-Aboriginal people ‘to imagine if this had happened to you’ he proposes that, ‘if the apology we extend today is accepted in the spirit of reconciliation in which it is offered, we can today resolve together that there be a new beginning for Australia.’ The new beginning is a point at which the pain of the past can be forgotten.

The apology reveals a fairly desperate desire to move on to a more comfortable, post-apology place - where the extreme acts which bring into question the extent of the sovereign’s power do not need to be contemplated. Directly following a request for acceptance of the apology, the Prime Minister adds, ‘for the future we take heart; resolving that this new page in history of our great continent can now be written.’

Of course, moving on to a new beginning where the past can be forgotten is the very point of the apology, and all the apologies discussed above aspire to enter this place. It was never intended to be a time for staying with the past. Historical injustice is capable of recognition on the condition that we do not stay there. The statement of apology was a political triumph for the Australian Labor Party. To be a moment of triumph, it had to be full of hope, full of the future, full of the possibility that the new government would make a difference.

The only way to guarantee that such policies will not be carried out again is to reconsider the assertion of absolute sovereignty which underpins both the policies of removal themselves and the Prime Ministers apology disavowing them. In this regard, Aboriginal leaders, among others, have advocated strongly for a guarantee of fundamental rights in the Commonwealth Constitution, or for a Treaty between Aboriginal peoples and the government in Australia. The apology was the appropriate time to heed these calls.

61 Rudd Apology p167.
62 Rudd Apology p 170.
63 Rudd Apology, p 170.
64 Rudd Apology p 167.
The apology and compensation

The apology is completely silent as to any government responsibility outside existing legal liability. Labor members were part of the majority on this Committee. Like the previous government, the Rudd government has rejected the establishment of a Compensation tribunal. On 29 January 2008, two weeks before delivering the apology, the Prime Minister told the Channel 7 Sunrise program:

“We will not be establishing any compensation fund. I said that before the election, I say it again. And since the Stolen Generation report came out years and years ago, it has been open for any … Aboriginal person affected by that to engage their own legal actions through the courts of their State or Territory. That’s fine. But at the level of national Government, we will not be establishing a compensation fund.”

This dismissal of the case for compensation is surprising in light of the Senate Legal and Constitutional References Committee inquiry into the implementation of the Bringing Them Home report recommendations in 2000 which recommended that a reparations tribunal be established to address the need for effective compensation.67

In 2008, soon after the Rudd apology was delivered, Democrats Senator Andrew Bartlett introduced a Bill into the Parliament which established a compensation scheme for victims of removal laws. The Bill was considered by the Standing Committee on Legal and Constitutional Affairs. Although recommending that the Bill not proceed the Committee was broadly supportive of its intention, and recommended that a National Indigenous Healing Fund be established to provide a range of services to members of the stolen generation.68

There are powerful reasons to establish a compensation fund if the State recognises the limits to its sovereignty. Besides the obvious case for matching rhetoric with action, a commitment to compensation would provide a mechanism by which the State could overcome the inherent problem it has with guaranteeing that policies of removal will not happen again. Compensation is a tangible recognition that the government acted outside its power and injustice resulted. By uncoupling compensation from the particular harm suffered by individuals (as is required in common law claims before the courts), the government acknowledges that the exercise of power outside the extent of its legitimate power was a harm in itself. As Jeremy Waldron has pointed out in relation to reparations paid to Japanese American families as a result of their internment during WWII,

“The point was not to make up for the loss of home, business, opportunity and standing in the community which people suffered at the hands of their fellow citizens, not was it to make up for the discomfort or degradation of their internment. .. The point was to mark – with something that counts in the United States – a clear recognition that this injustice did happen.”69

Similarly, in the Australian context, compensation can confirm the wrongdoing in asserting the power to implement and enforce policies of removal. In doing so,

compensation reinforces in a tangible way that the same must never, never happen again.

The existing mechanism for seeking compensation in the common law courts is an inadequate instrument for dealing with the compensation question. The abstract duties of care that exist at common law are not well suited to dealing with removal cases, the adversarial process is an inappropriate environment to relieve the pain of lives lost; and the structure of liability and damages at common law ‘relies crudely, on predicting what would have happened in the normal course of events.’

Psychologically, common law cases pit the government against those bringing actions. The government is put in the position of defending its record, and denying its responsibility to the extent that this is legally possible. Raising such a defence is irreconcilable with the government’s acceptance that its policies were ill-motivated and completely misconceived, if not beyond its power to pass.

Financially, allowing the common law to run its course makes little sense also. The government has no control over the amount of money that will end up being spent on child removal cases, and there is no chance of distributing the money equitably. What is more, a high proportion of the money spent on the legal process is lost in court costs and legal fees, with little going to compensate those who have suffered under the government’s policies. Where a case is successful as in the case of Bruce Trevorrow, who was awarded $525,000 damages and another $250,000 in interest, it does not assist the reconciliation process as it simply highlights what lengths a plaintiff must go to seek redress in face of government resistance, and the success of one simply emphasises the lack of success of others.

There are, of course, limits to what the government will be prepared to put into any compensation package, but it is currently spending considerable sums assisting plaintiffs in the common law claims and even more money on defending these claims. This money would be far better spent in a dedicated compensation process. There are a number of precedents for a compensation fund which the Senate Legal and Constitutional Affairs Committee considered in its inquiry into Senator Bartlett’s Bill.

Beyond the compelling practical reasons for favouring an administrative over an individual response to policies of removal, the fact that the policies represented an excess of power means that the courts cannot adequately account for their harm. The courts are the creations of the State. They derive their power to judge the actions of the State from the same source as the exercise of power they are called to question. In Mabo, the High Court was clear that it could not question the Act of State establishing the Australian colony under the principle of settlement, regardless of the violence that

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71 Trevorrow v State of South Australia (No 5) [2007] SASC 285.
72 Public Interest Advocacy Centre (PIAC) put forward a proposal for a model for a stolen generations reparations tribunal which was outlined in the Committee’s report and received broad support among the members of the committee. PIAC’s proposal is set out at paras 3.95 – 3.98 of the report. Senator Bartlett, recommended replacing the proposal in his original Bill with PIAC’s proposed compensation scheme. (Additional Comments by Senator Andrew Bartlett, para 1.13.)
this assertion may have inflicted on Aboriginal people. The most the courts can do is indicate its strong disapproval of State action through awarding exemplary damages.  

Conclusion

To fully account for laws, policies and practices which resulted in the forced separation of Aboriginal children from their families, the State must revisit the question of Aboriginal sovereignty. In addressing Aboriginal sovereignty, the State must acknowledge that its own sovereignty in Australia is limited. The apology of the Rudd government acknowledges that the State should not have implemented policies of removal. But it needs to go the next step to say that the State cannot implement such policies. Such policies cannot be supported by law. There is no legal authority to pass them. The denial of their possibility is a vital demonstration of the limits of the State’s sovereignty, and this limit needs express acknowledgement.

The Rudd government’s apology, as heartfelt, and meaningful as it was, continued to rely on an unquestionable sovereignty as the source of its authority. There is a clear decision to be made, which has been articulated well by Peter Fitzpatrick in a discussion of Mabo: “The legal decision ... is a deciding of how to relate, and how far to deny relation. As such it entails a primal responsibility.” In relation to policies of removal, the State can only move towards its primal responsibility when it recognises its own inherent limits. It is time to move to this place.

73 In Trevorrow, Justice Gray awarded $75,000 in exemplary damages to mark the Court’s disapproval of the conduct of the State and its ‘contumelious disregard for another’s rights’.