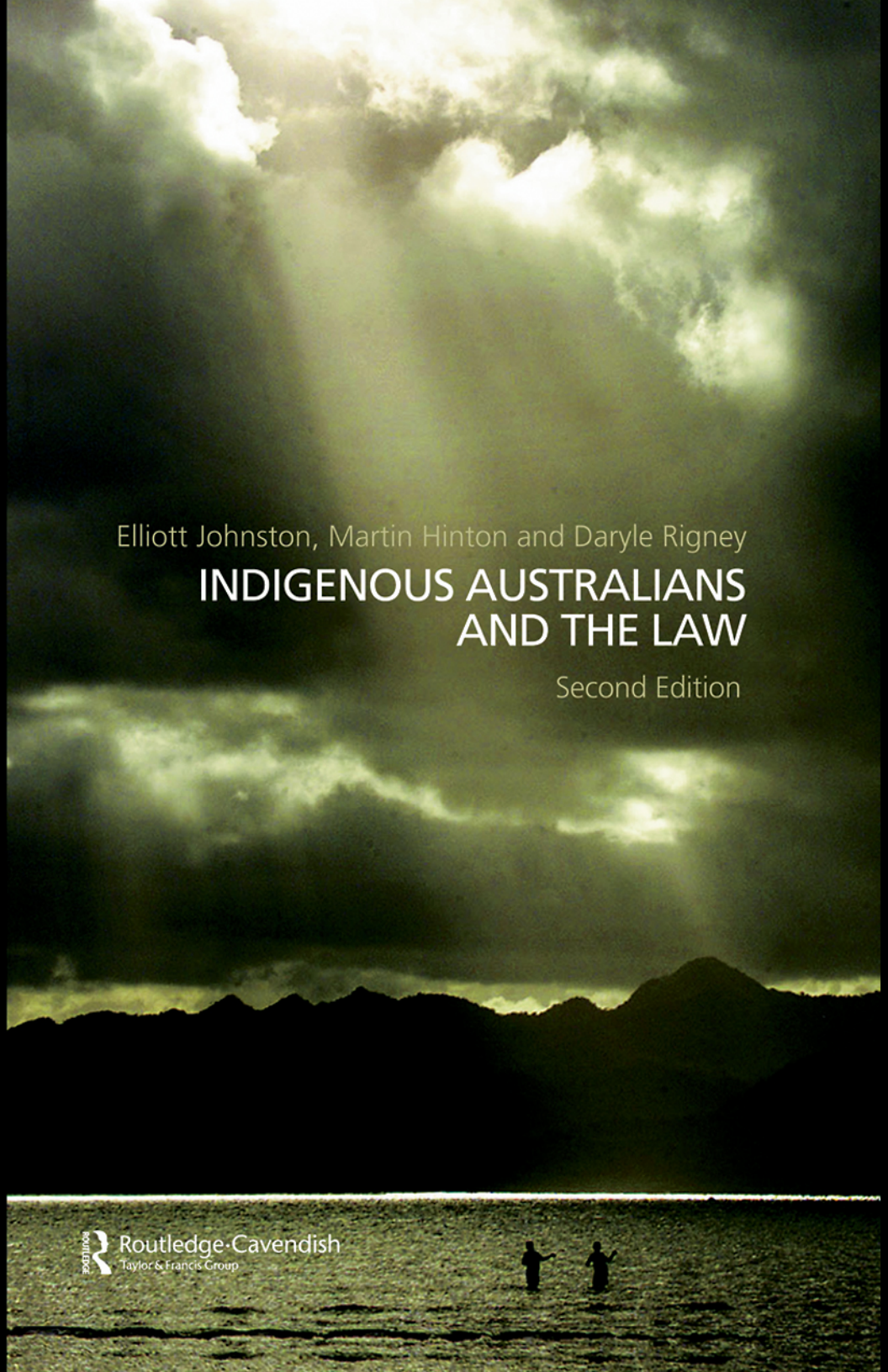
Elliott Johnston, Martin Hinton and Daryle Rigney
INDIGENOUS AUSTRALIANS AND THE LAW
Second Edition
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Indigenous Australians and the Law

Second Edition

Bringing together a well-respected team of commentators, many of them Indigenous Australians themselves, this revised and updated edition examines the legal, social and political developments that have taken place in Australia since the publication of the last edition.

Providing students with a greater understanding of the issues facing Indigenous Australians in the hope of contributing to reconciliation, the authors explore a broad range of developments, including: human rights and reconciliation in contemporary Australia; the demise of ATSIC; issues of Indigenous governance and water rights.

Giving readers an incisive account of the resounding impact of social, political and legal conditions upon the Indigenous people of Australia and their interaction with, and recourse to, the law, this book is an excellent resource for those interested in the law of a colonizer or conqueror and its lasting impact upon first nations.

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Indigenous Australians and the Law

Second Edition

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Martin Hinton QC and Daryle Rigney

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Prologue

We were pleased when Routledge-Cavendish asked us to edit a second edition of *Indigenous Australians and the Law*. For a long time, Indigenous issues had slid from public view under the policies of a seemingly uncaring Federal Coalition Government; a second edition was seen as an opportunity for us not only to reaffirm our own commitment to reconciliation, but also to raise the awareness of future lawyers of the living culture of Australia's Indigenous peoples, the debilitating impact upon them that colonisation has had, and the slow and highly inadequate efforts being made to address that impact. In educating our future lawyers, we hope to raise awareness among non-Indigenous Australia of the socio-economic and political marginalisation of Indigenous Australians so that, in a spirit of understanding and reconciliation, we can all work toward eradicating the disadvantage that Indigenous Australians continue to experience and support their efforts to build stronger and healthier communities.

It is now over 16 years since the Royal Commission into Aboriginal Deaths in Custody handed down its report in which it was made clear that the disadvantage experienced by the Indigenous people of Australia was a direct consequence of their land and waters being forcefully taken and their culture being dealt crippling blow after crippling blow for 200 years and more. A common thread woven through many of the chapters in this work is that little has changed. That this common thread remains the reality for the vast majority of Indigenous Australians is confirmed by the findings of the Steering Committee for the Review of Government Service Provision in its report, *Overcoming Indigenous Disadvantage: Key Indicators Report, 2007*.

And so the Report of the Royal Commission into Aboriginal Deaths in Custody remains a benchmark for Australia, against which it must continue to assess its response to the disadvantage that Australia's Indigenous people experience. It is not a report that this country can afford to leave on the shelf gathering dust. Ongoing and continued socio-economic and political disadvantage, together with 'new administrative' arrangements in Indigenous affairs, continue to be a problem. Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner with the Human Rights and Equal Opportunity Commission, documented the broad government commitments

to overcoming Indigenous disadvantage in the 2006 Social Justice Report and argued that government efforts:

> . . . are by and large struggling because of a lack of strategic focus detailing how the difficult and important jobs are to be done. . . . And I reported that the most significant problem with the government's approach is the lack of capacity for engagement and participation of Indigenous peoples. This manifests as a lack of connection between the local and regional level, up to the state and national level; and as a disconnect between the making of policy; and its implementation.[1]

Despite being denied prominence in policy debates, Indigenous issues have continued to present themselves during the ten years and more of the current Federal Coalition Government. These issues have included changes to the Native Title Act in 1998, the response to the final report of the Council for Aboriginal Reconciliation, the abolition of the Aboriginal and Torres Strait Islander Commission in 2004, the implementation of 'new' administrative arrangements for Indigenous affairs, a Stolen Generations test case in 2000, the subsequent successful case by Mr Bruce Trevorrow in South Australia, and the Federal Government's decision to intervene in Aboriginal communities in the Northern Territory to protect Aboriginal women and children from physical and sexual abuse. In this latter regard, we watch with trepidation, as yet again a government imposes a solution upon the Aboriginal people. Hopefully that solution will be developed with the Aboriginal people after full consultation in a spirit of cooperation and understanding. Something has to be done, that appears clear, but in determining what, we must be cautious not to repeat past wrongs. We must proceed in partnership, respecting our differences, and with the objective of building a future that is bright and long lasting. Tom Calma has stated that he wants every Indigenous child to enjoy the right to live free from violence in safe and supportive homes and communities. But with regard to the approach in the Northern Territory, his concern:

> . . . with the federal Government's proposal is that it doesn't put in place the preventative measures that Indigenous people need to stop the violence, and then prevent it from re-occurring. Nor does it provide the resources or services to support Indigenous people once these changes are made. How will people be assisted to safely come off their alcohol or substance addiction? Where are the rehabilitation services? Where are the trauma counselling and support services for families?[2]

1 Tom Calma, National Press Club Address, 4 July, 2007, at http://www.hreoc.gov.au/about/media/speeches/social_justice/2007/pressclub2007.html.

2 Human Rights and Equal Opportunity Commission, Media Release: Social Justice Commissioner's statement on the government's 'national emergency' measures, 22 June 2007, at http://www.hreoc.gov.au/about/media/media_releases/2007/44_07.html.

One of the measures of a commitment to social justice and reconciliation by Australian governments and the Australian population is structural change, and a rights framework. This structural change should aim to address both the key indicators of socio-economic disparity (labelled as practical reconciliation by the Prime Minister and current government) and the rights framework should address unresolved matters such as a treaty (labelled as symbolic reconciliation). In pursuing change, it is easy either to ignore, silence or dwell on the bad. It is more difficult to do something about it. We hope this book plays some small part in raising consciousness about, resistance to, and transformation of the disadvantage of Indigenous Australians in contemporary Australia.

But this book also represents an opportunity to celebrate some of the successes that have been realised. Perhaps one of the most readily observable successes is to be found in the fact that many of the contributors to this book are themselves Indigenous Australians. It is easy to overlook the good and to fail to acknowledge the richness that successes bring to us all. Up and down the country there are many programmes and initiatives that have improved the position of Indigenous Australians. Many are reported in the Steering Committee for the Review of Government Service Provision's report. These things are good. But more, much more, is required. It's not a matter of assuaging guilt. As Lowitja O'Donoghue has put it:

> I'm not trying to promote guilt. I see guilt as a very destructive emotion. But so is its converse, complacency.[3]

Complacency is the enemy of reconciliation.

As with the first edition of *Indigenous Australians and the Law*, this book is born of our shared sense of the responsibility we shoulder in supporting the journey toward maturity as a nation, the journey toward justice and reconciliation. We hope this book prompts some who may drift toward complacency to a greater understanding of the disadvantage experienced by the Indigenous people of Australia and, with that, a preparedness to act to bring about reconciliation and transformation to the relationship between Indigenous people of this country and the broader Australian community.

Adelaide
September, 2007

3 *The Advertiser*, 30 May 2007.

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The ten years since 1997

Tracey Bunda

In the first edition of *Indigenous Australians and the Law* (Cavendish, 1997) Maria Lane wrote of the impact that the dominant white culture has had upon the Aboriginal and Torres Strait Islander people since colonization. Against the background of Maria's chapter, Tracey Bunda updates the reader as to the ongoing impact of colonization and the nature of the contemporary political climate in which the Aboriginal and Torres Strait Islander people enter into dialogue with the dominant white culture and with the Australian Governments.

My experience, as an Aboriginal woman academic within higher education, has been concentrated primarily in the disciplines of Aboriginal Education and Aboriginal Studies and moreover in how these fields of study have resonance with, and are able to inform, Gender Studies, Sociology, Psychology, Australian Studies and Justice Studies, to name a few. It has also been my experience that in teaching undergraduate students, both non-Aboriginal and Aboriginal, although mainly non-Aboriginal, there remains an absence of critical understanding and engagement with the issues that affect Aboriginal peoples. Many of my Aboriginal colleagues in other universities speak of the same experience.[1] The Aboriginal contribution to the nation has an extensive history that commences prior to white occupation. This history and the knowledge that accompany it are made subordinate to the dominant story of the white nation and its achievements, its heroes and its significant sites.

1 Through professional Aboriginal higher education networks, the author has participated in committees and personal conversations with other Aboriginal colleagues to discuss the value and outcomes of teaching Aboriginal Studies to audiences that are comprised of both Aboriginal and non-Aboriginal students. For non-Aboriginal students, it is believed that Aboriginal students are provided with knowledge and understanding of Aboriginal cultures, histories and societies. For Aboriginal students, Aboriginal Studies provides affirmation of cultural positions. Teaching Aboriginal Studies within a critical framework can leave the Aboriginal academic dealing with a wall of resistance to the knowledge being provided. On other occasions, and with differing audiences, the knowledge can be embraced to effect behavioural change towards Aboriginal peoples, cultures and histories.

In the following, I provide my understanding of the story of the critical Aboriginal issues and events of the last decade, a challenging and tumultuous time within Aboriginal affairs, so as to provide a broad contextual understanding for the chapters that follow. I write cognisant that, as an Aboriginal woman, my work in the university does not operate in a vacuum and acknowledge that I am inextricably connected to the events that happen to Aboriginal peoples beyond the bricks and mortar of universities. The bricks and mortar, the foundations, of my identity are bound up in my connections to family, community and country. And so I write of the last decade of critical Aboriginal events viewed through a wide lens that captures these events as they have been shaped within the new discourses of Aboriginal peoples, and which demonstrates how these discourses have played out and highlights the consequences for my family, community and country.

I have, for professional reasons, journeyed far from home, although I return to country and family as often as possible to reaffirm my relationship with people and land. This is a fundamental enactment of my social, cultural, political and spiritual identity as a Ngugi/Wakka Wakka *joohndal*.[2]

Where is my family? Most members remain in and near our family home in Ipswich, Queensland. This community of my childhood of the 1960s and 1970s was a semi-rural community, although the success of the primary producing properties was giving way to the seemingly more secure industrial work of coal mining and its related industries in the railway workshops and the electricity industry. This economic environment sat alongside a social context that was simultaneously denied and repulsed by Aboriginal peoples, and yet was fascinated by us.

We knew that we lived on the periphery of town, geographically, socially, culturally and economically. The Salvation Army-operated mission named Purga had been tucked away on the periphery of the greater Ipswich area for over forty years. Aboriginal people had been forcibly herded to this mission from the surrounding areas. This site was, for decades, the epicentre of the Aboriginal population in Ipswich. The mission signified a source of black unpaid labour comprising Aboriginal children and adults and exploited by white families in the district. Members of my extended family had been incarcerated at Purga, where religious inculcation, the receipt of a minimal education and slavery were the core defining features of the mission during this period.[3]

The closure of the mission saw many of the Aboriginal families relocate a little closer to town, although still on the edge. Few of our families were able to secure permanent employment and, politically, we lived with the repercussions of the government policies of the 1950s, 1960s and 1970s that sought to

2 *Joondahl*, in my language, is 'woman'.

3 For further reading and a specific understanding of an Aboriginal history of Ipswich, including an analysis of the trans-generational effect of the Aborigines Protection Act 1897, see T. Bunda, *I Come from Ipswich: Hidden Histories*, 1999, Global Arts Link, Ipswich.

assimilate and integrate us. During this period, we were questioned as to the blood quantum of our Aboriginality to verify our authenticity to the white people who questioned us. We were looked upon with disdain, considered untrustworthy, lazy, stupid and as drunks. At times, our families physically defended the representation we wanted to have of ourselves against that which sought to contain and control us. There were also rare moments when white members of the community showed genuine kindness and humanity. Ipswich, like many communities throughout the nation, rural or urban, did not name itself as racially divided and socially incompetent in embracing diversity.

Against this historical backdrop, Ipswich as a community showcased federal politicians of repute. A would-be Prime Minister of the country lived and worked in Ipswich. Its other contribution to the nation's political history is mostly known through the election of the first Aboriginal senator, who also lived in Ipswich. Both men, although of opposing political affiliations, gave Ipswichites representation at the national table.

Political debates in my family were served with mugs of tea. My family drinks lots of tea and so there are many debates. What was the possible value for the Aboriginal nations of an Aboriginal senator in a conservative political party? Does the Labour Party truly provide for Aboriginal peoples, or is this political window dressing? How do the white legal system and systems of government do or undo land rights, not only for the mob in the Territory, but also for our mob in the east? How do the labels of 'radical' or accusations of being 'difficult' or an 'uppity blackfella' speak more about the fears of the whitefella than about Aboriginal peoples or communities struggling against injustice? Who is the Aboriginal individual being called 'leader' for Aboriginal peoples? Where does he [usually an Aboriginal man] come from? Who is his people and how can it be presumed that this individual speaks for all Aboriginal peoples for all issues that affect Aboriginal peoples?

Through these debates were woven the serious and considered reactions of the political issue of the day, in other words, in the discourse we owned and spoke as Aboriginal peoples about the white nation that surrounded us and sought to create us. It was this discourse that shaped my blackness in ways that no white education system could. In time, I would have a speaking position at the family table and, through this, I would participate in the discourse.

My position from spectator at the edge to talker was not the only change. On the many occasions that I returned to my family throughout the 1980s and 1990s, I observed the population of Ipswich grow as suburban activity became a little busier. New brick suburbs grew out of old paddocks and neighboured the rows of wooden homes on stilts, as the professional class neigboured trade workers, the poor, unemployed and unemployable.

Ipswich, at the centre of the seat of Oxley, was no longer a Labour Party stronghold and Hansonism had arrived at the national table of politics. Pauline Hanson enacted a politics of blame that targeted those in the community whom she had imagined as more privileged and more powerful

than 'ordinary, normal' Australians. The following extracts from her maiden parliamentary speech (1996) makes transparent that Aboriginal peoples and supporters were a target for blame and a cause of division in the nation.

> I won the seat of Oxley largely on an issue that has resulted in me being called a racist. That issue related to my comment that Aboriginals received more benefits than non-Aboriginals.
>
> Present governments are encouraging separatism in Australia by providing opportunities, land, moneys and facilities available only to Aboriginals. Along with millions of Australians, I am fed up to the back teeth with the inequalities that are being promoted by the government and paid for by the taxpayer under the assumption that Aboriginals are the most disadvantaged people in Australia. I do not believe that the colour of one's skin determines whether you are disadvantaged.
>
> I have done research on benefits available only to Aboriginals and challenge anyone to tell me how Aboriginals are disadvantaged when they can obtain three and five per cent housing loans denied to non-Aboriginals.
>
> This nation is being divided into black and white, and the present system encourages this.
>
> Apart from the $40 million spent so far since *Mabo* on native title claims, the government has made available $1 billion for Aboriginals and Torres Strait Islanders as compensation for land they cannot claim under native title.
>
> Reconciliation is everyone recognising and treating each other as equals, and everyone must be responsible for their own actions.
>
> This is why I am calling for ATSIC to be abolished. It is a failed, hypocritical and discriminatory organization that has failed dismally the people it was meant to serve.[4]

In this speech, Pauline Hanson utilizes a well-worn narrative of a nation divided by race demonstrated in 'Aboriginals having more benefits'. It is a narrative that featured in my growing years in Ipswich, and has held its currency through time. Hanson articulated a discourse on race in her maiden speech and later through the One Nation Party whereby the subject Aboriginal was disrupting the cohesiveness of the nation. 'Land grabbing' remained central to this disruption through *Mabo* (1992) and the recognition of Native Title and the establishment of the Indigenous Land Corporation (1995). But disruption also included the repositioning of the Aboriginal and Torres Strait Islander Commission as separatist and therefore discriminatory. The division between black and white Australia was further emphasized in attitudes towards compensation and guilt for past wrongs in the Reconciliation movement.

4 Extract of Hanson's maiden speech: http://www.australianpolitics.com/parties/onenation/96-09-10hanson-first-speech.shtml.

Hansonism and the One Nation Party received a ground swell of support and, in 1998, they attracted 23 per cent of the vote, resulting in the party securing 11 seats in the Queensland Parliament. Hansonism also gave rise to an open hostility towards Aboriginal people.

I recall three incidents that demonstrate hostility towards the black race specifically involving my family and the Aboriginal community in Ipswich at the height of Hansonism.

Incident 1 – My uncle, in his eighties, was spat on, as he stood waiting to cross an intersection in the city centre. His gentle manner, dignity and humanity did not warrant such violence.

Incident 2 – The service for the funeral of an Elder was being held at the Salvation Army Church, which was located in the same street, although at the opposite end of the government building, where Pauline Hanson had her electoral office. At the completion of the service, attendees moved out of the church and onto the street awaiting the hearse to proceed to the cemetery. Outside the church, the funeral attendees were confronted with the sight of a blue line and the street cordoned off. Our men stepped forward to talk to the police. A large gathering of Aboriginal people at the end of the street where the leader of the One Nation Party had her office, albeit attending a funeral, was deemed by white others in positions of authority as an angry black mob percolating a protest.

Incident 3 – Ipswich Elders with other members of the Aboriginal community had gathered at the old Purga Mission and awaited the arrival of Pauline Hanson. Hanson had agreed to a meeting and the Elders felt confident that a face-to-face meeting would allay the fears on both sides of the fence. As the government car made its way down the track, the Elders respectfully rose to meet the car and its special occupant. The community rose respectfully with the Elders. When the car halted, the Elders moved to open the door. Suddenly, the government car driving Hanson sped off back down the track and away from Purga.[5]

With hostility comes fear. The raw articulation of Hansonism was then taken up by the federal government and moulded into the conservative framework of the Howard Coalition. The Coalition had the power to implement policy and did so inscribing into the nation a more incisive form of control and containment of Aboriginal peoples that moved beyond ideologically targeting and blaming Aboriginal peoples to, what I believe, is a discipline of punishment and erasure of the non-compliant Aboriginal subject from the Australian social, political and economic landscape.

Hanson had called for the abolition of ATSIC. The federal government has achieved this objective. ATSIC (the Aboriginal and Torres Strait Islander

5 Incidents 1 and 2 have become part of the oral history of my family. I observed Incident 3 at first hand.

Commission) was established in 1989 by the Hawke Government. It was a final development in Aboriginal affairs that had been preceded by other government auspices and/or Aboriginal elected bodies, such as the National Aboriginal Conference (latter 1970s) and the Aboriginal Development Commission (1980). ATSIC operated with an administrative and an elected arm and its brief was to advise government on Indigenous issues, to advocate for the recognition of Indigenous rights and to deliver some of the Commonwealth government's programmes and services. The Howard Government established a panel to review ATSIC (2002) amid a climate of 'accountability' and 'crisis' with an 'untenable' black leadership and black agenda. The final recommendation of the review found that ATSIC was in urgent need of a structural change. In 2004, the government moved to abolish ATSIC.[6]

ATSIC provided a limited number of programmes and services for Aboriginal and Torres Strait Islander peoples. One of these programmes, the Aboriginal and Torres Strait Islander Sport and Recreation Component, provided valuable financial support to remote and rural communities. The funds enabled infrastructure and skill development and access to the social, physical and health benefits of sport and recreation. A review of this project, which I led, was held in 1999. The relationship between this programme and the Indigenous programme of the Australian Sport Commission was a key reference of the review. Any reference to the mainstream Sport and Recreation Component within the Commission or State bodies was met with clear misgivings on the part of the Aboriginal and Torres Strait Islander participants that such processes could not work effectively.[7] The provision of services by ATSIC did not reach to key programmes such as education and health, which remained the responsibility of the federal government. Accusations that there were areas of 'dysfunctionality' within ATSIC did not provoke a self-critical response in government as to the programmes for which the government was responsible. Aboriginal and Torres Strait Islander health and educational outcomes have not improved in the period of this federal government's reign. The understanding and experience of Aboriginal and Torres Strait Islander communities with 'mainstreaming' is such that it is considered to correlate with neglect and being made invisible within white systems. The white system of government, however, equated structural change with abolishment.

The abolition of ATSIC has been one of many strategic moves by the government to reconstitute Aboriginal affairs, to realign it with new policies of 'mainstreaming' and to delegitimise the need for 'separate' services that is considered the core reason 'threatening the unity' of the white nation at large.

6 The ATSIC website no longer exists. Historical information as to the formation and abolition of ATSIC can be found online at http://www.aph.gov.au/library/pubs/CIB/2004-05/05cib04.htm#establish.

7 The Report of the Review of the Aboriginal and Torres Strait Islander Sport and Recreation Component was not published by ATSIC.

The 'threat' was most manifest in the High Court decision of *Mabo v Queensland* (1992), which recognised Native Title and the changes to the law that followed.[8] In 1994, the National Native Title Tribunal was established to process land claims.[9] The Indigenous Land Corporation was established in 1995 to purchase land for Aboriginal and Torres Strait Islander peoples.[10] In 1996, the *Wik* decision resolved the coexistence of Native Title on pastoral leases.[11] In response to this decision, the Howard Government developed the Native Title Amendment Bill based on the Ten-Point Plan in order to protect the interests of the pastoralists.

Pauline Hanson made reference to *Mabo*, Native Title, and the Indigenous Land Corporation in her maiden speech. Land, and the question of who owns the land, is a fundamental and contentious characteristic of the black–white relationship in Australia. Issues of owning and belonging have helped construct the discourse of the nation and who has legitimacy and authenticity within the space of the nation. Hanson raised the issue of her belonging in this country in her maiden speech and, in doing so, exposed a raw nerve. In speaking as the voice of 'ordinary' Australians, she made visible an intolerance and impatience with the rights agenda of Indigenous Australians. With the legal decision of *Mabo*, 'ordinary' Australians had to reconcile how the now legally determined fictional position of *terra nullius* sat with their own sense of belonging to and owning the nation as a purely white site. Native Title holds the possibility of acknowledging my family's and other Aboriginal families' title to country that was disrupted by dispossession and forced relocation. This possibility was over-read by some who considered that Native Title dispossessed the white rights to land. As with the Land Rights (1970s) movement before it, heightened fears of an 'Aboriginal takeover' surfaced and seethed and unsettled. To 'smooth the pillow of a threatened race', the story of the nation had to be rewritten before it could be made comfortable again.

The Ten-Point Plan had the effect of rewriting Native Title to protect the interests of pastoralists and mining companies, and therefore the investment of the nation, which positioned these minority interests as pivotal to the economic development of the nation. The possibility of a project of co-existence between pastoralists, mining companies and Aboriginal peoples was not commensurable with the story of the nation that conservative ideologies wanted to be told.

The conservative story of the nation seeks to distract attention away from the 'black armband view'[12] of Australia's history,

8 http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/ntreport_1994/index.html.
9 http://www.nntt.gov.au/publications/index.html.
10 http://www.ilc.gov.au/webdata/resources/files/WhatIsTheILCJly06.pdf.
11 http://www.nlc.org.au/html/land_native_wik.html.
12 Geoffrey Blainey, Latham Lecture (1993).

> that reflects a belief that that most of Australia since 1788 has been little more than a disgraceful story of imperialism, exploitation, racism, sexism and other forms of discrimination.[13]

In this lecture, the Prime Minister premised his definition of the black armband view with the need to defend the history of the nation by ensuring that it wasn't written by those who *take the view that we should apologise for it*. The Howard Government has not offered an apology for the Stolen Generations and has sought to rewrite the effects of past government policies impacting upon a generation (the official government position) not *generations* of Aboriginal peoples. Does my mother, taken from her mother, as my grandmother was taken from her mother, want an apology from this government? I don't know, although I do know she has little time for insincerity. Her story and the story of my father are similar to those of other Aboriginal peoples. It is often a hidden story within the nation, although collectively these stories reveal the complexity of race within this nation.

As I write, conservative ideology continues to rewrite Aboriginal peoples. The language of social justice and the rights for Aboriginal peoples is made subordinate to the discourse of mutual obligation, and Aboriginal culture is being inscribed as 'bad' culture. Pauline Hanson has launched her biography, *Untamed and Unashamed*, and is seeking to re-enter the national political arena, and it is an election year at the federal level. Two recent legal decisions in Perth and Western Victoria for the Noonga peoples[14] and the Gunditjmara peoples[15] respectively, have provided Aboriginal peoples a cause for celebration, but the arduous work of penetrating the nation's psyche to understand how it positions race, including its own white race membership, continues. In the last decade, the critical events of *Mabo*, Native Title, the *Wik* decision, the government's Ten-Point Plan, the Stolen Generations, reconciliation and the rise of neoconservative ideology collectively point to the nation remaining unsettled. The dominant white story of the nation politically, legally and socially does not exist without the corollary that is its black stories. In my family, the black story of the nation asks the questions: who are the people? How do these people connect to the land? How do we look after the land?

The next decade in this nation and the next generation of decision makers and thinkers in this nation can alter the lens to give a clear focus to these questions.

13 John Howard, Sir Robert Menzies Lecture (1996).

14 Justice Murray Wilcox's decision on Native Title on selected Crown lands in Perth, available online at http://www.nntt.gov.au/newsletter/hotspots/1160012986_1792.html.

15 Judge Tony North's decision on the Convincing Ground in Portland, Western Victoria, *The Australian*, 31 March–1 April 2007.

2 The Royal Commission into Aboriginal Deaths in Custody

Looking forward, looking backwards

The Honourable Elliott Johnston AO QC

It is over 15 years since the Royal Commission into Aboriginal Deaths in Custody presented its final report.

There is little doubt that the decision of the Hawke Government to establish the Commission was greatly influenced by Aboriginal agitation about the number of deaths in custody. And there is no doubt that, whatever the cause of that decision, the subsequent decision to expand the number of Commissioners to four times that originally provided for was due to the fact that, within a few months of setting the Commission up, it became apparent that about a hundred deaths would have to be investigated.

I will never ever forget the day when we discovered that the rate of Aboriginal deaths in custody was no different to the rate of non-Aboriginal deaths in custody. Until that point in time, it had been generally assumed by most people that the task of the Commission was to consider why the number of Aboriginal deaths in custody was so high. The revelation that the rate of Aboriginal deaths in custody was no different to the rate of non-Aboriginal deaths in custody had a resounding impact upon the work that we at the Royal Commission were doing. At the same time, we learnt that, whilst the rate of Aboriginal deaths in custody was no higher than non-Aboriginal deaths, the number of Aboriginal people in custody as a proportion of the Aboriginal population overall was far greater than the number of non-Aboriginal people in custody as a proportion of the non-Aboriginal population of Australia. Aboriginal people were 14 or 15 times more likely to be in custody. And so we were compelled to look for answers as to why so many Aboriginal people were in custody.

Before proceeding further, it is necessary to bring those figures up to date. The Royal Commission found that, as at 30 June 1989, 'there were 15 times as many Aboriginal people in prison than there were non-Aboriginal people'.[1] That is, for every 100,000 Aboriginal people making up the general adult population of Australia, 1,464.9 Aboriginal people were in prison as compared to only 97.2 non-Aboriginals per 100,000 non-Aboriginal persons. The

1 RCIADIC, National Report, Vol 1, ch 9, p 225.

annual reports of the Australian Institute of Criminology give the number of Aboriginal and non-Aboriginal deaths in prison custody and the proportion of Aboriginal and non-Aboriginal people in prison custody. Accordingly, it is possible to estimate the number of each group in custody from their figures. In 2001, 20.2 per cent of all prisoners were Aboriginal. The figures for the following years are:

2002 – 20.2%
2003 – 20.8%
2004 – 20.98%
2005 – 23.2%

It is quite clear that the percentage of Aboriginal people in custody remains unacceptably high. Sixteen years on, this is disheartening and disgraceful.

The consequence of the lack of any meaningful decline in the rate of imprisonment for Aboriginal people is that, as a society, we find ourselves asking exactly the same question today as that which the Royal Commission had to face when it first became apparent that the rate of Aboriginal deaths in custody was not the real problem, that rather it was the totally disproportionate number of Aboriginal people in custody.

The research conducted on behalf of the Royal Commission and the inquiries into the lives of the 99 individuals who had died in custody threw up a series of factors that, when combined, represented the common life experiences of Aboriginal people who found themselves in custody. It was considered that this life experience was largely causative of the over-representation of Aboriginal people in custody. A significant part of the Aboriginal person's life experience was the impact of the terrible treatment that had been imposed upon Aboriginal people for over 200 years by the non-Aboriginal residents of this country. I do not wish to spend a lot of time on this issue, but it is of fundamental importance. We took from the Aboriginal people their land, which was very closely related to their manner of living and pivotal to their culture; we forced many of them to live on reserves or in missions: we killed quite a lot of them and took many of their children; many of them (perhaps all) resented our society and our laws. Of course, in recent times, there have been some improvements, but let us not forget that it was not until the 1960s that Aboriginal people had the right to vote in federal elections.

I very much doubt whether there is a single non-Aboriginal Australian who knows the whole history of the mistreatment of the Aboriginal people over the whole country. I certainly do not.

The consequence of this history has had an extremely debilitating and compounding effect upon the Aboriginal people's prospects for education, work, their health, their families and the very fabric of their communities. Against this background, the Royal Commission made a considerable number of recommendations – 339 in all, of which very few were rejected by the

Commonwealth. Amongst the States, opinions differed slightly. That said, all governments committed to the vast majority of the recommendations and, importantly, all committed to reconciliation.

Much has been said and written about reconciliation since the Royal Commission reported. But from my observation, from reading the press and from speaking to Aboriginal people, little has been achieved. An apology for the consequence of colonisation aside, the life experience of the 99 Aboriginal people whose deaths were the subject of inquiry by the Royal Commission remains largely the life experience of the majority of Aboriginal people today.

Undoubtedly, there has been greater awareness amongst non-Aboriginal Australia of the debilitating consequences of colonisation for Aboriginal Australia. And education of our young on the impact of our history upon the Aboriginal people has greatly improved. But political will, translated into action, has been sadly lacking.

Too many Aboriginal people are in custody. Too many Aboriginal people have not received the support and services needed to generate opportunity and to begin to recover from the impact of colonisation.

The crucial question as to how to change the numbers of Aboriginal people in custody does not relate primarily to the application of the criminal law, but to whether, contrary to past treatment, the Aboriginal people are able and permitted to make their own decisions about their culture, their way of life and their beliefs. At least, this was the point of view of the Commission and it expressed the view that there were at least two matters crucial to it.

(1) That the Aboriginal people have the desire and the capacity to do so.

I do not think it necessary to discuss this point at length. I think it clear that the Aboriginal people have the capacity and the desire to empower themselves as a people, to reinvigorate their culture, to make informed choices for themselves and to exploit opportunities. As much can be seen today in the scores of Aboriginal organisations fighting for education, health, arts, land, access to the law, employment, etc. From my observation, there is amongst both Aboriginal and non-Aboriginal Australians a greater determination than ever existed in the past to reach a position of understanding and agreement. It is not my observation that the same determination exists amongst the country's leaders.

In the period following the change in the federal Constitution, there was improvement in this area. For example, the very first federal government to give any money to the SA Aboriginal Legal Rights Commission was Liberal (shortly before the election of the Australian Labour Party). Both parties had in common a willingness to defer discussion to the very people involved. Consequently, that ALP Government appointed a Royal Commission to make recommendations after consultation with the Aboriginal people about how land in the Northern Territory should be given to them. The Commission

delivered its report and the government set about the necessary legislation, but lost office before it could do so. Subsequently, the Fraser government enacted the legislation. There was a similar incident in South Australia. The Dunstan government planned to pass legislation (following a report of a commission that had long discussions with the Aboriginal people) vesting Pitjantjatjara land in the northwest of the state in the local Aboriginal people, but lost office before doing so. The succeeding Liberal government enacted the legislation and the Premier attended the official handing over of the land to the Anangu Pitjantjatjara people. The Royal Commission identified a further example when it reported that the Joint Committee of the House of Representatives had affirmed support for a policy that meant that Aboriginal people would be provided with the resources and the capacity to control the future of their own communities.

It was important in this common approach that there should be an Aboriginal body that could speak for its people. At the time of the Royal Commission, ATSIC had been established and, during the Commission, it did some very good work in the opinion of the Commission, the federal government and the opposition. Another important act was the establishment, with government financial support, of a federal Reconciliation Committee.

It is a matter of grave importance and grave regret that the same attitude no longer prevails as far as the federal government is concerned. It has abolished ATSIC. Of course, it was justified in making some criticism of ATSIC, but this was no ground for abolition. Has one ever known either a government or an opposition that does not criticise its opponent and vice versa? Since the abolition of ATSIC, there has not been the slightest suggestion of any new method of consultation with Aboriginal people or any suggestion of a new form of organisation that permits consultation at the grass-roots level.

In 2005, the federal reconciliation body held a workshop in Canberra to discuss preparation for the 40th anniversary in 2007 of the Amendment to the Constitution, to which I have referred. There were about 200 people there, about 45 per cent Aboriginal. The Prime Minister spoke to the gathering, as did his Minister. Typical of his speech is the following: 'I sense that there are real and new opportunities for progress. And they are opportunities based upon a recognition of the need to blend the symbolic with the practical and to mix rights and responsibilities.' He made no reference whatever to what gave rise to this 'sense', nor to what constituted the 'symbolic' or the 'practical', nor to his concept of 'rights' or 'responsibilities'. This was typical of his whole speech. The gathering had before it some propositions, one of which was: 'Recognition of the need for a representative Indigenous body at the national level, elected by Indigenous people, who can speak for the people'. The Prime Minister made no reference whatever to this proposition, or to any variation of it.

ATSIC may have been a difficult body to deal with. It may have been a body that could have been better administered, but it provided the Aboriginal people with a powerful voice. With the passing of ATSIC, that voice has been

quieted and a focal point for the national identity of the Aboriginal people lost. I mention that recently, when the Prime Minister announced his Northern Territory intervention policy, there was absolutely no 'dealing' whatever with the Aboriginal community.

(2) That a willingness exists on the part of the non-Aboriginal community to enter into discussion with Aboriginal representatives and their communities.

It is important to make a distinction between discussions that relate solely to Aboriginal matters and those that relate to both Aboriginal and non-Aboriginal Australia. With respect to the former, the aim for non-Aboriginal Australia should only be to offer any assistance that appears possible. When it comes to the latter, there must be no dictation of the attitude or approach to be adopted, but rather quiet discussion and the pursuit of agreement. Our history and the work done on the Stolen Generations teach us that policies of patronage do greater damage. I very much hope that the current interventions in the Northern Territory do not result in a repetition of the sort of damage that has been done previously in the name of what non-Aboriginal Australia considered to be in the best interests of the Aboriginal people without the Aboriginal people being involved in any discussion.

In the course of my work as a lawyer and with the Royal Commission, and throughout my life, I have met many, many tremendous people both Aboriginal and non-Aboriginal doing great things and good work for the benefit of the Aboriginal people and our country as a whole. And it is heartening to see the increasing number of Aboriginal people in positions that, twenty years ago, no Aboriginal person could have hoped to achieve: artists, academics, scientists, businessmen, teachers, doctors, lawyers, actors and dancers. The year 2007 is an important year for the reason stated. There is a considerable proportion of the Australian people who want to see reconciliation. We have a duty to build a mighty force of people behind the reconciliation movement. Small things can make big differences. If our leaders will not own and drive reconciliation from the top down, then we, and particularly (for the aged) our children, can and must force it up.

3 Aboriginal women's laws and lives

How might we keep growing the law?[1]

Irene Watson[2]

> The anger is so great because this is not in Aboriginal culture. You know, even 20 years ago, 22 years ago, had an Aboriginal person done that, he'd have been killed. Had he raped a child, he'd have been killed. . . . In Aboriginal law, in Aboriginal custom, culture, we don't go dobbing people in because they know what they've done and they're supposed to, under real Aboriginal, true Aboriginal law, they admit they've done it. And, they're getting away of (sic) it because of this not guilty until proven guilty. What a lot of nonsense! . . . Get the grandmothers to start standing up. We've got what we used to call Grandmother's Law, or Grandmother's Ways, Grannie's Ways, and that's not working anymore. And the Grannies have got to stand up and the men have to remember that the Grannies, the women's, stories are stronger than the men's. And the women are just getting as stupid and drunk as the men are. And the women had better get up off their backsides and do something because the women are the backbone of any society, whether it's black or white it doesn't matter. And the women are going to have to get up and save the kids and the whole society and the social structure and this is the only way to do it.[3]

1 I have never used the term 'customary law' to describe the Aboriginal laws of Australia. 'Customary law' is an assimilationist term, one in which the dominant culture has the power to determine – that is, to determine, to recognise or not, to incorporate or not. Aboriginal law is the sovereign law of the first peoples of Australia, a place of immense diversity of peoples, laws and cultures prior to the invasion in 1788. For a further discussion of Aboriginal law and its representation, see I. Watson, 'Aboriginal Sovereignty: Past, Present and Future (Im)possibilities' in S. Perera (ed) *A New Back-yard Blitz: Enactments of Australian Sovereignty Post-2001* (2006). For further discussion of customary law, see G. McIntyre, *Aboriginal Customary Law: Can it be Recognised?* Background Paper No 9, Law Reform Commission of Western Australia, 2005; C. Cunneen and M. Schwartz, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, Background Paper No 11, Law Reform Commission of Western Australia, 2005, pp 2–14.

2 I would like to acknowledge Michael Watson for his patient reading and careful editing, and also Valerie Kerruish for her valued reading and comments, and also the referencing assistance provided by Debbie Bletsas.

3 Betty Pierce, speaking to Jean Kennedy in 'Customary Law Blamed for the Low Reporting Rates of Aboriginal Crime' *PM*, 16 May 2006, available online at http://www.abc.net.au/pm/content/2006/sl1640091.htm.

This chapter is a tribute to the strength of Aboriginal women of Australia and also a dedication to my great-grandmother Amy Gibson: the elderly tiny Aboriginal woman of the Tanganekald and Meintangk peoples who was feared by drinking men. Granny Amy stood strong with her fighting stick against those who dared to abandon their families for the grog, but, more than the force of the strike from her fighting stick, the men feared her position as a strong law woman: that is what they revered the most. In this chapter, I want to look at how the grannies have continued to stand strong in the face of an oppressive colonial violence and discuss the challenges that are faced by women. One of those challenges is to discuss how Aboriginal men might remember the strength of stories of women, so that communities raise children in safety, away from the violence and trauma that has taken hold not only of the Aboriginal world, but also of most spaces now inhabited by humanity.

In this chapter, I will review the question of Aboriginal women's laws and their intersection with Anglo-Australian laws and contemporary patterns of violence. While this chapter looks at what has been said over and over again in the past,[4] I am hoping that in going over old ground we can come to focus more on old ways of looking at the problem of violence against women and use this focus to re-establish possibilities for the law of the grannies to continue to be told and relived over and over into the future. Our grandmother's laws are a continuing strategy for providing a safe and healthy environment for women and children, in the same way as our women's laws did when women were sovereign in this land.

Feminist conversations have ranged across universalising positions of women and applying international human rights standards as a solution to the violence many women endure. In this universalised order, whose concepts of equality will apply? And is there a will on the part of government to supply what is deemed equal: equal housing, health, education for example? Or are all of the aspirations of white women even desired by Aboriginal women? How do we provide equal protection to Aboriginal women and children against a popularly perceived black misogyny[5] when white misogyny exists in non-Aboriginal communities? What can be expected from the notion of

4 A large body of work has been compiled about the oppressive conditions in which Aboriginal Australia lives, conditions which, I argue in this chapter, contribute to high levels of violence in a number of Aboriginal communities. Most of those reports have been ignored or filed away, a list of some of those reports has been compiled at 'The 25 Reports on Aboriginal Australia That Line Government Bookshelves', Crikey.Com.Au, 2006, available online at http://www.crikey.com.au/articles/2006/05/31-1311-8270.print.html.

5 Violence against Aboriginal women has been presented over a number of years by the Australian media as being inherent in Aboriginal culture and law. As recently as May 2006 on ABC *Lateline*, Tony Jones interviewed Northern Territory Crown Prosecutor Nannette Rogers, who spoke of the rape of small Aboriginal children in the Northern Territory. What followed was the month of May awash with media stories on 'dysfunctional' Aboriginal communities. Just prior to stories of violence and rape, the Howard government had been promoting the benefits of freehold land as opposed to communal land ownership.

equal protection when we see violence against and rape of white women and children occurring in mainstream communities? In the limited space I have here, I will attempt to look briefly at the lives of women living under one law for all, discussing its white, colonising, patriarchal character and the challenges it throws up for the laws of the grandmothers confronted by the federal government's current call for the extinguishment of Aboriginal laws.[6] The usual difficulties that arise when set the task of writing are compounded by assimilating contemporary misrepresentations on the violence against Aboriginal women and children, misrepresentations that have led to a broad and misleading debate that has once again left the public with the impression that violence against women is inherent in Aboriginal culture.[7] I will argue that the violence we are currently observing in Aboriginal communities can be sourced in the invasion and colonisation of Australia. That is perhaps stating the obvious, but it is a position that has been strongly rejected and criticised.[8] I will deal with some of those criticisms that are particularly relevant to this chapter. The obvious has also been stated before, by ancestors and other critical theorists: violence is inherent in the colonial project. To

6 The rhetoric of one-law-for-all-Australians took hold during the media avalanche of reports of rape and violence. The following media reports of the Prime Minister John Howard report on those comments: 'Howard Pans Indigenous Law', News.Com.Au, 28 May 2006, http://www.news.com.au/story/0,10117,19283530-421,00.html; M. Schubert, 'PM Blasts Custom of Promised Brides', *Age*, 29 May 2006, available online at http://www.theage.com.au/news/national/pm-blasts-custom-of-promised; P. Karvelas, 'One Law for All: Howard', *Australian*, 29 May 2006, available online at http://www.theaustralian.news.com.au/printpage/0,5942,19288622,00.html. With that has also come the call for the privatisation of Aboriginal lands currently held collectively under State and Commonwealth legislation. For further comment on proposals to privatise, see Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 31 May 2006: Minister Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs, in his speech accompanying the second reading of the Aboriginal Land Rights (Northern Territory) Amendment Bill.

7 In revealing that misrepresentation, and for a description of Aboriginal law protecting Aboriginal women, see J. Lloyd and N. Rogers, 'Crossing the Last Frontier: Problems Facing Aboriginal Women Victims of Rape in Central Australia' in P. Weiser Eastel (ed), *Australian Institute of Criminology Conference Proceedings*, No 20, 'Without Consent: Confronting Adult Sexual Violence', 1993, pp 150, 151, available online at http://www.aic.gov.au/publications/proceedings/20/lloyd.pdf; for a discussion of the impact of substance abuse in violence against women, pp 152, 161; improper interpretations of Aboriginal law by the legal system, pp 155, 158; the failure of the courts to include Aboriginal women's voices p 159; the need to empower Aboriginal women in their customary roles, p 162. Rogers, the co-author in this article, is the Crown Prosecutor who appeared on the May 2006 ABC *Lateline* programme. In between then and now, there appears to be a shift from her earlier position when she argued Aboriginal law was not the basis for violence against women. Her current position is not clear as to her support for Aboriginal women's law, other than comments that the law of men in this region is very powerful.

8 In the works of P. Sutton, 'The Politics of Suffering: Indigenous Policy in Australia Since the 1970s' (2001) 11 (2) *Anthropological Forum* 127, and K. Windschuttle, *The Fabrication of Aboriginal History: Volume One Van Diemen's Land 1803–1847* (2002).

view the contemporary crisis in Aboriginal communities without reference to the violent colonial history of this country is to look too simply at a complex and layered landscape.

Laws of women

It is not my intention to give a description of past, or even present, manifestations of women's laws because there are not one, but many Aboriginal laws and Aboriginal laws of women who live in the Australian landscape and its peoples. There are too many to describe and, anyway, it is not appropriate for me to do what is a task belonging to the law holders or the women who carry their laws, to speak of their knowledge and their ways on their own behalf. I cannot speak for others, or universalise their story or their relationships to law, country and kin, but I can speak of my own grandmothers and their status as law women. To assume the role of speaking for all Aboriginal women and our laws would itself be a breach of our law. I can say that our grandmothers held the law and that they carried and passed onto future generations what they could within a rapidly changing colonised space.

In this chapter, I want to examine present and future possibilities for the autonomy of Aboriginal women, while also reviewing the extent to which Australian colonial law enables/disables that possibility. The question then emerges: what law am I talking about, Australian and or Aboriginal law?[9] In responding to that question, we should look at how the two bodies of law speak or don't speak to each other,[10] at how the body of Aboriginal women has been brought into Australian law, and at what happens to Aboriginal law or the laws of the grandmothers in that process of embodiment.[11] I don't have the space here to give a fuller survey of how the courts have read Aboriginal law and women into the dominant legal narrative,[12] but it seems clear that the courts' reading of Aboriginal women's law is given less

9 I have written extensively in the past on Aboriginal law. Here, I am referring to the possibility of a re-emerging sovereignty of Aboriginal laws, a status that was held as at 1788 in respect of Aboriginal perceptions of law. Here, I am not talking about colonial discourses of an invisible law, which, when seen to exist, could be captured and contained within the body of Australian law. I am also suggesting the sovereignty of Aboriginal laws is distinct from notions of sovereignty that are held by nation states. For further discussion on different concepts of Aboriginal law and its relationship to Australian law, see McIntyre above at n 1 and Cunneen and Schwartz, and Watson, (2006) above at n 1.

10 D. Bird Rose, 'Land Rights and Deep Colonising: the Erasure of Women' (1996) 85 (3) *Aboriginal Law Bulletin*, pp 6–12, critically evaluates the colonising effect Australian law has on Aboriginal women and, in particular, the erasure of women during the land claims process.

11 Similarly, the exclusion of colonised women featured in the treaties made across the Americas, see the work of R. Green, 'Native American Women' (1980) 6 (2) *Signs*, p 250, where the 'matriarchal, matrifocal and matrilineal societies were neither acceptable nor comprehensible to members of European patriarchies'.

12 This is the research project with which I am currently engaged.

recognition than is accorded the laws of Aboriginal men. What do we conclude from this? I would suggest that it illustrates the male dominance in the Australian legal profession, a dominance that works to reinforce stereotypes of a male-dominated Aboriginal society in which women are invisible in their lawfulness.[13] Similar arguments have been made many times in colonial encounters throughout the world, where the position of Aboriginal women is decentred as a result of the colonising mission, with the consequence that '. . . male-centred and inept interpretation(s) of Native American women's lives'[14] ultimately take(s) over.

My current research focus looks at the interface between Aboriginal law and colonialism, and attempts to develop a decolonising text, which re-inscribes a women's law space, a space where violence against women can be sorted and reordered. However, the critical question is: can that space re-emerge when the imposed Australian legal system has taken up all of the space? What space could be accorded to Aboriginal women's law? Perhaps space is not the only thing required but so is will: does the will exist for a male-dominant political legal system to let go, to release its hold on power over law – can it ever happen? I think these questions are central to any discussion about creating space for Aboriginal law, and women's law in particular, to continue to function and grow in Aboriginal communities.

Looking from a universalist positioning of women, Catharine MacKinnon[15] takes us back to a question Simone De Beauvoir once asked; 'Why is it that women do not dispute male sovereignty?' For Aboriginal women, the sovereignty of women's law was known and recognised by men: the grandmother's law held a sovereign position. The colonisation of Australia displaced the sovereignty of both men's and women's laws. MacKinnon takes De Beauvoir's question to be universal in its application, but I argue that De Beauvoir could not have known of the position of Australian Aboriginal women and perhaps her question should have been limited to a Western political legal landscape, or even to herself. The above quote by Aboriginal Elder Betty Pierce shows that for her, the grandmother's law or the laws of Aboriginal women, have a central place in our lives, not only in the past, but also still today. They have a place in bringing lawfulness to the current situation of endemic violence against women and young children across Australia, more than ever before. However, while the application of the grandmother's law is known to Aboriginal people, it has been mostly invisible to the dominant culture. Thus it has been difficult for the grandmother's law to re-establish its lawful place in the midst of a dominant culture that has no concept of Aboriginal women's laws. The dominant

13 Bird Rose, for further examples of invisibility of women in the land claims processes, above n 10, p 8.

14 Green, above n 11, p 256.

15 C. MacKinnon, *Women's Lives Men's Law*, 2005, p 282.

culture administers and polices itself entirely within a patriarchal horizon. The problem is not so much what we as Aboriginal communities need to do, but rather the work the dominant culture needs to do in shifting the male-dominant nature of its own legal system, a system that denies the presence and place of women's law. While I am not denying the work already done by feminist theorists and activists in this area to unmask the dominant patriarchal nature of Western legal systems, what has not been recognised is the different nature of Western legal systems from other systems of law and governance. For example, Aboriginal law does not fit within the adversarial model, but rather focuses on restoring harmonious relationships amongst individuals and community members. To universalise the notion of the dominant colonial legal system is to miss the opportunity to engage with Aboriginal legal systems. As Elder Betty Pierce states:

> We've got what we used to call Grandmother's Law, or Grandmother's Ways, Grannie's Ways, and that's not working anymore. And the Grannies have got to stand up and the men have to remember that the Grannies, the women's stories are stronger than the men's.[16]

With the whitewashing or the making invisible of women's law came the transferred Western values, which left Aboriginal women little opportunity to represent their law stories, or hold in place our own meanings and functions of the law.[17] Now we hear more about the laws of men and in particular those laws that are repugnant, for example, those that mandate old men marrying young women, or those of the payback system.[18] It is these features of Aboriginal law of which the public is made most aware. Laws relating to the obligation to care for country and family, ecological sustainability, and the ethics of sharing and caring and their deeper philosophy remain largely unknown to the public. It is this unbalanced representation of Aboriginal law that has potential to lead to its demonisation.[19] The public knows very little

16 Ibid n 3.

17 Jane Lloyd in 'Ngaanyatjara Pitjantjatjara Yankunytjatjara Women's Council Welcomes State and Territory Legislation that will Protect Aboriginal Children from Abuse' (2004) 30 *Indigenous Law Bulletin*, discusses the contemporary social issues that have challenged Aboriginal law and its contemporary application, as the women also struggle with 'Aboriginal men's perceptions and beliefs about gender relations and their demands to maintain their male privilege in defining how customary practices govern gender relationships'. C. Wohlan, *Aboriginal Women's Interests in Customary Law Recognition*, Background Paper No 11, Law Reform Commission of Western Australia, 2005, pp 1–10, discusses the complex interaction between Aboriginal and Anglo–Australian laws.

18 Where, for example, justice is administered by a community-controlled fight, beating or spear in the leg.

19 This phenomena of misrepresentation of Aboriginal law via the media has also been identified in the work of G. Valencia-Weber and C. P. Zuni in reference to the situation in North America, 'Domestic Violence and Tribal Protection of Indigenous Women in the United States' (1995) 69 *St Johns Law Review*, p 70.

of the complexities of Aboriginal law, perceiving it as being responsible for violence against women and children.[20] Aboriginal women are portrayed as victims in need of rescue from violent black males. Here, I want to make it clear that I am not in denial of the contemporary position of Aboriginal women and children that is critical in many communities. What I am suggesting is that the actions of individuals who are physically and sexually abusive towards women have been blown up and taken as representative of a culturally approved norm, to the effect that Aboriginal law allows for violence against women.[21] But the blowtorch gaze of the dominant culture and its media is never turned back on Western civilisation and its laws, which fail to protect women from male violence. Its legal system also allows for the violation and destruction of our natural environment, and we are witnessing global warming, desertification, pollution of waterways and other natural disasters, all of which are linked to inability of the 'civilised legal systems' to utilise its laws to better manage the looming environmental crisis.[22] In contrast, the ways of Aboriginal law promote sustainability of both peoples and the environment. I think we need to engage more positively with Aboriginal laws and move away from the simplistic and racist demonisation of the first laws of Australia, to argue that the greater body of Aboriginal laws, which is a balance of women's, country and men's law, has a legitimate place as it always has. But there are some who wouldn't agree. Anthropologist Peter Sutton has suggested traditional controls worked in the hunter–gatherer past, but are no longer functional where communities are tied to the permanency of resources, and that 'rape and child abuse, have to be tackled head on and dealt with'.[23] In Sutton's work, there is the suggestion that rape is a part of Aboriginal culture and law;[24] Sutton has misrepresented Aboriginal law as legitimising rape and child abuse, and has failed to understand a more complex picture, one in which the effects of colonialism and race have been excluded.

20 Catherine Wohlan discusses the high levels of violence in Aboriginal communities, but contextualises the problem as not one sourced in Aboriginal law, but instead suggests, at p 1, that Aboriginal law 'has the potential to be a useful tool in addressing community justice'. See Wohlan, above n 17, p 1.

21 See Valencia-Weber and Zuni, above n 19, p 72, where a similar representation of Native American men has taken place, and see Wohlan generally above n 17.

22 MacKinnon above n 15, pp 463–464, discussing the *Santa Clare Pueblo v Martinez*, 436 US 49 (1978) decision, unmasks the split consciousness of the USA and the different results that are reached on questions of sex, inequality and sovereignty of first nations, particularly when the question concerns oil, minerals, water, fish, and trees (including sacred ones). In those situations, MacKinnon argues, 'indigenous peoples are seen to have few rights that are respected as sovereign, the Supreme Court's holding in *Martinez* can be read less as respecting cultural self-definition than as devaluing Indian women. Certainly, the decision recognizes men's rights over women, called – as men's rights over women can virtually always be called – respect for "their" culture'.

23 Cited in K. Finnane, *Alice Springs News*, 14 May 2003, p 3, available online at file:// E:ilb%20article.htm.

24 Sutton above n 8, p 127.

Sutton's analysis abstracts culture from the overall power relations between Aboriginal peoples and the dominant culture and, in its abstraction, is flawed as an explanation for the high levels of violence in Aboriginal communities. The women he portrays are victims whose lives would be better off once absorbed by the civilising mission.[25]

The real picture is more complex. The savagery and violence of colonialism is missing from Sutton's analysis. The narrative we don't hear from Sutton is that of the rapes by the civilising mission men, and we don't hear of the inter-generational trauma suffered as a result of those rapes. The history of rape and the violent colonial frontier is given almost no context in the contemporary analysis of violence in Aboriginal communities, even though the evidence of a violent colonial history is well known to us. We hear of it in our oral histories and some of those stories have also survived in the records of early colonialists. Katrina Schlunke[26] invokes the historical writings of the missionary Threlkeld,[27] who writes about the rape of young Aboriginal children in the aftermath of a violent massacre by the same white settler who perpetrated the Myall Creek massacre of 1838:

> After killing the majority of the bark gathering party, the men, to quote the missionary Threlkeld, reserved two little girls who were 'dreadfully injured'. Elsewhere he describes what was done to them as 'inhumanly cut for lascivious purposes' and elsewhere again 'because they were too small for them they cut them with knives.' These two girls, 'about seven years old' were then given as wives to two young Aboriginal men who were with the party, Davey and Billy. The two girls stayed with Davey and Billy, for months later Threlkeld's son sees with his own eyes the 'miserable plight' of the girls. It is from Davey that we learn of the second incident, although there had been rumours. This was the final murder carried out by the group in this place. Threlkeld again: 'The last that was murdered, was an elderly women whose throat they cut as she stood, and then let her run away, that the blood spurted out, and when she fell they took her up while yet alive and cast her into the triangular log fire, and her infant child they threw alive without any previous injury into the flames'.[28]

When the anthropological writings of Peter Sutton shift the focus from the past to the present position of Aboriginal communities, and argue that Aboriginal peoples are inherently violent,[29] I am left to wonder what a missionary

25 Ibid.

26 K. Schlunke, 'Dumb Places' (2004) 6 *Balayi: Culture Law and Colonialism*, pp 72–80.

27 Cited in Schlunke, N. Gunson, (ed) *Australian Reminiscences and Papers of L.E. Threlkeld; Missionary to the Aborigines, 1824–1859*, 1974, pp 273–275.

28 Schlunke, above n 26, p 73.

29 Sutton, above n 8, p 127.

man like Threlkeld would have thought. I am also left to wonder what, if any, of Sutton's work explores the territories of white men and their connections to inherent codes of violence. The colonial frontier men raped both land and bodies and the violence of the frontier is the most significant colonial legacy Aboriginal peoples carry. The 'sensitivity' the courts have sometimes shown to Aboriginal men in matters of rape where 'culture' is taken as a mitigating factor 'is often about the culturalization of rape: how cultural and historical specificities explain and excuse the violence men direct at women'.[30] In taking what they perceive to be Aboriginal law into consideration, the courts contribute to 'making invisible the harm that is done to Aboriginal women', and while deeming Aboriginal men inherently violent, confirm the 'superiority of white men'.[31]

Aboriginal women speak of the grandmother's laws. MacKinnon asks us to consider whether sovereignty is itself a gendered notion,[32] invoking 'home' as the place where women are least equal and least safe from male violence. The metaphor of this private space being man's sovereign castle[33] doesn't have universal appeal: Aboriginal people's use of private space is different, and not simply the sovereign space of men. Crenshaw too notes 'the home is not simply a man's castle in the patriarchal sense, but may also function as a safe haven from the indignities of life in a racist society'.[34] The home for Aboriginal people also becomes a retreat from the violence of racism, but it has also become that vulnerable place for women, a space that the Western legal system has condoned as a place where men have power over 'their' women. In the pre-colonial past, Aboriginal law provided for gendered spaces; there were places where the law of women was revered and provided safety for women of the community. The Western legal system has no similar concept: male is sovereign in the private realm of the home as well as in most public spaces, although, in public spaces, competition for the position of alpha male and the hierarchical (dis)ordering takes place to position power relations between males. MacKinnon suggests that women are likely to gain greater equality and freedom the further removed from the home they are. It seems Aboriginal women have become less safe the more the colonising project destroys Aboriginal laws and our women's spaces. We become less safe, the more we are assimilated and shut into the container-we-have-come-to-call-home.

30 S. Razack, 'What is to be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence' (1994) 19 (4) *Signs*, p 899.

31 Ibid, pp 899–900.

32 MacKinnon, above n 15, p 464.

33 Ibid, p 234.

34 K. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 *Stanford Law Review*, p 1257, discussing the impact of racism on African Americans.

Culture from the inside – power on the outside

How do we look back at our past, what versions of the past prevail and what presence do we give them today? Will we judge our present 'civility' on the past, and what of that past will we allow to live on in our lives today? Perhaps more importantly, what or whose versions of past Aboriginal lives will tell us who we really are?

The recent debate in Australia known as the 'history wars'[35] is looking like the relative of the current critique on Australian Aboriginal cultures. As the history wars attacked the 'black armband' or Aboriginal views of history, similarly the current attack against cultural relativism[36] is an attack on Aboriginal peoples' cultural right not to have values imposed from outsiders. Cultural relativism challenges the application of universal human rights laws that would displace cultural particularity, and is now criticised for enabling cultural practices deemed harmful to women and in the mainstream deemed unlawful by the state.[37] It is also seen to silence effectively the voices of critics of 'objectionable practices among other groups'.[38] The positing of 'objectionable practices' is to position the critics as 'free beings, as beings whose freedom is protected by right'.[39] However, critics who focus solely on culture and 'traditional practices' as the barriers to 'equality' or the emancipation of women, also enable the demonisation and undermining of the right of peoples to cultural self-determination. To avoid this, culture should not be viewed in isolation of the larger context of marginalisation due to colonialism. The demonisation of Aboriginal law is most likely to occur when the focus shifts away from the social, political and economic disempowerment of many of the communities who are seen to transgress 'civilised' behaviour.[40] To focus

35 The 'wars' were perhaps kicked off by the revisionist historical writings of K. Windschuttle, *The Fabrication of Aboriginal History: Volume One Van Diemen's Land 1803–1847*, 2002, where he questioned the validity of recordings that documented a violent colonial history of massacres, cultural genocide and the overall violence of the colonial frontier, instead preferring a more 'sanitised' view of colonial 'settlement'.

36 Perhaps it could be said was kick-started by Peter Sutton, see above n 8, and rekindled by the May ABC *Lateline* programme, see above n 5.

37 MacKinnon, above n 15, p 471, and at p 472 reviewing the decision *In re Fauziya Kasinger Board of Immigration Appeals* 35 ILM 1145 (1996), asks the question: do insiders resisting from inside their own cultures pose a problem for cultural relativism? In contrast, see D. Ferreira da Silva 'Mapping Territories of Legality: An Exploratory Cartography of an Emerging Global Subject' in P. Fitzpatrick and P. Tuitt (eds), *Critical Being*, 2004, pp 209–215.

38 N. Naffine, 'In Praise of Legal Feminism' (2002) 221 *Legal Studies* 81, refers to the 'nervousness' one may feel when speaking critically of another culture. Ferreira da Silva, above, n 37, p 204 argues that 'traditional practices' altering the female body emerge as one of the last obstacles to emancipation.

39 P. Passavant, 'The Paradox of Human Rights' in P. Fitzpatrick and P. Tuitt (eds), *Critical Beings*, 2004, p 138.

40 Ferreira da Silva, above n 37, pp 208–209.

entirely on questions of culture, and then to measure civility by the standards represented by the dominant culture[41] (one that is responsible for our colonised and subjugated non-status) gives a view that emanates from a position of comparative power, an outsider's view. What is missing in thus measuring the standards of Aboriginal people's culture, is the abstraction of culture from questions of power,[42] and the destruction that that power, wielded for more than 200 years, has wrought on the social, political and economic position of Aboriginal peoples.[43] From this 'measured civility' approach, we are seen (once again) as we were at the time of invasion and first contact, as the barbarians of our past, and are thus disentitled from the 'equality of recognition'.[44]

The state is excused and allowed to disengage with the possibility of equality and the recognition of Aboriginal laws as the rape of young children is (mis)translated to the public as being protected by 'traditional practice'. Culture is deployed to explain the rape of small children,[45] and the focus is shifted from the social, economic and political environment of those being raped.

On the ground at home, reality is more complex. Blaming culture, as though culture is fixed and able to determine all there is to know about an individual, is itself a racist proposition.[46] Angela Davis argues that the USA's deployment of culture to explain the tortures at Abu Ghraib or Guantanamo is based on the assumption of an inferior 'Islamic culture'; these situations of torture say more about US strategies than they do about the cultural response of the torture victims.[47] The violence in Aboriginal communities is also more a comment on the Australian government's

41 Ibid p 217, and R. Kapur, 'Revisioning the Role of Law in Women's Human Rights Struggles' in S. Meckled-Garcia and B. Cah (eds), *The Legalization of Human Rights Multidisciplinary Perspectives on Human Rights and Human Rights Law*, 2006, p 107 discusses 'third world women portrayed as victims of their culture, versus privileging the culture of the West'.

42 Passavant, above n 39, p 154.

43 Razack, above n 30, p 897, argues that white supremacy is one of those effects that is now entrenched: 'Aboriginal women are obliged to talk about culture and violence within the context of white supremacy, a context in which racism and sexism and their intersections are denied.'

44 Razack discusses how 'white society' views violence in immigrant communities as a sign of backwardness: ibid, p 896.

45 In a recent South Australian court decision, His Honour Judge Gordon Barrett, referred to 'culture sickness' when referring to the impact of Aboriginal people disconnected from country as an explanation for the rape of a woman. See 'Rapist's "Cultural Sickness" ', *Advertiser*, South Australia, 10 June 2006, p 21.

46 A. Davis, *Abolition Democracy Beyond Empire, Prisons, and Torture*, 2005, pp 58–59. Here, Davis is referring to culture being used to frame an understanding of the torture of Muslim men, she asks the question, why do we think a Muslim man would act differently, suggesting assumptions about culture are themselves racist.

47 Ibid.

management[48] of the colonial project, than it is about the culture of the perpetrators of violence. As Aboriginal communities across Australia continue to decline, the gaze turns away from the poverty and dispossession of Aboriginal Australia to cultural profiling of the other as barbarian. We are delineated 'friend and enemy'.[49] So we return to the same old racial discourse we know so well, the one that provides the ideological basis underlying the colonial foundations of the Australian state.

Equality and the universal woman: who is she and how far from the centre does she roam?

Feminist legal scholar Catharine MacKinnon writes about the tension between the reality of an unequal world in a 'world' with equality rules, suggesting that this presents a problem for those who have a stake in maintaining inequality while also having a stake in maintaining the illusion of equality.[50] Australia's existing colonial foundation makes imperative the Australian government's stake in retaining inequality. Extending 'protection' of the law and the 'heroic' call to protect the 'human rights' of Aboriginal women under Anglo–Australian law creates the illusion that 'equality' for Aboriginal women is possible. But under colonialism it is never a possibility, for maintaining privilege is the natural position of colonialism. Universal principles of equality, remain abstract, disembodied and meaningless in practical terms, and the maintenance of privilege ensures 'so called universal principles remain abstract, disembodied, not realised in practice'. In maintaining the illusion of equality, the state retains the reality of inequality. But the reality of Aboriginal peoples' lives is one where our Aboriginal laws have no space under colonialism to grow up healthy communities, as they have become disembodied laws. The oppression of Aboriginal people is guaranteed by the state's failure to deliver basic human services, such as adequate housing and health care, as privilege remains guaranteed. In Australia, the divide between Aboriginal and non-Aboriginal women is well illustrated by all social and economic indices, and is a position that exposes 'the imperial and essentialist assumptions . . . and a reliance on a center–periphery model of world culture'.[51] The reality for many Aboriginal women is that of lives lived on the outside, far removed from the 'centre' and the place where the rationing of privilege is most likely to occur. The 'trickle-down effect' never reaches the outer periphery, it was never intended to.

48 The Howard government's Practical Reconciliation project has been hailed a failure: L. O'Donoghue, Third Annual Human Rights Oration, *Age*, Victoria, 11 December 2003.

49 Passavant, above n 39, pp 152–153.

50 MacKinnon, above n 15, p 10, but there is more to be said by those coming from a colonised space.

51 Kapur, above n 41, p 103.

In calling for the grandmother's law to have space to function, what support can we muster from the keepers of power? The federal government's position is clear, that is, there is one law for all. In that statement, there is no space for conversations on the sovereignty of any Aboriginal laws,[52] let alone the possibility of developing strategies to provide space for the grandmother's laws to (re)form. The opportunity is unlikely to occur while the state holds on to its stake in the colonial enterprise and, with that, its misrepresentation of Aboriginal women. This is a misrepresentation that enables the white colonising patriarchal sovereign to pose as the crusader of the 'unequal', rather than the oppressor of the colonised. Looking at the picture from another angle, the presence of Aboriginal women and our calling up of the sovereignty of the grandmother's law causes a disruption to the stability of a colonising white patriarchy. Similarly, theorising by women of colour has questioned the effect of eliminating patriarchy on the possibility of female emancipation.[53] In Aboriginal Australia, I would argue that emancipation also calls for the decolonisation of the natural, political and legal landscape, for it is assumed we want to become the same, rather than considering there may be a way other than wanting to participate 'equally' in the machinery of oppression.[54] The emancipation of Aboriginal women will come once we have dismantled patriarchy, but also the colonial institutions that patriarchy has assembled along the course of its own history. Enjoined in that struggle is that of holding our position as Aboriginal peoples against the pressures of extinguishment.

The location that Aboriginal peoples occupy is one of collective belonging, with a community of kinship relationships, distinct from the individualism valued by the West.[55] The West asserts that it is better able to protect human rights and universal values by relying on human rights laws to provide universal solutions to the oppression of all women, even those that it never reaches, on the outer periphery. Advocates of universal human rights make this claim while at the same time masking the 'colonial encounter' and how the 'struggles for rights are tethered to the legacy of this encounter in the contemporary moment'.[56] And at the same time as the 'magic' of human rights discourse is enunciated, the Aboriginal peoples struggle against the oppression of colonialism and for the sustainability of the collective. With the weight of the West bearing down in its extraction of our lands and natural resources, in what sense will alliances with universally dreamed-up

52 For a further discussion on the future of Aboriginal laws, see Watson (2006), n 1.

53 Ferraria da Silva above n 37, p 205.

54 Davis above n 46, p 29.

55 Valencia-Weber and Zuni, above n 19, p 72 discuss the position of Aboriginal peoples of North America.

56 Kapur, above n 41, pp 103, 105 refers to the UN Declaration on Violence Against Women, GA Res. 104, UN GAOR, 48th Sess., 85th plen. mtg. Supp. No 49 at 217–219, UN Doc A/48/49 (1993).

standards help us survive? Will white women of the 'universal' return stolen lands and resign their shares of corporations that plunder Aboriginal peoples natural resources?

The tension between sexual equality and the sovereignty of Aboriginal peoples is illustrated in the *Martinez* decision.[57] The tension arises out of the different treatment that Martinez (an Aboriginal women) and her children received when she married out of her tribal community. This was contrasted with how Aboriginal men who similarly married outside were treated.[58] The decision has been seen by some to discriminate against 'native' women. Angela Harris[59] argued that while MacKinnon may be right in highlighting contact with Europeans and the possible injection of patriarchal values into some of the first nations' social structure, first nations are well adept in making decisions regarding issues of first-nation membership and status. Valencia-Weber and Zuni argue it is within the first nations' power to self-define; that is the key to sovereignty and to understanding the decision in *Martinez*.[60] But it is a power that is held, or only just held, within the overarching power of the USA. I have discussed earlier in this chapter how, in Australia, the possibility of holding sovereignty is thwarted by the federal government mantra of one-nation-one-law. Any attempts at recognition are further removed through demonising the perceived power held by Aboriginal men's law and the perceived invisibility of Aboriginal women's laws.

When did it begin, violence against women? I wasn't here in the beginning, but my grandmothers were. So I am interested in looking at what they encountered and what happened to the laws of the grandmothers. From early colonial times, the relationships between Aboriginal men and women were represented as women subjugated to the violent domination of Aboriginal men. The picture of a 'pathologically violent' race of people emerges, one that absents 'other narratives and images portraying a fuller range of black experiences'.[61] The exclusion of other narratives works to silence other possibilities, one being the role of the grandmothers. When the frame remains limited, so too does our search for solutions. When we focus solely on male power, we exclude the possibility of an inherent power held by women and, as

57 MacKinnon, above n 15.

58 MacKinnon above n 15, p 458 discusses how the impact of dispossession of 'natives' from Indian lands was to divide and destroy Indian communities. When white men married Indian women, the Indian land and families effectively left the community; this did not happen when Indian men married white women. Then the land remained with the community. Martinez marrying out of her community could be seen as part of 'an engine of assimilation and extinction that Native men marrying out was not. If this is the case, the rule was hardly an authentic relic of a sovereign culture but was rather an attempt at cultural survival under conditions of siege and conquest'.

59 A. Harris, 'Race, and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review*, pp 581, 593.

60 Valencia-Weber and Zuni, above n 19, p 90.

61 Crenshaw, above n 34, p 1255.

Crenshaw suggests, while racism may deny 'men of color the power and privilege that dominant men enjoy', it also denies power and privilege that was held prior to colonisation by Aboriginal women. So 'when violence is understood as an acting-out of being denied male power in other spheres, it seems counterproductive to embrace constructs that implicitly link the solution to domestic violence to the acquisition of greater male power'.[62] It is women who should be turned to and empowered by the recognition of the grandmother's law, but instead we have seen the silent roles of women that have been brought about as a result of colonisation, to be filled instead with the greater empowerment of Aboriginal men as a white patriarchal 'norm'. While the current debate is focused on questions of cultural difference or 'friend and enemy' between 'civilised West' and 'primitive Aboriginal culture', the debate has missed the more critical issue of the power of colonialism and its impact upon the power held by Aboriginal women in the past.[63] Instead, the debate has been taken over by the racist discourse of the primitive barbarian and the stereotyped Aboriginal women-victim. How do we turn power around to bring greater presence to laws of the grandmothers?

62 Ibid, p 1258.
63 Ibid, p 1265.

4 Petrol sniffing

His Honour Judge Wayne Chivell

Introduction

Petrol sniffing has become emblematic of the situation of many young Aboriginal people in rural and remote communities. It symbolises the attitudes these young people have developed to their peers, their families, their communities and to their culture – a kind of listless, uncaring apathy, an indifference to the harm it causes to themselves and to everyone who must deal with them.

Of course, petrol sniffing can be seen as simply another form of substance abuse, a phenomenon that has been a part of human behaviour since man discovered that the ingestion of certain substances could have mind-altering effects. It could be argued, for example, that petrol sniffing is no more harmful than the inhalation of solvents in urban areas by young people.

Stewart Roper is a very experienced registered nurse. He worked for a substantial period in clinics operated by the Nganampa Health Council, the health body delivering health services in the Anangu Pitjantjatjaraku (AP) Lands.[1] Mr Roper wrote a thesis for a Master's degree about the phenomenon of petrol sniffing and its associated issues.[2] He quotes C. Burns, who argued, in a PhD thesis[3], that petrol sniffing shares:

> . . . some commonality with explanations of adolescent drug use generally. These factors include; adolescent risk taking behaviours and experimentation, peer group influences, rejection of and rebellion against significant role models, a desire to be autonomous and seek self-identity, and pharmacological factors, particularly the euphoric effects of petrol sniffing and development of psychological dependence.

1 The area of land delineated in the grant of freehold title by the Pitjantjatjara Land Rights Act 1981.

2 'Petrol Sniffing and Preventative Intervention on the Anangu Pitjantjatjara Lands', submitted for the degree of Masters of Science (Primary Health Care), Flinders University of South Australia (August, 1998).

3 C. Burns, 'An End of Petrol Sniffing', 1996.

Burns continues:

> Like native American youth, the degree of social disadvantage experienced by Aboriginal youth through poverty, prejudice and the lack of economic, educational and social opportunities may increase their susceptibility to drug use but may also be accompanied by factors common to other adolescents which make them vulnerable to harmful drug use.[4]

It is certainly true that petrol sniffing in remote Aboriginal communities in Australia is part of a general picture of substance abuse in those communities. Alcohol abuse has had particularly harmful consequences, as it has in the wider Australian community. Other drugs, such as cannabis, amphetamines and heroin, are becoming increasingly available in remote areas, with concomitant issues of AIDS, hepatitis and other conditions associated with intravenous drug use.

So why is petrol sniffing so alarming? Firstly, because it is a practice that is so foreign to urban Australians – the practice of young people walking around with their face in a can containing petrol is beyond our experience, whereas drinking, smoking and even intravenous injection is not. Secondly, because the practice can be associated with the breakdown of traditional Aboriginal authority structures over children and young people in such a visual way. Thirdly, because the inexorable development of consequences – the physical debilitation, the anorexia, the lack of personal hygiene, the inability to communicate, the violent, aggressive and irrational behaviour, eventually the brain damage, the spasticity, the tremors, and finally the total and permanent incapacity, both physical and intellectual – are so obvious.

Background

According to Maggie Brady, who wrote a seminal study of petrol sniffing in 1992,[5] the earliest report in the scientific literature concerning petrol sniffing came from the USA in 1934. She wrote:

> In Australia, it is commonly believed that petrol sniffing among Aborigines started during the Second World War when large numbers of American servicemen were stationed throughout north Australia, in Queensland and the Northern Territory (Nurcombe et al, 1970, 369; Senate Select Committee 1985, 1,494). Some would have it that the practice was initiated by Black Americans.[6]

4 Ibid n 2 p 27.
5 M. Brady, 'Heavy Metal – The Social Meaning of Petrol Sniffing in Australia', 1992.
6 Ibid at p 139.

Brady expressed some scepticism as to the accuracy of this assertion, commenting that it is 'tempting to interpret (blaming black Americans) as an example of externalising blame – or of racism'. Brady was unable to find any mention in contemporary accounts of petrol sniffing. More recently, evidence was given to a Northern Territory Legislative Assembly Select Committee in October 2004 about American servicemen sniffing petrol and Aboriginal people taking it up.[7]

Whatever its origins, petrol sniffing was observed on the Cobourg Peninsula in 1950.[8] There is fairly sparse information after that, until the phenomenon gathered momentum in the late 1960s/early 1970s. This coincided with the development of larger, more concentrated communities at places such as Maningrida.

Petrol sniffing was also noted at Amata (established in 1961) and Ernabella (now called Pukatja, first established in 1936) in the 1960s. Both of these communities are now in the AP Lands.

Brady attributed the spread of petrol sniffing to a number of factors.

- *Historical* – forced and voluntary abandonment of the small hunter-gatherer group lifestyle; creation of mission and government settlements.
- *Political* – government policies made settlements into institutions; Aborigines became dependent on white systems to solve local problems.
- *Demographic* – lower infant and child mortality; larger groups of age-mates.
- *Social* – creation of teenagers as a social grouping; growth of non-Aboriginal focus on youth; interest in sport and attendance at boarding schools exaggerates teenage group bonding.
- *Logistical* – availability of privately owned vehicles; availability of petrol; mobility facilitated by these two factors.
- *Cultural* – marriage links and land alliances covering vast distances; contact facilitated by vehicle ownership.

In the early years, it was not thought that petrol sniffing would cause any long-term harmful effects. However, since the 1970s, when petrol sniffing became chronic and continuous, there has been an associated rise in morbidity and death.[9] It was initially thought that the harmful effects were caused by the lead in petrol, but, in more recent times, permanent brain and other organ damage resulting from chronic sniffing of unleaded petrol has been noted.

Interestingly, Brady argues that the fact that the older generation may have experimented with petrol sniffing without long-term ill effects may have

7 (2004) Report, p 39.
8 Ibid n 5 at p 140.
9 Ibid n 5 at p 150.

inhibited direct intervention by those people when their children began petrol sniffing. The parents did not see it as dangerous. She observed:

> Although individuals from this group express 'official' concern about sniffing, their own experience is sufficient to induce a tolerance of the practice and the expectation that it will pass.[10]

Brady also commented that different belief systems, which attribute illness and sudden death to other causes, complicate matters. There may be both a cultural and psychological imperative to believe, in the event of a death, that it was caused by adulteration of the petrol, or 'strong' petrol, rather than by the practice of sniffing itself.

This experience may explain why petrol sniffing has persisted in some locations, whereas in others it has been successfully curbed. The communities within which the older generations did not develop this more tolerant attitude to petrol sniffing may have been stronger in dealing with it. In the other communities, a more powerful education programme may be needed to counteract these perceptions of the older generation.

Brady undertook a detailed analysis of the spread of petrol sniffing throughout Central and Northern Australia and the reasons why the practice of petrol sniffing took hold in some communities and not in others, and an examination of her work is instructive.[11]

Anne Mosey, an experienced project officer and consultant who has been involved in these issues for many years, suggested that petrol sniffing had been occurring in the Kutjungka region of northern Western Australia since the 1950s.[12] Surprisingly, however, the practice had not become entrenched throughout the region, and was confined to certain communities and not others. Clearly, local factors such as boredom, or particular adult responses to the practice, were at work.

Mosey commented:

> There appear to be slightly different patterns of use in different areas (A. Mosey, *Petrol sniffing in the Central Australian Region*). Much of the NT and the north of WA appear to have a pattern of wave-like cyclical occurrences of sniffing. There may be none at all in a community for several years, then it will be re-introduced and flare up again for a time then reduce again after community action. Numbers of young people sniffing may go from none to sixty then back to ten over a period of a year. Sniffers typically do not sniff in the daytime, but only at night.

10 Ibid n 5 at p 151.

11 Ibid n 5 at pp 152–167.

12 A. Mosey, 'Dry Spirit: Petrol Sniffing Interventions in the Kutjungka Region', WA (1999–2000), Mercy Community Health Service and Office of Aboriginal Health, 2002, p 10.

> More of the sniffing appears to be opportunistic, rather than chronic. This intermittent nature has been suggested as the reason for a lower number of seriously disabled ex-sniffers in NT, compared with SA. (There may well be other reasons for this.) There appears to have been very few, if any, 'chronic' sniffers in comparison with communities to the south and east. When chronic sniffers are visiting from other communities, they can attract others to the practice very easily and rapidly.
>
> In contrast, the communities in the north of SA and the western Goldfields region of WA appear to have a pattern of a number of chronic continuous sniffers, with a larger group of intermittent sniffers. The chronic sniffers sniff during all their waking hours, typically with a blanket or parka over their heads and petrol container, and can become violent at attempts to alter their behaviour. There have been some instances of violence by sniffers in Wirrimanu – these may have occurred when violence was used against them. A 'gator' (a small buggy) was burned after the male Wardens had assaulted a sniffer. There have also been many instances of 'break and enter', and some damage to vehicles, usually against buildings during the school holidays.

Roper also observed that petrol sniffing had been noted in Central Australia since the 1960s and had possibly been occurring since the 1950s.[13] He commented:

> By 1970 the practice had escalated considerably as cars became more common. In these early years it appears that petrol sniffing was largely experimental and probably not indulged in often enough to produce serious health problems. This inference is supported by the finding that:
>
> > Many of these individuals rose to political and local prominence, becoming Council members, teachers' aides and even parliamentary representatives.
> >
> > (Brady, 1992, p 150)
>
> However, from the mid 1970s core groups of mostly young males have increasingly used petrol almost continuously and over long periods of time.

He noted that the few petrol sniffers who were consulted by the Senate Select Committee on Volatile Substance Fumes in 1985 all said that they did it for fun.[14]

13 Ibid n 2 at p 12.
14 Ibid n 2 at p 285.

The consequences of petrol sniffing

Petrol is sniffed because it produces a state of euphoria and it can also have hallucinogenic consequences. Petrol is poured into a container, usually a metal can, which is moulded to adapt to the contours of the face. The can is pressed to the face and the vapour is inhaled.

Petrol, in its conventional form, contains a complex mixture of organic substances including benzene, toluene and xylene. Petrol used in older cars (manufactured before 1986) also contained lead and sniffing it caused lead poisoning. In earlier times, this was considered the most harmful consequence of petrol sniffing, as I have already mentioned.

The effects of petrol sniffing are many, and include euphoria, hallucinations, delusions, nausea and vomiting, loss of appetite, aggressive behaviour, irritability, hyperactivity, aches and pains, headache and fatigue.

Chronic petrol sniffing can lead to seizures, tremors, and ataxia and encephalopathy. A phenomenon called 'sudden sniffing death' has also been observed. It is thought that petrol sniffing has led to the onset of fatal cardiac arrhythmias in such cases.

In cases involving the deaths in 1999 and 2001 of three young people from the AP Lands, which were the subject of a coronial inquest which I conducted as South Australian State Coroner in 2002, the cause of death was recorded simply as 'hydrocarbon inhalation'. Each of the deceased had taken a can of petrol to bed and continued to sniff until they died from respiratory depression and/or asphyxia, although cardiac arrhythmia can never be excluded in such cases. What was remarkable about these cases was that each person died with their face still sealed in the can and the marks made by the can were still visible after death.[15]

Roper observed that the true extent of mortality from petrol sniffing is difficult to determine. The condition with which the patient presents to a hospital may be recorded as pneumonia, organ failure due to malnutrition or other cause, cardiac arrest, or injury from violence or accidents such as burns. The fact that these conditions may be sequelae of petrol sniffing is often not recorded. For example, Brady found 20 deaths had been recorded at the National Drug Abuse Information Centre as related to petrol sniffing between 1980 and 1988, but upon examination of coroners' records, police and health clinic records, she found that the figure was closer to 35. Even that was considered an underestimate.

Roper noted, from Nganampa Health Council records relating to two periods for which records were kept, that petrol sniffing was by far the highest cause of mortality among young people. From 1 January 1984 to 30 June 1987, and from 1 January 1990 to 30 June 1993, the Health Council recorded that there were 19 deaths in the 15–24 age group. Of these, petrol

15 See R.W. Byard, W.C. Chivell and J.D. Gilbert, 'Unusual Facial Markings and Lethal Mechanisms in Cases of Gasoline Inhalation Deaths' (2003) 24 *American Journal of Forensic Medicine and Pathology*, pp 298–302.

sniffing was responsible for 11, and possibly 13, deaths, if two cases attributed to pneumonia are included. Motor vehicle accidents, the next highest cause of death among 15–24 year olds, caused three deaths during the same period. There is no reason to think that the situation would be significantly different now – indeed, for reasons I will discuss about the changing patterns of petrol-sniffing behaviour, they may be significantly worse.

The extent of the problem

As I have already mentioned, in 2002, I conducted a joint inquest into three deaths from petrol sniffing on the AP (Anangu Pitjantjatjara) Lands. The mode of death was strikingly similar in each case.

I quoted from a report of Peter d'Abbs and Sarah MacLean, *Petrol Sniffing in Aboriginal Communities: A Review of Interventions*,[16] as follows:

- Petrol sniffing is a form of volatile substance misuse (VSM). VSM is practised by a significant minority of young people across Australia and in other countries. It is more prevalent in particular ethnic and socio-economic groups. Petrol sniffing has been reported among indigenous populations of a number of developed nations;
- Although petrol sniffing tends to attract the most media attention, a range of other forms of drug use including other VSM is practised by young Aboriginal people. Interventions targeting a particular substance may have the effect of shifting young people to other forms of drug use;
- A majority of aboriginal petrol sniffers are males. Most are between 8 and 30 years of age. Sniffing is most prevalent among people in their late teens. Older sniffers are more likely to be chronic users;
- Because of fluctuations in petrol sniffing and variations between communities it is difficult to draw conclusions about the prevalence of petrol sniffing . . .;
- Early intervention against petrol sniffing is critical as people are much more likely to stop early in their 'sniffing career' before the practice becomes entrenched;
- A complex range of interrelated causes has been proposed to explain petrol sniffing. These range from dispossession and cultural breakdown to individual psycho-social factors. Boredom is a major contributor and any program must offer a counter-attraction to the experience of petrol sniffing. Poverty as a contributing factor in petrol sniffing warrants more consideration than it has received in the literature;
- Petrol sniffing poses a range of problems to sniffers, their families, communities and to the wider society. Among the problems which

16 Cooperative Research Centre for Aboriginal and Tropical Health, 2000.

have been associated with petrol sniffing are: serious health consequences including death or long-term brain damage, social alienation of sniffers, social disruption, vandalism and violence, increased inter-family conflict and reduced morale on communities, incarceration of sniffers and costs to the health system in terms of acute care and providing for the long-term disabled;

- Families, communities, community organisations and governments (State/Territory and Commonwealth) each have a role in addressing petrol sniffing. Cooperation and consistent action between these agencies is essential. Within jurisdictions a whole-of-government approach is required;
- Interventions against petrol sniffing are all too often spasmodic, consisting of responses when sniffing peaks rather than implementation of long-term preventative strategies.

I heard evidence from John Tregenza, a man with vast experience in the AP Lands since the early 1970s. He told me that all communities had experienced petrol sniffing to varying degrees and said that it was 'very often a barometer of the health of the community in a general sense'. He cited as examples Mimili, where sniffing was not occurring to any great degree, and Pukatja (previously Ernabella), which had deteriorated markedly to the extent that, when visiting during a court circuit, he had seen 18 people carrying tins of petrol within sight of the court. He said:

> I saw, just last week, a pre-adolescent girl carrying her sister, sniffing . . . so it was a 13 year old nursing a 2 year old, and, well, both had to be sniffing, the 2 year old involuntarily, of course.

The numbers of sniffers on the AP Lands has also tended to fluctuate. Surveys conducted over the years by the Nganampa Health Service have produced numbers as high as 178 in 1993, decreasing to 85 in 1995, and then climbing again to 166 in 2000.

It was thought that the decrease in 1995 was due to the introduction of Avgas for use in petrol-driven vehicles, until alternative sources of conventional fuel became available.[17] This may have resulted in a relaxation of effort in the measures to combat petrol sniffing.

I conducted a further joint inquest into four deaths on the AP Lands in 2004. By that time, it was reasonable to conclude that the number of petrol sniffers had increased to around 220. It is difficult to know how accurate these figures are.

17 Evidence of Dr Paul Torzillo, Medical Director of the Nganampa Health Council, pp 135–136. Transcript of South Australian Coroners' Inquest, Inquest No 11/2002.

The cohort effect

Dr Torzillo, when giving evidence in 2002, described what he called a 'fairly dramatic cohort effect' that had developed since the 1980s. Whereas most petrol sniffers in the 1980s and 1990s were adolescent and late teenage males, this had gradually changed so that more females were becoming involved and the median age was increasing, so that, in some communities, many petrol sniffers were more than 25 years old.

This data indicates that some petrol sniffers have been sniffing for 10, 15 or even 20 years. This has made intervention much more complicated. Firstly, the health effects upon these older sniffers are much more obvious. Secondly, the problem becomes inter-generational, as exemplified by Mr Tregenza's observations referred to earlier. Of course, a parent who is also a sniffer is barely able to look after him- or herself, let alone look after a dependent child. This places great burdens on grandparents, who may also be unwell, and if the children are left neglected and hungry as a result, the chances of them also taking up sniffing are that much higher.

A mother of one of the deceased gave evidence in 2002 about this. Her granddaughter had suffered intra-uterine growth retardation because the mother continued to sniff during pregnancy and did not care for herself or her daughter well during that period. The baby weighed only 1.7 kg at birth, and showed serious health and other issues as she grew. The grandmother said:

> If there is intervention early before they get taken into sniffing, it is possible to stop sniffers, but you need to have active young parents to do that. It's too hard for grandparents – in relation to my grandchildren it would be hard for me and my husband to keep a good eye on them now that my daughter is deceased.

As to interventions in such cases, Liza Balmer, the Coordinator of the Nutrition Awareness Project for young mothers and children, a programme administered by the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic Violence Service (NPY), said:

> I think that's a reflection on what I was saying earlier, that people are tired. It's a difficult issue to deal with that requires a lot of energy and a lot of commitment and obviously the earlier you can provide intervention support the more success you will have. When people have been sniffing for 5, 10, 15 years, no little two week respite trip into Alice Springs or a basketball game is going to stop the problem.

She added:

> I think why people sniff is a mystery and sometimes it is beyond the parents, no matter how much food and love and care they show their

> children, that they themselves can't change it and it's not a dissimilar behaviour pattern to people who use heroin or use cocaine or use alcohol. Sometimes it's inexplicable even from a loving family.

Among longer term sniffers, there is evidence that permanent neurological damage may have been sustained, even among sniffers as young as 15 years old. This sort of damage, and the lack of insight and inhibition when intoxicated, has led to an upsurge in domestic violence and sexual abuse, although it is difficult to know whether such abuse has increased or whether it has simply been unmasked in recent times.

Ms Jane Lloyd, the coordinator of the NPY Women's Council Domestic Violence Service, told the 2002 inquest that one in four women between the ages of 15 and 44 who live on the Anangu Pitjantjatjara lands is, or has been, a client of her service. She estimated that about 80 per cent of violence is committed by males who are under the influence of alcohol, petrol or marijuana.

Ms Lloyd pointed out that female petrol sniffers are especially vulnerable to violence, both physical and sexual. She said:

> Restraining orders are neither an effective nor appropriate strategy for these women. If the young woman's partner is a petrol sniffer then she will tend to protect him, despite his life-threatening assaults on her. These clients generally come to our attention because they have been the victim of a serious offence where police have become involved, such as an unlawful wounding or an assault occasioning actual bodily harm. Our information about these clients comes mainly from family, other NPYWC programs, clinics and the police.

One case mentioned by Ms Lloyd was particularly horrific:

> In a child sexual assault case that occurred in Amata in 1995, a four-year-old girl was sexually assaulted. She had to be evacuated to Alice Springs hospital for surgery. No offender was identified. The child's mother and her defacto were at the time (and continue to be) chronic petrol sniffers. The child's maternal aunt and uncle were also chronic petrol sniffers. Up to six or more petrol sniffers would stay in the household where this child was living. No charges were laid.
>
> Six months after the child was raped her mother was the victim of a serious assault and rape. Alcohol was the main substance featured in this incident. Her husband was in such an inebriated state that he was unaware that another man was raping his wife. When she complained to the husband that she had been raped his response was to punch her about the body and cause her to fall out of a moving vehicle. She was also evacuated to the Alice Springs hospital and remained in the intensive care unit for a number of days due to respiratory failure as a result of

> chronic sniffing. She would not make a complaint to the police for fear of her husband being gaoled. She had already experienced the shame of having her petrol addiction publicly aired in a contested Family Court matter several years before.[18]

Such cases have recently come to public attention to a much higher degree since public statements were made by a senior prosecutor in Alice Springs in May 2006 about some other shocking examples of such abuse, including the rape of a seven-month-old baby. This coincided with the appointment of a new federal Minister for Indigenous Affairs, Mr Mal Brough, who has taken a more activist approach to these issues.

The current situation

My personal knowledge of events in the AP Lands does not extend beyond November 2004. The only way to gauge the current situation is by personal communication with people who currently visit, and from the media.

In a recent article in the 'Inquirer' section of *The Weekend Australian* newspaper of 15–16 April 2006, journalist Nicholas Rothwell described a recent visit in this way:

> Let's take one troubled community in the Anangu Pitjantjatjara lands of SA, visited recently by *Inquirer*. It's a broken-down place, with barred windows, decayed houses and wrecked cars strewn about the streets. At times, as many as 50 per cent of the young people smoke marijuana compulsively and sniff petrol. Once night falls they drift along the streets, zombie-like, shouting, throwing stones, staring into the black nothingness. One long-time, non-Aboriginal, resident describes the way petrol sniffing dominates life. (He cannot be identified because all non-local employees on the Anangu Pitjantjatjara lands must sign agreements not to talk to the media without clearance and vetting.)
>
> 'Sniffing is about walking around at night and not eating,' he says. 'It's about brotherhood and about rape. Girls also sniff, often to lose weight. It makes you warm in the winter and gives you an excitement you don't find elsewhere. It's a theatrical behaviour, too, because all life here is role-playing. Sniffing illustrates that things aren't right and sniffers tend to start on petrol soon after the loss of a significant relative, but it's also a form of manipulation. Walking about with a can of petrol under your nose elicits pity.'
>
> . . .
>
> Underpinning the use of petrol is the ingrained culture of heavy

18 Transcript of South Australian Coroners' Inquest, Inquest No 11/2002.

> marijuana consumption: just as the petrol comes from Yulara and Alice Springs, the drugs are run in via the Stuart Highway from centres such as Alice Springs, Port Augusta and Coober Pedy.
>
> Despite the significant resources thrown at petrol sniffing in the past half-decade and the vast publicity devoted to preventive campaigns, the problem has only worsened. This is not just because of the attractions of the habit, with its appealing high that combines accents of LSD and good alcohol. It is because of the deep patterns of desert Aboriginal society and the hands-off approach to policing that has prevailed until recently.

The article went on to describe changes happening in law enforcement in the region – the establishment of new police stations in remote Aboriginal communities, the development of intelligence-collection systems to combat trafficking in alcohol, drugs and petrol, the development of cross-border policing powers, and cooperation between the three jurisdictions, SA, WA and NT. Rothwell described the battle they face as follows:

> As is well known, there have been persistent reports that young women in remote communities prostitute themselves for petrol and that babies are quieted with petrol on the breast. Some of the best-known kingpins and government employees in one prominent community also function as alcohol sellers and drug suppliers to their kin. A well-oiled distribution network deals cannabis from Port Augusta into the Anangu Pitjantjatjara lands, while petrol is generally brought into the desert communities from Alice Springs.
>
> Sometimes the most innocuous travellers help to spread the poison: well-meaning tourists are often asked for petrol by supposedly marooned Aborigines beside their cars on the Yulara road and helpfully hand over a spare jerry can.
>
> . . .
>
> The detectives cannot yet confirm with hard evidence what the people in the communities know: that there is a distinctive pattern to the suppliers. New arrivals of part-Aboriginal descent prey routinely on the inhabitants of desert communities. Often these dealers claim some family relationship with those they exploit.
>
> Mutitjulu, near Yulara, is a special focus for this predatory relationship because of the large financial resources that have been poured into the stricken community. At a coronial inquest last year, the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council said bluntly that the presence of such Aborigines from urban backgrounds and comparative educational advantage generally had negative effects.
>
> 'Some of these more recent arrivals are alleged by NPY members and suspected by police to be the main suppliers of illicit substances,' they said. 'Locals feel unable to provide names because these more recent arrivals are their relations.'

Anangu attitudes to petrol sniffing

It is obvious from the above that, apart from sniffers themselves and those who are supplying them, there is a strong attitude against petrol sniffing in Aboriginal communities. This attitude is accompanied by feelings of powerlessness to deal with the issue.

There can be a tendency to avoid the issue by describing petrol sniffing as an outside, or white-imposed problem. The father of one of the young men whose death was the subject of the three inquests I conducted jointly in 2002 said:

> There has been petrol sniffing since the 1950s. Who is responsible? The petrol doesn't belong to us. It is not part of Anangu law. It was introduced to the Lands by white people. It is important that Anangu revive their culture and hold on to their culture. The problem with petrol comes from outside, it's like the Maralinga bomb tests, the solution should come from the outside too.

He went on:

> Children and sniffers have become bosses over their parents. They are running the agenda by their behaviour. They are out of control and people have to react to the behaviour of sniffers rather than keeping to the law and keeping to the culture. Sniffers break their mother's arms. There is violence against families. Sniffers threaten their parents that they will commit further acts of self-harm. They swear at their parents. They breach traditional secrets by speaking out of turn. They throw rocks at their parents. They break their parents' arms. When I talk about these things I am talking about sniffers generally, I am not talking about the deceased.
>
> We as older people are worried about the children and about the younger generation of parents having to bring up petrol sniffers. We have no sniffers now. We have lost our only son.

The ability of Anangu to deal with such problems is compromised by their own situation as well. Dr Torzillo explained:

> . . . entrenched and endemic poverty with major educational and employment disadvantage and, in that setting, the ability for communities or individual families to tackle this problem is severely limited . . . there seems to be a widespread view within government . . . that this is a problem which the community should solve, this is their responsibility. This is a community with less resources and ability to control a tough problem than any mainstream community . . . and secondly, that's not a demand that's put on any other community in the country. No-one, no politician

and no bureaucracy expects that a suburb like – the people of Cabramatta are not told that they have to solve the heroin problem and it's up to them to do it. No-one makes that demand of them and they don't make that demand of them because it's a stupid thing to do, it's clearly not possible.[19]

Government responses

Following the 2002 inquest, I made a number of recommendations in the hope that their implementation might prevent similar deaths. In summary, those recommendations were:

- that Commonwealth, State and Territory governments recognise the urgency of the situation;
- that any attempts at rehabilitation or prevention will be ineffective if the underlying issues of poverty, hunger, illness, lack of education, unemployment, boredom, hopelessness are not also addressed;
- Aboriginal communities are not able to solve these problems without help;
- that too much time had already been spent consulting and information gathering;
- that service delivery infrastructure needed to be established and built upon;
- strategies such as providing youth workers, neuropsychological testing, disability services, homelands/outstations, Avgas, wider sentencing options for courts, sobering-up facilities, night patrols, the role of welfare officers in child protection, secure care facilities for detention, detoxification, treatment and rehabilitation, the establishment of a permanent police presence, were all recommended;
- governments should return to the recommendations of the Royal Commission into Aboriginal Deaths in Custody as a further check, having regard to the research that was then conducted, more than ten years earlier, into the underlying issues referred to above.

As I said, there was a further inquest in 2004 into four further deaths on the AP Lands, one in May 2003 (self-inflicted hanging), December 2003 (exposure – severe brain damage – wandered off and perished), and two in March 2004 (both by self-inflicted hanging).

There were two other suicides by young people in March 2004 as well, but the evidence suggested that those deaths were not connected with petrol sniffing.

There had been some disquiet that little had been done to implement the

19 Ibid.

recommendations from the 2002 inquest. It became apparent that the increased 2003/04 budget allocation of $12 million remained largely unspent. Some action had been taken, particularly by SA police, mental health services and in the area of domestic violence, but very little else transpired, apart from much further discussion and consultation.

I therefore repeated the 2002 recommendations, with specific further references to policing, a correctional facility, a secure care facility, a youth worker programme, neuropsychological testing, homelands/outstations, Avgas, night patrols, child protection issues, service coordinators, crime prevention strategies, disability services, recruitment/retention of staff and other issues.

In March 2004, a Coordinator of Government Services on the AP Lands was appointed, but he resigned within weeks. The Honourable Bob Collins replaced him, but he was severely injured in a severe motor vehicle accident on 24 August 2004. Two Special Advisors, Dr Lowitja O'Donoghue and Mr Tim Costello were appointed on 25 August 2004, and provided a report in March 2005 with further recommendations. While all of this was happening, Yalata, an Aboriginal community on the West Coast of South Australia, was declared a 'community in crisis' by the Australian government, and similar steps were taken to address petrol sniffing and other social problems there as well.

In December 2005, the SA government reported on the progress made by the Aboriginal Lands Task Force, a body set up to respond to all of these recommendations. A 'peak body', Tjungungku Kuranyukutu Palyantjuku (TKP) was set up to be 'responsible for planning and oversight of services to improve conditions on the Lands'.

A further Service Coordinator was appointed in June 2005.

A Strategic Plan was developed to identify service needs and funding priorities. Legislation was passed concerning governance of the AP Lands, and fresh elections were held in November 2005.

The Department of Health, and the Department of Families and Communities, have established staff at Marla, on the edge of the Lands. Housing is being built for them at Umuwa. A wide variety of projects and programmes have been developed to improve health and well-being. A substance abuse rehabilitation facility is being developed, with construction to commence in 2006. All communities now sell Avgas rather than unleaded petrol. Disability services are being provided. Mental health services have been expanded. Police powers to intercept and deal with petrol traffickers have been expanded, and new offences are proposed for legislation.

A major improvement in the provision of police services to the AP Lands has been undertaken. There are now seven sworn officers on the Lands to support the community constables, with three living permanently at Umuwa. Another base, further west at Murpatja, is being established. Existing police facilities are being upgraded. Tri-state policing initiatives are being established. Various large infrastructure projects are under way. Education initiatives have been developed to further improve retention rates at schools.

Employment and training programmes are being established. Arts and crafts, native food enterprises, tourism enterprises and sporting facilities including swimming pools (which have employment, recreation and health advantages) are planned. Healthy food store policies are being established.

Conclusion

It remains to be seen whether these measures will be effective. The problems are deeply rooted and have passed through at least two generations since petrol sniffing has become an issue.

On 26 June 2006, at a 'summit' in Canberra convened by Mr Brough, a 'package' of measures accompanied by Commonwealth funding of more than $130 million over ten years was announced, provided that it is accepted in total by the State and Territory governments and they agree to match the funding. Many of the State Ministers emerged saying that the measures would not work. The South Australian Minister did not say that. It is easy to say what will not work. What needs to be developed is a plan that will work.

The only cause for optimism is that these issues are now at the forefront of the public consciousness, and Commonwealth, State and Territory governments now have political positions to defend. Until there is substantial change and petrol sniffing is eradicated or at least minimised to levels that can be effectively dealt with, I stand by what I wrote in 2002:

> Clearly, socio-economic factors play a part in the general aetiology of petrol sniffing. Poverty, hunger, illness, low education levels, almost total unemployment, boredom and general feelings of hopelessness form the environment in which such self-destructive behaviour takes place. That such conditions should exist among a group of people defined by race in the twenty-first century in a developed nation like Australia is a disgrace and should shame us all.

5 Aboriginal children in State care and the Stolen Generations

The South Australian Children in State Care Commission of Inquiry

The Honourable E.P. Mullighan QC

Many years ago, an experienced worker in the office of the Aborigines Protection Board visited a remote Aboriginal community run as a mission by one of the churches and inspected children. The father of these children of a traditional Aboriginal woman was European and had left the family. The children were required by the worker to extend their hands. She turned the palms upwards and as she inspected each child she said, 'This one is white enough to learn.'

The children were removed from their mother and her extended family. They were taken to Adelaide, separated and placed with different white families who cared for them and saw that they went to local schools. The children were not reunited until many years later. They were deprived of the love and nurture of their mother, and of an upbringing with their people and their culture, stories, traditions and life in their community. The negative affect upon them has been substantial and continues throughout their lives.

This story is shared by many Aboriginal children of mixed blood. The belief of the Aborigines Protection Board was that the children would benefit by being removed and placed in white society with complete strangers who had little or no understanding of Aboriginal life, culture and tradition.

Many Aboriginal people were moved from their homelands to missions and communities from the far north and most other parts of the State and later moved to other locations without consideration of the significance to them of their land and culture. Many were eventually moved to metropolitan Adelaide and regional cities and placed in homes run by government, churches and charities and became permanent residents.

The effects of dispossession and loss of culture and family were usually devastating. This dispossession and movement was considered by the agencies of the white government to be in their best interests. It was assumed that white ways were far superior to the Aboriginal life. The assumption was made with very little, if any, knowledge of the well-ordered, inclusive and protective Aboriginal life.

The Commission

In the few years prior to the end of 2004, there had been considerable agitation in South Australia about the alleged sexual abuse of children by persons connected with the Anglican Church and other non-government organisations. Allegations were also made about the sexual abuse of children in the care of the State. In consequence, the South Australian Parliament enacted the Commission of Inquiry (Children in State Care) Act 2004, which came into operation on 18 November 2004. This Act established the Commission of Inquiry with the following terms of reference:

> 2 Terms of reference
>
> (1) The terms of reference are to inquire into any allegations of –
>
> (a) sexual abuse of a person who, at the time that the alleged abuse occurred, was a child in State care; or
>
> (b) criminal conduct which resulted in the death of a person who, at the time that the alleged conduct occurred, was a child in State care,
>
> (whether or not any such allegation was previously made or reported).
>
> (2) The purposes of the inquiry are –
>
> (a) to examine the allegations referred to in subclause (1); and
>
> (b) to report on whether there was a failure on the part of the State to deal appropriately or adequately with matters that gave rise to the allegations referred to in subclause (1); and
>
> (c) to determine and report on whether appropriate and adequate records were kept in relation to allegations of the kind referred to in subclause (1) and, if relevant, on whether any records relating to such allegations have been destroyed or otherwise disposed of; and
>
> (d) to report on any measures that should be implemented to provide assistance and support for the victims of sexual abuse (to the extent that these matters are not being addressed through existing programs or initiatives).

The legislation provided that the Inquiry related only to conduct or omissions occurring before the commencement of the Act. However, there is no time limitation as to allegations of conduct before then and some persons alleging that they were sexually abused as children are now in their seventies and eighties.

I was appointed Commissioner and investigation into matters referred to in the terms of reference commenced in early December 2004. The response to the Commission has been substantial. An extensive outreach programme was undertaken in South Australia and interstate through most aspects of the media and by meetings in regional locations. This outreach included

Aboriginal media and there were meetings with Aboriginal groups and leaders. The work of the Commission was publicised in many organisations including prisons, detention centres and those concerned with the past and present care of children. Also there was a focus upon persons with a disability and the elderly. So far, information received by the Commission indicates that about a thousand children were sexually abused, most of whom were in State care. There are many other allegations received by the Commission of children having been sexually abused, but the investigation revealed that the majority of them were not State children when the abuse occurred. Of those, 293 are alleged to be Aboriginal children. The information received by the Commission reveals that 720 children died whilst in State care. A small number of deaths of State children are known to be Aboriginal children.

So far, investigations of sexual abuse of Aboriginal children in remote areas have not commenced, except in a preparatory way at Coober Pedy and Oodnadatta. It is planned to undertake investigation of all of the communities in the Pitjantjatjara lands, the Maralinga lands, Yalata, the West Coast, Oodnadatta, Coober Pedy, Nepabunna, Gerard, Point Pearce and the many homelands of Aboriginal people. Already there has been considerable investigation of allegations of sexual abuse of children at Raukkan and Murray Bridge.

I have been asked to write about the work of the Commission regarding Aboriginal children in State care and including those children who might be regarded as part of the Stolen Generations.

It is not appropriate to reach any final conclusions about any matters until the inquiry has been completed and this will not occur before the publication of this book. However, it is possible to mention some matters that appear to be well known and others that have been established by preponderance of evidence at the Commission.

The extent of sexual abuse

The extent of sexual abuse can never be accurately determined, but it is now widely accepted that at least one child in every five will be sexually abused before the age of 16 years. When this estimate is applied to the general population, it may be seen that not less than about four million Australians have been, are being, or will be, sexually abused, of whom not less than 300,000 are South Australians. The application of this estimate to the Aboriginal population, determined by the 2001 census, indicates that nearly 5,000 of them are Aboriginal persons. At the time of writing, the 2006 census information is not yet available. It is likely that the percentage of Aboriginal children subject to sexual abuse is much greater than the estimate that has been mentioned for a variety of reasons.

These matters will be explored by the Commission, but it is anticipated that these reasons include a breakdown of culture in many communities, the consequences of drug and alcohol abuse within some Aboriginal communities

and the vulnerability of Aboriginal children when isolated from their families.

It is also widely accepted that, for a variety of reasons, there is a low rate of reporting sexual abuse by adults and children. A recent survey conducted by the Bureau of Statistics indicates that reporting rates for sexual assault of adults is 19.4 per cent. It may be accepted that the reporting rate by, and about, children is very much lower and particularly for Aboriginal children.

For the purposes of the inquiry, I have regarded a 'State child' as a child who, at the relevant time, was the subject of care or control by the Minister for Families and Communities, officers of the Department for Families and Communities, and Families South Australia (Families SA) and their predecessors in name, as well as the Aborigines Protection Board when it existed.

Sexual abuse is conduct amounting to a sexual offence within the meaning of s 4 of the Evidence Act 1929, which includes rape, indecent assault, any offence involving unlawful sexual intercourse, or an act of gross indecency, incest, any offence involving sexual exploitation or abuse of a child, or abuse of a child as the object of prurient interest, or any attempt to commit, or assault with intent to commit, any of these offences. All of the allegations of sexual abuse that are the subject of evidence before the Commission fall within this definition.

The investigation of allegations of sexual abuse of children is no easy task. The disclosure by adults of sexual abuse of them as children is difficult. Experience at the Commission indicates that those making disclosures have had to develop confidence in themselves and in the Commission before doing so. The circumstances of the abuse usually involved secrecy, shame, feelings of guilt and powerlessness. Many had made attempts to disclose as children and later in life that were often disregarded or rejected. Many perpetrators threatened children of the dire consequences of disclosure and also made it plain that if an attempt were made the child would not be believed. The experience of many who have made disclosure to the Commission is that, sadly, many of them were not believed. A common statement by persons making disclosure to the Commission is that it was the first time anyone had listened to them and accepted what they had to say.

The willingness to disclose sexual abuse is facilitated by confidentiality, which is a feature of the process at the Commission. Allegations are not disclosed by the Commission without the knowledge and approval of the persons making disclosures. For many persons, that approval is not given because the alleged perpetrator is dead, aged or infirm. There are other reasons. The wishes of the person are respected and disclosure is not made to anyone unless it is adjudged to be in the public interest. Already the allegations made by 132 persons have been forwarded to the police and it is anticipated that many more will be referred in the next few months.

The approach of the Commission to Aboriginal persons

It was appreciated at the outset that it was necessary to demonstrate to Aboriginal people that they could have confidence in the Commission. Many Aboriginal people providing information to the Commission expressed the view that previous commissions and inquiries had not achieved much for Aboriginal people. It is not appropriate for present purposes to make any comment about this assertion except to say that there has been a determination at the Commission to publicise itself widely and to include Aboriginal people in its work.

Also it is recognised that the work of the Commission must be undertaken in a manner that assists and encourages Aboriginal people to disclose, and respects and accommodates relevant matters of culture, language and tradition.

There can be problems in language that may not be appreciated by investigators. Some persons may only be prepared to disclose to someone of their own gender and others may prefer to disclose to someone of the opposite gender. There may also be cultural reasons impeding disclosure of certain types of conduct of the perpetrators and the naming of them. It was accepted that there were many other factors that could impede disclosure to the Commission.

For these reasons, and to assist the Commission in other respects, an Aboriginal Advisory Group within the Commission was established. It is comprised of Aboriginal men and women with considerable experience in working with Aboriginal people in fields of advocacy, social inclusion, genealogy, Aboriginal children in detention and on the streets, justice, legal rights, State records and promoting and developing the welfare of Aboriginal people as well as a Kaurna Elder, Mr Lewis O'Brien. The statement of purpose of the Group reflects the concerns of the Commission and is as follows.

1. Ensure that a strong Aboriginal voice is heard by the Commission and reflected in its reports.
2. Advise as to the best way for the Commission to:
    - 2.1 make contact with Aboriginal people who are, or have been, State children and were sexually abused;
    - 2.2 encourage Aboriginal witnesses to come forward;
    - 2.3 protect the privacy and confidentiality of Aboriginal witnesses;
    - 2.4 provide interpreters and, if necessary, companions or counsellors for Aboriginal witnesses.
3. Indicate the Aboriginal people who can best assist in making the contacts in each Aboriginal community and region and in explaining how the Commission operates.
4. Inform the Commissioner and staff of all matters of Aboriginal culture, law and custom relevant to the work of the Commission including:

4.1 to whom Aboriginal women and men will, or may not, speak about sexual abuse to them and their children, or deaths of Aboriginal children whilst in State care;
4.2 whether it is desirable that an Aboriginal person with cultural authority should sit with the Commissioner and the staff of the Commission when stories are told;
4.3 the best place and environment for the telling of the stories;
4.4 the circumstances in which it is not appropriate for a recording to be made of a story or part of it and if so, what part of it;
4.5 how to gain an understanding of Aboriginal laws, legislation and social circumstances of Aboriginal people.

5. Inform the Commission of any special problems facing Aboriginal children and former children in disclosing sexual abuse or deaths of State children and, in particular, if perpetuated by family members.
6. Inform the Commission of what outcomes Aboriginal people would like to see discussed in the report of the Commission.
7. Assist the Commission in locating records relating to Aboriginal people who were State children in care.
8. Direct the Commission to persons, including Aboriginal persons, who may be able to provide information relevant to the terms of reference of the Commission.

The advisory group first met on 24 February 2005 and has since met regularly. It has provided enormous assistance and support to the Commission and has facilitated access to Aboriginal people by the Commission.

Disclosure of sexual abuse

When a person wishes to disclose having been sexually abused, an investigator at the Commission is assigned to that person who obtains information and assists in preparing that person to provide the information or give evidence to me as the Commissioner.

Pursuant to s 8(1) of the Act, the Minister for Families and Communities, after consultation with me, appointed a person with appropriate qualifications and experience in social work to assist the conduct of the inquiry. Ms Judith Cross, the Chief Executive Officer of Respond SA, has assisted the Commission by ensuring that there is appropriate and skilled support for persons giving evidence and providing information to the inquiry.

Also the Commission made arrangements with various organisations to provide assistance to persons making disclosure, including psychiatrists, psychologists, counsellors and social workers, and employed suitable persons to oversee the management of those services and provide counselling as required. The most recent appointment is an Aboriginal Social Worker.

These services have been widely used by persons disclosing sexual abuse, including Aboriginal people.

The disclosure of sexual abuse by children is even more difficult. Many abused children have not had the opportunity to develop confidence in adults because, in most cases, the perpetrators were adults. For children, the sense of powerlessness is current and feelings of guilt and shame are easily acquired and not fully understood.

For Aboriginal people, sexual abuse has additional problems. It is safe to accept that sexual abuse of children is not, and never has been, part of traditional Aboriginal culture or life. Whilst these matters have not been explored in great detail by the Commission, it is reasonable to accept that kinship and family arrangements and the systems of social regulation, morality, governance and law in traditional communities rejected and usually prevented the abuse of children and particularly sexual abuse. The care and development of children was not restricted to parents but was undertaken as required and appropriate by all family members within the kinship structure and as well as the community.

There are other problems that can arise for Aboriginal children disclosing sexual abuse, which may not be known or understood by white people. It is usually white people who were the agents of government and removed Aboriginal children from their families. It is white people, including courts and police, who have enforced the white person's law upon Aboriginal people often with little understanding of the context. The imposition of white person's law and ways upon Aboriginal people is not conducive to the type of relationship between an Aboriginal person and a white person that is essential for disclosure of sexual abuse. It cannot be assumed when sexual abuse is suspected that any victim or family or community member would be ready and willing to disclose. The reluctance might be more pronounced when the abuser is a member of the community and has power or authority in the community and over the immediate family of the abused person. The perceived consequences of disclosure are likely to weigh heavily upon the victim or survivor. It is thus necessary to develop ways of enabling disclosure. Those ways can only be achieved with the guidance, assistance and cooperation of the Aboriginal people.

Also, the consequences of proof of sexual abuse by Aboriginal persons under white man's law may be an obstacle to disclosure. Many Aboriginal people usually feel disempowered when involved in the white justice system and their past experiences would almost certainly make them cautious, if not reluctant to disclose, when a consequence is the involvement of the criminal law.

The Commission will endeavour to ascertain whether there is a better way to prevent child sexual abuse and protect children in remote communities than the use of criminal law. There will be wide consultation with Aboriginal people who have cultural authority and are aware of the traditions and culture of the relevant community.

There should be effective ways to protect Aboriginal children other than by removing them from their families and communities. If the Aboriginal people can develop confidence and trust in the Commission, they will be able to say if a better form of child protection is to re-empower Aboriginal people and provide support to the genuine leadership.

When considering whether the State dealt appropriately or adequately with the matters that gave rise to allegations of sexual abuse by Aboriginal people and the resources that should be implemented to provide assistance and support to them, it will be necessary to consult widely with Aboriginal people as to the best way to deal with the allegations of sexual abuse, which should include processes that are effective and acceptable to them. These processes may include a community restorative approach, if this is considered by Aboriginal people to be appropriate.

Consequences of child sexual abuse

The Commission is investigating the consequences of child sexual abuse for the victim. The evidence adduced so far indicates that often there are lifelong consequences and there can be severe symptoms later in life and at various times usually predicated by adverse life events. The consequences have been described by many as post-traumatic stress disorder, a psychiatric condition that is increasingly being understood. Other experts describe the condition in different ways and it is necessary to investigate what is the significance of sexual abuse to Aboriginal children during their lives. Is it a precursor to petrol sniffing and alcohol and substance abuse? Is this behaviour a means of masking symptoms of sexual abuse?

The response

The evidence received by the Commission so far suggests that when disclosure of sexual abuse of an Aboriginal child was made, it was either disbelieved or the child was removed. In either event, the consequences were devastating. When the allegations were rejected, the sense of powerlessness was reinforced and the confusion of the child as to the propriety and appropriateness of the conduct was exacerbated. If the abuse continued, as was usually the case, the child attempted to accommodate the circumstances and the continuing abuse. Usually, some action would eventually be taken by the child. Often it was running away or committing aberrant conduct that drew the attention of the police. Many children were then put into institutions and homes. If the allegations were accepted as true, or possibly true, usually the child was removed and also placed in homes and institutions.

On the evidence before the Commission, there was no attempt to address the very serious consequences of the abuse by therapeutic, or any other, means. Some children who were placed in institutions and homes were then abused by carers or other children, and many felt powerless to disclose.

In many cases, not only were the allegations rejected when the abuse occurred in institutions and homes, but severe physical punishment was administered. The children were isolated from family and community and often long distances away from them. They lacked advocacy and supervision of those responsible for their placements. There seems to have been an assumption that, because the institutions and homes were run by government, churches and charities, vigilance was not required.

Many Aboriginal children were separated from their siblings never to see them again or to see them only much later in life. They were removed from their lands or communities and culture. Many were unable to undertake ceremonies, initiations and other business with the consequence that they have suffered a cultural deficit.

For a long time, some children had no connection with culture and family and some were not aware that they were Aboriginal. Many sought family and culture and desired to understand and develop their Aboriginal heritage later in life. Often, a lack of records prevented the identification and tracing of families.

Following the early 1970s, the nature of the care of State children progressively changed and the placement of children in small cottages and then foster care became the preferred model. Eventually, the Department developed community residential centres, within which Aboriginal and non-Aboriginal children were placed. Foster care became the predominant method of care.

The development of these methods and their use in relation to Aboriginal children is under investigation in order to determine whether there was a failure on the part of the State to deal appropriately and adequately with the circumstances of the children who were the victims and survivors of allegations of sexual abuse.

Some Aboriginal children were placed with white foster carers and their Aboriginality did not form any part of their upbringing. There was no policy, until comparatively recently, of reunification with birth parents. Many Aboriginal children remained in institutions and homes until they attained the age of 18 years and ceased to be State children. Others were placed in foster homes, but there was no policy, such as the present Aboriginal Placement Principle, that required preference in appropriate circumstances for foster parents to be culturally appropriate Aboriginal people.

Some of the institutions and homes were brutal places and many Aboriginal boys and girls suffered considerably, not only from the brutality of others, but from sexual assault by carers and older children. The assumption that placement with white people was beneficial to Aboriginal children seems to have continued.

Many Aboriginal people who were taken from their parents living in established communities speak affectionately of those communities and of their upbringing, which included traditional and material education such as storytelling, hunting, fishing, identification and selection of food and mutuality. When removed, these benefits were lost.

Some children led dysfunctional lives after being in care, being involved in alcohol and substance abuse and crime. Many were placed in detention in the children's training centres at Magill for boys and Vaughan House for girls. Younger children were placed in secure facilities at Brookway Park and Lochiel Park. All of these were institutions run by government. Some children were placed at the detention centres for safe keeping even though they had committed no crime. There was no isolation of them from young offenders.

At present, Aboriginal people comprise about 2.2 per cent of the general population and, at times, about 33 per cent of the prison population. So far, the evidence before the Commission indicates that about 30 per cent of State children are Aboriginal children. On this basis, there has been, and still is, a substantial over-representation of Aboriginal children in care including detention. The progression from detention to prison is one of the great tragedies for many dispossessed Aboriginal children. Another is the introduction of Aboriginal children to drugs and alcohol abuse, prostitution, sexually transmitted diseases and poverty.

In each case, these matters must be considered in order to ascertain if there is a nexus between them and child sexual abuse.

When considering what should be the response to allegations of sexual abuse of Aboriginal children, it will be necessary to consider their culture and wishes and those of their families and communities when reaching conclusions about the assistance and support that should be provided to them.

Deaths

To the end of November 2006, the Commission has identified 720 children who have died in State care since 1908 when appropriate records were first made and have since been kept. As was anticipated, most of the deaths did not fall within the terms of reference of the Commission, because they were not the result of criminal conduct, but were due to illness and disease particularly before the discovery of penicillin and the development of antibiotics during the middle of the twentieth century and other advances in medical treatment. Not all records have yet been located, but it is already established that what was anticipated is true.

However, it is clear so far that some deaths of State children were caused by criminal conduct and many other deaths could have been the result of crime.

Evidence has been received of deaths of State children and former State children by suicide. It is necessary to investigate the circumstances of these children before death. If they were sexually abused or otherwise abused by conduct that amounted to a criminal offence, those deaths would fall within the terms of reference if there were to be a causal link between the abuse and suicide.

The investigation of these matters continues and the Commission is still trying to locate all government records essential to the investigation.

It has not yet been possible to identify all of these State children who were Aboriginal. Often the Aboriginal children are known by European names and their deaths are recorded by using those names. So far, the Commission has not found any records using traditional names of Aboriginal children.

Another difficulty encountered by the Commission has been to establish what happened to State children who are missing.

Over the years, many State children have run away from their placements and have lived on the streets and in homes by 'couch surfing' with other children or in accommodation provided by adults who have not reported their whereabouts to Families SA or the Police. These children were reported to the police as missing persons. Some returned to their placements soon after running away. The police located others and the whereabouts of some children became known to Families SA some considerable time after they ran away. Evidence of some former State children indicates that children went, or were taken, interstate. How many returned is not known.

It is possible that some of the missing children did lose their lives due to criminal conduct. Hopefully, the position will become clearer as the investigation continues.

Records

A significant part of the work of the Commission has been to identify and locate records of past and present State children.

The terms of reference require investigation as to whether appropriate and adequate records were kept in relation to allegations of sexual abuse and deaths of State children and whether any records have been destroyed or otherwise disposed of.

The Commission has received, and continues to receive, evidence about the systems of government in the making and keeping of records and the destruction of some records.

It is clear that some records have been destroyed and, in many instances, no records, or inadequate records, were made.

So far, records have been made available by Families SA and records have been sought and obtained from many other government and non-government organisations, including churches and charities.

There are difficulties in obtaining relevant records about some Aboriginal people. Brief mention has been made of the use of European names and not traditional names for some Aboriginal people.

In some instances, inaccurate records were made by government agencies about Aboriginal children, their parents, siblings, birth dates and other important matters. Inaccuracy can be an obstacle to the location of the records of a person.

Also, evidence has been received about the work being undertaken by State Records to catalogue records accurately so that they are accessible. If records are not accessible, for practical purposes, it is as if they do not exist.

The keeping and availability of accurate records for children in State care is of great importance to persons who were removed from their families. Many of these children cannot recall their lives as young children or their memory is inaccurate. They may not have the benefit of accurate stories by parents and other family of many events of significance to them, because they had been removed from their families. Some do not have the usual personal features of their past, such as photographs, school reports, cards and letters. For them, the records of their carers, the State, churches or charities, as the case may be, have special significance.

Often State children want to know why they were taken into State care, the names of their carers and the other children with them and other information that provides some degree of a personal history for them.

It is imperative that records of State children be accurately kept and maintained so that they are available to the children in later life.

So far, the Commission has made over 4,030 requests to various government and non-government agencies for records in response to allegations of sexual abuse and deaths of State children. There has been a response to over half of those requests and over 17,000 records have been sent to the Commission.

Of considerable importance is that of these requests there are no records relating to 106 children. There is no written record of their lives in State care. The Commission will continue to investigate what records have been destroyed or otherwise disposed of, and when and why.

There is another consequence for former State children about whom no, or inadequate, records were made, kept and accessible. For the many children who were separated from their siblings when taken into care and lost contact with them, inadequate records prevent the capacity to trace and reunite families.

This problem is of particular significance to Aboriginal people. There were many large families of mixed blood who were taken into care and the loss of contact had serious consequences for the children as well as the parents and the extended family. Some children never saw their parents again. Some were unified with some of their siblings many years later. Others still search for surviving members of their families. All of them suffer from lack of knowledge of their personal histories.

Fortunately, the publication by Nunkuwarrin Yunti of South Australia, *Finding Your Own Way*, which is a guide to records of children's homes in South Australia written by Dr Karen George with the assistance of Kay Goodman-Dodd of SA Link Up and Andrew Wilson of State Records SA, is a valuable work that assisted many Aboriginal people to re-establish links with family members.

The existence and availability of records may also enable persons to ascertain the dates and circumstances of the deaths of family members and to locate their spouses, children and other family members.

Some Aboriginal people when establishing a link with a family member

have been able to learn about their Aboriginality and culture, which is of great importance. Hopefully, the work of the Commission will enable more records to be located or catalogued.

The availability of records is also important in the investigation of the allegations of sexual abuse and deaths, including establishing what disclosures and responses were made at the time, what confirmatory evidence is available and the identity of alleged perpetrators.

6 Indigenous cultural expression and intellectual property

Terri Janke

Introduction

Indigenous Australians[1] express their cultural identity through many ways including songs, stories, dance and art. This intangible cultural heritage is interconnected with land, seas, places and objects. Despite this, the debate regarding the protection of Indigenous cultural heritage has focused on the land, seas, places and objects. The non-Indigenous laws relating to Native Title, land rights and cultural heritage have developed to protect tangible culture. However, for Indigenous people, cultural heritage is holistic in that the tangible is interconnected with the intangible. Consequently, in recent years, Indigenous people have called for recognition of their rights to their intangible cultural heritage. They seek protection of their expressions of culture and traditional knowledge from exploitation from outsiders.

This chapter will examine intellectual property laws and their impact on Indigenous cultural expression and traditional knowledge.

Indigenous cultural expression and traditional knowledge

In 1999, *Our Culture Our Future: A Report on Australian Indigenous Cultural and Intellectual Property Rights*[2] examined the scope of 'Indigenous cultural and intellectual property'. In that report, 'Indigenous cultural and intellectual property' referred to Indigenous people's rights to their heritage. Heritage comprises both tangible and intangible aspects of the whole body of cultural practices, resources and knowledge systems that are developed,

1 'Indigenous' refers to the Aboriginal and Torres Strait Islander people, the original inhabitants of Australia. An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he or she lives.

2 T. Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, 1999 Michael Frankel and Company, Sydney, published under commission of the Aboriginal and Torres Strait Islander Commission and the Australian Institute of Aboriginal and Torres Strait Islander Studies, pp 43–47.

nurtured and refined by Indigenous people, and passed on as a living expression of their cultural identity. The heritage of Indigenous people is a living and evolving heritage, and includes items that may be created in the future.

The notion of heritage for Indigenous Australians includes:

- literary, performance and artistic works (including music, dance, songs, ceremonies, symbols and designs, narratives and poetry);
- documentation of Indigenous people's heritage in all forms of media (including scientific and ethnographic research reports, papers and books, films and sound recordings);
- languages;
- scientific, agricultural, technical and ecological knowledge (including cultigens[3], medicines and the sustainable use of flora and fauna);
- spiritual knowledge;
- movable cultural property (including burial artefacts);
- immovable cultural property (including Indigenous sites of significance, sacred sites and burials);
- Indigenous ancestral remains;
- cultural environment resources (including minerals and species).

The 2006 amended version of the draft Declaration of World Indigenous People produced by the World Intellectual Property Organization stated:

> 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
> 2. In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.[4]

This chapter will focus on:

- Indigenous cultural expression – including songs, stories, ceremonies,

3 Cultigens are plant species that have been artificially cultivated for so long that they are unable to replicate without human intervention.

4 United Nations General Assembly, Draft Declaration on the Rights of Indigenous Peoples, United Nations Documents, Human Rights Council, A/HRC/1/l/3, 23 June 2006.

rituals, dance and art including rock art, face and body painting, sand sculptures, and bark paintings;

- traditional knowledge – including knowledge of plants and animals, biodiversity knowledge, medicinal knowledge, environmental management knowledge, cultural and spiritual knowledge and practices, use of biological resources, foods, architecture and agriculture.

The nature of Indigenous cultural expression

There are many different Indigenous Australian groups. Each particular group has ownership of rights over its particular cultural heritage. There may also be overlap between groups, and groups may share certain cultural stories and traditions. Further, many generations contribute to the creation of Indigenous cultural expression and traditional knowledge. In this respect, it is collectively owned, socially based and continuously evolving.

Cultural laws that govern rights to authorise use of Indigenous cultural and intellectual property are common to all Indigenous groups. These laws are based on responsibility for cultural heritage, to ensure that it is maintained and protected, and passed on to future generations. To this end, there is often an individual or group who is the custodian or caretaker of a particular item of heritage, although in some groups, there may not be due to the disruption of cultural practices since colonisation. The traditional custodians are empowered to protect a particular item only to the extent that their actions harmonise with the best interests of the community as a whole. The role of the custodian was noted in the case of *Milpurrurru v Indofurn*,[5] in which the Court observed that the artist Banduk Marika had the authority to depict a traditional, pre-existing design in her artwork by virtue of her birthright. While she held this right, she holds the knowledge embodied in the work on trust for the rest of the clan.

The nature of this custodian relationship was explored more recently in the case of *Bulun Bulun & Anor v R & T Textiles Pty Ltd*[6]. In that case, Mr Bulun Bulun was the artist and copyright owner, but in certain paintings, which incorporated collectively owned designs of the Ganalbingu people, he was also a cultural custodian. Mr Bulun Bulun's use of ritual knowledge to produce the artworks was given to him under Ganalbingu customary law, based on the trust and confidence that those giving permission had in the artist. The Court found that the relationship between Mr Bulun Bulun and the Ganalbingu people gave rise to a fiduciary relationship between them. This relationship imposed the obligation on Mr Bulun Bulun not to:

> . . . exploit the artistic work in a way that is contrary to the law and

5 *Milpurrurru v Indofurn* (1995) 30 Intellectual Property Reports (IPR) 209.

6 *Bulun Bulun Bulun v R & T Textiles* (1998) 41 IPR 513.

> customs of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work.[7]

Similarly, the collective, or persons on behalf of the collective, must consent to use of Indigenous cultural and intellectual property. Such consent is given through specific decision-making procedures, which can vary from group to group and may depend on the nature of the particular cultural item. Some communities may have formal procedures, which make use of organisations such as land councils or community councils. In others, decision-making processes will be less formal and may require a person to meet with relevant people, to clear consent.

In the *Bulun Bulun* case, evidence given by Djardie Ashley discussed how the Ganalbingu laws deal with consent procedures. Mr Ashley noted that, in some circumstances, such as the reproduction of a painting in an art book, the artist might not need to consult with the group widely. In other circumstances, such as its mass reproduction as merchandise, Mr Bulun Bulun may be required to consult widely. Mr Ashley further noted that Mr Bulun Bulun 'could not act alone to permit the reproduction of "At the waterhole" in the manner that it was done'.[8]

Non-Indigenous laws and customary law deal with the reproduction and use of traditional knowledge and material in different ways. Indigenous communities need to consider customary obligations regarding ownership of intellectual property, dissemination, reproduction, consent and attribution. Knowledge of intellectual property laws will enable Indigenous people to consider how non-Indigenous law will protect their cultural material and, in this way, make informed decisions about providing wide access to the material.

What rights do Indigenous people want to their cultures?

Our Culture: Our Future reported that there are fundamental rights that Indigenous people need in order to protect and maintain their cultures, including the right to own and control Indigenous cultural and intellectual property.[9] Based on the submissions received, the rights fell into the following categories.

7 Ibid at 531.

8 Ibid at 520. 'Traditional owners' refers to the group, clan, community of people in whom the custody and protection of cultural heritage is entrusted in accordance with the customary law and practices.

9 T. Janke, *Our Culture: Our Future*, op cit, p 47.

a. Cultural custodianship and self-determination

The right to own and control cultural heritage and to define what constitutes heritage is a fundamental right for Indigenous people. So too is the right to ensure that any means of protecting Indigenous heritage is based on the principle of self-determination. In this way, Indigenous people can maintain and develop their own cultures and knowledge systems, as well as their own forms of social organisation.

To continue to practise their cultures, Indigenous people must be able to preserve, care for, protect, manage and control Indigenous cultural objects, Indigenous ancestral remains and Indigenous cultural resources such as food resources, ochres, stones, plants and animals – and Indigenous cultural expressions such as dances, stories and designs.

Indigenous people seek the right to protect their cultural expression and knowledge of sites from exploitation. Maintaining access to Indigenous sites of significance, sacred sites and burials sites for cultural and ceremonial purposes is important for Indigenous people. The unauthorised and inappropriate use of sites and land, and the dissemination of secret information about them, is a concern for them. Sites of cultural importance, and cultural knowledge and stories associated with these sites, are consistently used for tourism purposes (e.g. rock paintings that are photographed for tourism and advertising purposes). Indigenous people also feel that sites uncovered in the interests of tourism have, in some instances, lead to the physical destruction of sites and the theft of associated objects.[10]

Indigenous people require the rights to control management of Indigenous land and sea areas, and to protect Indigenous sites, including sacred sites.

b. Interpretation and integrity

Keeping the cultural integrity of heritage is also important to Indigenous people who wish to be recognised as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future. The right to prevent derogatory treatment of Indigenous cultural material, as well as to prevent distortion and mutilation, is critical.

The rise in demand for Indigenous visual arts is obvious and has lead to the inappropriate use of art-based themes, icons and images. Indigenous peoples are concerned that many non-Indigenous individuals and corporations are copying Indigenous designs, motifs, symbols and artworks for commercial gain. For example, Indigenous art has been copied onto carpets, dresses, fabric and T-shirts without the knowledge or permission of the Indigenous artists, or the artist's community. In many instances, the designs are altered. Indigenous Australians complain that such use is inappropriate, derogatory

10 Ibid, p 30.

and culturally offensive. The moral rights provisions of the Copyright Act 1968 (Cth) provide rights to artists to protect their works against derogatory treatment – but the work must be a protected copyright work and an individual artist must assert these rights.

c. Attribution and recognition of collective ownership

Indigenous peoples require full and proper attribution. That is the right to apply for protection of Indigenous cultural and intellectual property rights, which, where collectively owned, should be granted in the name of the relevant Indigenous community. Intellectual property laws tend to focus on individual ownership.

d. Consent and consultation

Indigenous people must have the right to authorise or refuse to authorise the commercial use of Indigenous cultural and intellectual property according to Indigenous customary law. For example, it should not simply be assumed that access or use of material is granted. A story or ceremony may be closed to wider access and only allowed to be seen by the initiated. The right to maintain the secrecy of Indigenous knowledge and other cultural practices is also important.

Furthermore, Indigenous people seek the right of prior informed consent for access, use and application of Indigenous cultural and intellectual property, including Indigenous cultural knowledge and cultural environment resources.

Indigenous people's traditional stories are often reproduced in books, theatre and film without their prior informed consent. Indigenous people have been concerned when non-Indigenous authors have written creation or 'traditional stories' – ones that have never been published but have been orally transmitted – and then that person claims copyright in the version published without proper recognition of the source of the story.

Consequently, Indigenous people should also be in control of where their cultural expression and traditional knowledge is made publicly available, recorded, reproduced and disseminated. The recording and transfixing of cultural expression and knowledge removes control over this material from Indigenous communities. For this reason, Indigenous people need to be able to control the recording of cultural customs and expressions. The language, the particular cultural expression and traditional knowledge is essential to cultural identity, and the teaching of culture.

e. Sharing of benefits

The primary interest of Indigenous people in maintaining and preserving their culture has always been established in intrinsic spiritual considerations that are linked to the fabric of Indigenous society. However, in recent years, there has been economic focus on cultural expression and traditional knowledge, which also require consideration. The Aboriginal art market, for example, has considerable economic value. The worth of traditional knowledge if applied to the patents system can amount to the billions. This has created incentive for increased production and dissemination of Indigenous cultural expression and Indigenous knowledge. Hence, Indigenous people require the right to benefit commercially from the authorised use of Indigenous cultural and intellectual property, including the right to negotiate terms of such usage.

Intellectual property laws in Australia

'Intellectual property' is the term used to refer to the rights that the law grants to individuals for the protection of creative, intellectual, scientific and industrial activity, such as ideas (also in material form) and inventions. Such rights are for the protection of economic investment in novel, inventive and/or creative effort.

Intellectual property rights are designed to inspire creative innovation by granting specific economic rights to inventive persons as a reward for sharing their contributions and to stimulate further inventive activities. Through international treaties such as the Berne Convention for the Protection of Literary and Artistic Works,[11] intellectual property rights are enforced internationally in countries that are signatories to such treaties.

Australian intellectual property laws provide some protection for Indigenous cultural expression where Indigenous people can meet the criteria for protection. This has usually been for individual Indigenous artists and for their economic rights.

The Australian Constitution gives the Commonwealth power to make special laws regulating 'copyright, patents of inventions and designs, and trade marks'.[12] There are also common law-based actions that relate to breach of confidential information, passing off and trade practices that loosely fall into the term 'intellectual property'.

11 ATS 1978 No 5, Paris, 24 July 1971 (came into force 1 March 1978).
12 Australian Constitution, s 51(xviii).

Copyright

Copyright is a bundle of rights granted by statute to creators of artistic and cultural material. The Copyright Act 1968 (Cth) protects literary, dramatic, artistic and musical works from unauthorised use and dissemination.[13] Under Part IV of the Copyright Act, rights are given to subject matter other than works: that is, the makers of sound recordings,[14] cinematograph films, television and sound broadcasts, and published editions.

Copyright law has been used by Indigenous artists to take action against infringers of their works, included works that incorporate pre-existing communally owned clan designs. However, copyright is limited in the protection it affords Indigenous cultural expression and traditional knowledge.

Requirements of copyright

Copyright protection does not require registration: it exists in a work or film as soon as it is made. However, for copyright to protect a work, it must meet the following requirements.

a. Originality

For copyright to subsist in a work, the work must be original.[15] This means that it cannot be copied from another work. The creator must put into the work the necessary degree of labour, skill and judgment to produce the work, giving it some quality or character that the raw material did not possess. As a continuing expression of culture, many Indigenous people draw from the wealth of their cultural heritage by painting pre-existing clan designs, dancing ceremonies and telling stories that have been handed down from their ancestors. It is this nature of Indigenous cultural expression that has lead to speculation of whether an artist who reproduces a traditional or pre-existing design or story is producing original work. This is because the cultural requirement of 'painting' iconic themes in accordance with traditional designs limits the scope for interpretation and individuality.[16] While the issue depends on the particular facts at hand, von Doussa J in *Milpurrurru v Indofurn* stated that 'although the artworks follow traditional Aboriginal form and are based

13 While the Copyright Act 1968 (Cth) does not define these terms, s 10 provides guidance on what these categories include.

14 Copyright Act 1968 (Cth), s 10 defines a sound recording as 'the aggregate of the sounds embodied in a record'.

15 Copyright Act 1968 (Cth), s 32.

16 See Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, Canberra, 1981, para 1403; P. Banki, 'Protection of Expressions of Folklore', in WIPO *Australian Copyright Program for Asia and the Pacific*, Canberra, 2–13 November 1987, p 222.

on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality'.[17]

b. Material form

Copyright law provides protection for the form of expression of ideas rather than the ideas themselves.[18] Indigenous cultural expression such as songs, dances and stories, must be written down or recorded in some permanent tangible form. Non-permanent forms of cultural expression such as oral stories, songs and dances that are ceremonially performed and never before recorded are not protected because they are not produced in a permanent tangible form.

Many Indigenous forms of cultural expression are oral. Traditional songs and stories told and passed on through the generations were not recorded in material form. Some forms of visual art are transient, such as body painting. These do not meet the material form requirement of copyright and are therefore not protected.

As Indigenous oral stories, songs and information are recorded for the first time, the person putting them into material form is recognised as the copyright owner. If the traditional owner writes down an oral story, that individual is recognised as the copyright owner.

c. Meet the connecting factors

The author must be a qualified person when the work is first published: that is, 'an Australian citizen, an Australian protected person or a person resident in Australia'.[19] 'Published' means supplied or made available to the public.[20]

The right to exploit copyright

The copyright owner, who in the first instance will be the author, has the exclusive right to exploit the copyright in the work or subject matter. This includes the right to reproduce and authorise reproduction of the work or subject matter, and to deal with the copyright in a number of ways, depending on the nature of the work or subject matter, such as performing the work in

17 *Milpurrurru v Indofurn* above at 216.
18 *Walter v Lane* [1900] AC 539.
19 Copyright Act 1968 (Cth), s 32(4).
20 Ibid, s 29(1)(a).

public[21], communicating the work to the public[22] and making an adaptation of the work.[23]

Duration of copyright

Copyright protects works and subject matter for only a limited period. For example, protection lasts generally 70 years after the death of the artist for works. After the period elapses, the work, film or sound recording can be used without the need for consent, or payment of royalties.[24]

This is problematic for Indigenous people. The system does not take into account Indigenous artistic and cultural expression, which is created as part of an ongoing process of passing cultural knowledge to future generations. Indigenous rights to cultural works are in perpetuity and therefore cultural consent to use is always necessary, even if a work is no longer copyright protected.

21 Ibid, s 31(1)(a)(iii). A public performance refers to any form of presentation to the public, whether visual and aural, or merely aural. The definition of 'performance' includes not only performances of works encompassed in films, CDs, etc., but extends to live performances, speeches, addresses, lectures and sermons. The right to make a public performance of material protected by copyright is a separate right to the right to communicate to the public.

22 Ibid, s 31(1)(a)(iv). This is a broad-based, technology-neutral right. Introduced by the Copyright Digital Amendment Act 2000 (Cth), it replaces the previous technology-specific rights of broadcast and transmission to subscribers of a diffusion network.

23 Ibid, s 31(1)(a)(v).

24 In accordance with the US Free Trade Agreement, Australian copyright protection was extended from 50 years to 70 years to be consistent with US copyright laws. The 70 years' duration period applies to non-government-produced works and materials after 1 January 2005, and works and material still in copyright on 1 January 2005. The duration of copyright protection for published literary, dramatic, musical and artistic works (not photographs) is 70 years after the author's death: Copyright Act 1968 (Cth), s 33(2). Further, copyright in a literary, dramatic, musical or artistic work continues to subsist until the expiration of 50 years after the end of the calendar year in which the author dies. For photographs, the duration of protection is 70 years from the death of the creator, but 70 years from publication if published anonymously or under a pseudonym: Copyright Act 1968 (Cth), ss 33(2), 34(1). Unpublished, literary, musical and dramatic works, not previous broadcast or performed in public or records offered for public sale, such as works published, performed or broadcast after the death of the artist – 70 years from the first date of publication, performance or broadcast (whichever occurs first): Copyright Act, 1968 (Cth), s 33(2). Importantly, protection is indefinite if not published. With subject matter other than works, films (after 1 May 1968) and sound recordings, copyright is protected for 70 years from the date of production. It is important to note that the copyright duration rules for government copyright did not change after 1 January 2005. Material under the direction and control of the government is protected by copyright, generally, for 50 years from the date of publication. See the Australian Copyright Council's 'copyright duration' sheet G23, available online from www.copyright.org.au.

Enforcement, agreements and payment for authorised use

Copyright is infringed whenever a work or subject matter is reproduced, published, broadcast, sold, imported (or any other exploitation rights are exercised) without the permission of the copyright owner. Issues for Indigenous people are that it requires Indigenous people to know and take action against infringements. Many worthy cases will go unchecked because Indigenous people cannot take action to enforce their rights because they cannot afford the legal fees.

Moral rights

Moral rights are recognised at law by virtue of the Copyright Act 1968. Moral rights are:

- the right of attribution of authorship;
- the right not to have authorship falsely attributed; and
- the right of integrity of authorship.[25]

Only individuals have moral rights.[26] Companies do not have moral rights. Further, moral rights cannot generally be asserted collectively by an Indigenous clan group or community. The rights apply to creators of artistic, literary, dramatic or musical works, and directors, producers and screenwriters of films.

Unlike copyright, moral rights are not economic rights, although monetary damages may be granted for infringement.[27] Moral rights cannot be assigned or sold on. Moral rights are in addition to other rights under copyright.[28] Therefore, they remain with the author where the copyright does not belong to the author. For instance, employees hold moral rights in created work, even if copyright vests with the employer.

The author of a work has a right of attribution of authorship in respect of his or her work.[29] The author is entitled to be attributed where his or her work has been used in certain way. For instance, the author of an artistic work is entitled to be attributed where his or her work is reproduced on a website or transmitted by digital means.[30] Similarly, the author of a film is entitled to be attributed for transmission of his or her work.[31]

25 Copyright Act 1968 (Cth), s 189.
26 Ibid, s 190.
27 Ibid, s 195AZA.
28 Ibid, s 192.
29 Ibid, s 193.
30 Ibid, s 194(2).
31 Ibid, s 194.

This right is seen as important to Indigenous people who claim their artwork, images and knowledge as being linked to their belonging to land.

The right of integrity provides that an artist may bring an action if their work is subjected to derogatory treatment. 'Derogatory treatment' refers to anything that results in the material distortion of, mutilation of, or material alteration to, the work[32] or film[33] that is 'prejudicial to the author's honour or reputation' or 'an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs'.[34] It also includes doing anything else in relation to the work[35] or film, which is prejudicial to the author's reputation.

The right of integrity is not infringed if it is subjected to derogatory treatment that is proven to be reasonable in all the circumstances,[36] or if the author consented to the treatment.[37] Indigenous creators should be cautious when considering commercial agreements and contracts of employment that seek broad consent to their moral rights. However, even if consent were not given, the fact of employment[38] and industry practice may be taken into account when deciding whether the derogatory treatment was reasonable in all the circumstances.[39]

The right of integrity is important for Indigenous artists. Preserving the overall integrity of the work and the underlying story or ritual knowledge is extremely important to the proper representation of Indigenous art and film. Greater access to work, once it is in digital form, increases the ways in which artistic works and films can be distorted, mutilated and altered. The right of integrity, including the right to bring an action for infringement, is an important development in protecting the integrity of Indigenous work.

One of the deficiencies in the moral rights provisions is that, like copyright protection, the protection is not provided in perpetuity. The right of integrity in a film lasts until the death of the author.[40] The right of integrity in works other than film continues for the duration of the copyright: that is, 70 years after the death of the author.[41] For works of important cultural significance,

32 Ibid, ss 195AJ(a) and 195AK(a).
33 Ibid, s 195AL.
34 Ibid, s 195AK(b).
35 Ibid, ss 195AJ(c), 195AK(c) and 195AL(b)
36 Ibid, s 195AS. Certain matters must be taken into account when determining if the treatment was reasonable. These are listed in s 195AS(2) for literary, dramatic, musical and artistic work and (3) for films.
37 Ibid, s 195AW (film or work included in a film) and s 195AWA (work that is not a film or included in a film).
38 Ibid, s 195AS(2)(e), (f), (g) for literary, dramatic, musical or artistic works and s1 95AS(3)(f), (g), (h) for films.
39 Ibid, s 195AS.
40 Ibid, s 195AM(1).
41 Ibid, s 195AM(2).

Indigenous peoples assert cultural rights, including attribution and reproduction of cultural material in perpetuity.

A second deficiency with the current moral right regime is that it applies only to individuals and not to communities. The Commonwealth has drafted proposed amendments of the Copyright Act 1968 (Cth) that acknowledge Indigenous communal moral rights (ICMR) as existing alongside individual moral rights. It is proposed that the ICMRs will be exercisable independently of the individual author's moral rights. ICMRs will exist in works and films drawn from a traditional base,[42] if before the first dealing of the work or film, there is a voluntary agreement between the creator of the work or film, and the Indigenous community.[43] There must also be acknowledgment of the Indigenous community's association with the work.[44] Further, all interest holders in the work (i.e. copyright owners) need to have consented to the ICMRs existing in the work or film.

ICMRs would exist for the term of the copyright period.

An Indigenous community that has Indigenous communal moral rights in respect of a work may exercise those rights only through an individual who is the authorised representative in respect of the work. This authorised representative may be recognised by the community according to its cultural practices, or may be appointed by the community, according to decision-making processes.[45]

The Bill is not yet law; however, the government intends to introduce it for consideration shortly.

Designs

The Designs Act 1906 (Cth) defined a design as the 'features of shape, configuration, pattern or ornamentation applicable to an article, being features that, in the finished article, can be judged by the eye, but does not include a method or principle of construction'.[46] An 'article' was defined under the Act to mean any article of manufacture. The 1906 Act was replaced by the Designs Act 2003 (Cth). The 2003 Act defines 'design' much more broadly as follows:

42 Drawn from a traditional base means that the work or film must be drawn from the 'particular body of traditions, observances, customs and beliefs held in common by the Indigenous community'.

43 A community is defined loosely and can include an individual, family, clan or community group.

44 Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003, cll 195AZZL and 195AZZM.

45 T. Janke, 'The Moral of the Story: Indigenous Communal Moral Rights', *Bulletin*, #3/05, ISSN #1440–477, pp 1, 2, 7 and 8.

46 Designs Act 1906 (Cth), s 4(1).

> 'Design' in relation to a product, means the overall appearance of the product resulting from one or more visual features of the product.[47]

A design can only be registered in relation to a product. It is not possible to register a design itself. A 'product' is 'a thing manufactured or hand made'.[48] There is a commercial focus. Indigenous designs such as *Wandjinas* and other clan insignia may not be commercially applied to a product. They are not registrable, therefore, as a design under the Designs Act 2003 (Cth).

Designs laws protect designs as they are applied to products and items. Under Indigenous customary laws, a design or motif belongs to a certain Indigenous cultural group, and there are laws that govern who can use and reproduce this material. Can the designs laws be used to protect Indigenous clan designs, didgeridoos, morning star poles and basket-weaving techniques that are produced, in recognition of Indigenous cultural rights?

In 1993, a review of the Designs Act 1906 (Cth) undertaken by the Australian Law Reform Commission (ALRC) looked at the issue of protecting Indigenous designs as part of the overall review of the Act. The Issues Paper, *Designs*, noted that existing copyright and designs law is not adequately equipped to deal with the ownership rights recognised under Aboriginal customary law.[49] The ALRC Review considered that the issue should be dealt with in a broad-based approach rather than including them as part of the Designs law review.[50] There is no special protection for Indigenous designs under the new Designs Act 2003 (Cth), which came into operation in 2004. The Designs law applies to Indigenous designs as it does to all designs that meet the requirements for protection.

To apply for registration of a design, a standard application form is completed and submitted to Designs Office of IP Australia. There are costs and fees payable to IP Australia associated with the registration of a design and the examination process. To register Indigenous designs for protection under this system could be expensive. Many Indigenous groups have little access to legal services and resources to afford registration costs and legal fees.

The Designs Act 2003 (Cth) protects three-dimensional items for industrial or commercial purposes. It would be difficult and impractical to use the designs law, for example, to protect against Indigenous designs that are protected under customary laws such as *Wandjinas*, *Mimis* and styles. Protection under the Act is focused on the commercial production of products and it would be necessary to be the producer of such products.

The Designs Act 2003 (Cth) may offer some protection for commercially applied Indigenous peoples' designs that meet the registration requirements, such as, for example, jewellery or toys.

47 Designs Act 2003 (Cth), s 5.

48 Ibid, s 6.

49 Australian Law Reform Commission, *Designs*, Issues Paper 11 (1993), Sydney [9.9], p 58.

50 Australian Law Reform Commission, *Designs*, Final Report No 74 (1995), Sydney.

Patents

The Patents Act 1990 (Cth) grants patent rights to scientific inventions and new methods of manufacture. A patent is a right granted for any device, substance, method or process that is new, inventive and useful. A patent is legally enforceable and gives the owner the exclusive right to exploit the invention commercially for the life of the patent. Unlike copyright protection, patent protection is not automatic. An application must be lodged with the Patents Office of IP Australia, for the grant of a patent.

There are two types of patent in Australia:

- a standard patent, which provides long-term protection and control over an invention for up to 20 years; and
- an innovation patent, which is a relatively fast, inexpensive protection option, lasting a maximum of eight years.[51]

Patents provide effective protection to the owners of inventions of new technology that will lead to a product, composition or process with significant long-term commercial gain. In return for the patent protection, patent applicants must share their knowledge by providing a full description of how their invention works. This information eventually becomes public and can provide the basis for further research by others.

To be patentable, an invention must be a manner of manufacture.[52] A good idea or a mere discovery is not patentable. The discovery of existing, naturally occurring substances cannot be patented unless there is some newly invented method of using the material or some new adaptation of it to serve a new purpose.[53] Indigenous people cannot claim intellectual property rights in genetic resources just because they are found on land owned, or previously owned, by Indigenous people. For patent protection, or to prevent others from asserting a patent over this material, the Indigenous people would have to 'discover' the resources and put them to a new use with commercial significance.[54]

Naturally occurring genetic material found on Indigenous land is potentially patentable under the Patents Act 1990 (Cth), if a new use for that material can be identified.

An invention must be novel and involve an inventive step.[55] An invention is generally considered novel and involving an inventive step when it is compared with the prior art base.[56]

51 The innovation patent replaced the petty patent on 24 May 2001.

52 Within the meaning of the Statute of Monopolies 1623, s 6 (England).

53 *National Research Development Corporation v Commissioner of Patents* (1990) 102 CLR 252.

54 S. Gray, 'Vampires Round the Campfire' (1997) 22(2) *Alternative Law Journal*, p 61.

55 Patents Act 1990 (Cth), s 18(1).

56 Ibid, s 7(1).

Across the world, many Indigenous peoples and organisations have expressed their opposition to patenting of genetic materials, life forms generally and inventions derived from Indigenous knowledge where there was no compliance with customary laws. In order to challenge a patent, interested parties can oppose the grant of the patent using various grounds, including that it is part of the prior art base, within the three-month period after its publication in the *Official Journal of Patents*.[57] The Patents Act 1990 (Cth) also allows any person, with information that may show a patent should not have been granted, to apply to court for an order to revoke the patent. These avenues require considerable legal and technical resources that Indigenous peoples frequently do not possess.

Gray notes that Indigenous groups, wishing to challenge the use of Indigenous genetic resources on the basis of lack of novelty, have to prove their knowledge of that use as part of the 'prior art base'.[58] For example, while Indigenous people were aware that smokebush had certain healing properties, they were not aware that it was a potential cure for AIDS.

For Indigenous people who do wish to patent inventions themselves, the technical expertise and infrastructure is prohibitive. Patent applications for biotechnological inventions usually apply to the novel compound, a process for producing that compound and sometimes the compound when produced by a particular process. Scientists are able to extract the pharmaceutical components of medicinal plants to a level by which the active ingredients can be isolated and defined. It is often this process or the pharmaceutical composition of the Indigenous resource that becomes the subject of patents.[59] This process requires great technical knowledge and resources that Indigenous communities do not have readily available. The cost of patenting an invention in Australia reach into the thousands and these expensive set-up costs and the high costs of enforcing patent rights often preclude Indigenous communities from making use of patent law to legitimise their rights.

Indigenous people who seek to patent their inventions may also be hindered by previous publication of their knowledge, such as by ethnobotanists and ethnopharmacologists publishing accounts of the uses of plants by Indigenous people.[60] This is because, once published, such information becomes public knowledge and therefore part of the prior art base. By publishing information themselves about the traditional uses of plants in leaflets and books, Indigenous people also risk being able to patent their traditional medicinal knowledge.[61]

57 Australian Government, IP Australia.

58 Gray, above n 54, p 62.

59 P. A. Power, 'Interaction Between Biotechnology and the Patent System' (1992) 3 *Australian Intellectual Property Journal*, pp 214, 217.

60 Ibid.

61 While communities may own copyright in such publications, their rights to the information contained in the book does not amount to patent rights.

The increase in bioprospecting and successful exploitation of biological resources has led to global moves to protect the interests of nation states. International instruments such as the Convention of Biological Diversity have been developed to enunciate standards and mechanisms for dealings between nation states in relation to access and benefit sharing of biological resources. This has included limited recognition of the role of Indigenous knowledge. Further, when Indigenous knowledge is accessed and used to contribute to the development of products that can be patented, Indigenous people may have no control over or benefits from their contribution.

Trade Marks Act 1995 (Cth)

A trade mark is 'a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person'.[62] A sign includes 'any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent'.[63]

Under the Trade Marks Act 1995 (Cth), the registered owner of a trade mark is granted a statutory property right to use that trade mark in association with his or her trade and in accordance with the class of goods and services approved by the Trade Marks Office of IP Australia. Trade marks are personal property.[64] They can, therefore, be licensed, assigned and transmitted.

An application to register a trade mark must be made on an approved form and accompanied by a specified fee. The mark must be represented graphically. Once lodged, the application is examined to see if the mark complies with the requirements for registration. This takes approximately 12 months. Rights are granted in the specified classes of goods and services.[65] Applicants must apply and pay registration fees based on each class of goods or services for which registration is sought. This could make the registration of some cultural material quite expensive and may prohibit many Indigenous groups from using the trade mark laws to protect Indigenous cultural material.

The person who claims to be the owner of the mark and who is using, or intends to use, the trade mark may apply to register the mark with the Trade Marks Office at IP Australia.[66] This includes any intention to license the use of the trade mark. When applying for a trade mark in respect of goods and services, the applicant is not required to obtain any 'permission' to use the

62 Trade Marks Act 1995 (Cth), s 17.

63 Ibid, s 6.

64 Ibid, s 21(1).

65 For a list of classification of goods and services in Australia, see http://www.ipaustralia.gov.au/trademarks/apply_classes.html.

66 Trade Marks Act 1995 (Cth), s 27(1).

Indigenous cultural material. It is not necessary for a person to show that he or she has the prior informed consent of the Indigenous traditional owners in order to register a trade mark related to an Indigenous word, symbol or design, and thereby become the registered owner of the mark.

Indigenous groups have complained that non-Indigenous companies have registered as trade marks Indigenous words without prior informed consent and without observance of Aboriginal customs or laws.[67]

Once lodged, a trade mark application is examined by an officer at the Trade Marks Office. The examiner considers whether there are any grounds for rejecting the application and whether it has been made according to the legislation. Division 2 of Part 4 of the Trade Marks Act 1995 (Cth) lists grounds under which the registrar can reject an application. There are no specific grounds that address the registration of Indigenous knowledge. There is currently no basis in the Act or Regulations that would require inquiries to be made as to whether a word or design is used with the consent of the relevant traditional owners. However, grounds for rejection of a trade mark include the following.

a. Not distinctive

A trade mark can be rejected if the applicant's mark is not distinctive from the goods and services of other persons in the relevant classes of goods or services.[68] The test for capacity to distinguish is the likelihood that other traders, in the ordinary course of their business and without improper motive, will wish to use the same mark.[69] Geographic marks and descriptive marks may not be distinctive for registration. This is because descriptive words describe a product and should be available for other traders to use. A geographic name, such as the town or area where goods are produced, would not be registrable. This is because other traders from the same region would want to use the geographic name without necessarily trying to ride off the applicant's reputation.[70]

b. Likely to deceive or cause confusion

A trade mark can be rejected if it is likely to deceive or cause confusion,[71] or if it is substantially identical, or deceptively similar, to the trade mark of another person who has an earlier priority date for registration.[72]

67 T. Janke, *Minding Cultures: Case Studies on Intellectual Property and Traditional Cultural Expressions*, 2003, Geneva: WIPO.

68 Trade Marks Act 1995 (Cth), s 41.

69 *Registrar of Trade Marks v W & G DuCros Ltd* [1913] AC 624.

70 *Re Registered Trade Mark 'Yanx', ex parte Amalgamated Tobacco Corp Ltd* (1951) 82 CLR 199.

71 Trade Marks Act 1995 (Cth), s 43.

72 Ibid, s 44.

c. Scandalous and contrary to law

A trade mark or part of the trade mark that comprises scandalous matter or is contrary to law may be rejected by the registrar.[73] This provision is not often used, but may provide scope for Indigenous people to challenge registration of culturally offensive marks.

Opposition to registration

The Trade Marks Act 1995 (Cth) allows third parties to oppose the registration of a trade mark.[74] Grounds for opposition are similar to those that the registrar can use to reject applications. They include that the trade mark does not distinguish the applicant's goods and services from the goods and services of others, is scandalous or contrary to law, or is likely to deceive or cause confusion.[75]

Indigenous people may be able to make use of the restrictive provisions under the Trade Marks Act 1995 (Cth) to challenge culturally offensive trade marks that are scandalous or contrary to law. Perhaps there is scope for an Indigenous community to challenge marks that are against customary laws as scandalous marks. It may at least be possible to draw offensive use to the attention of the registrar.

In New Zealand, there are provisions in the Trade Marks Act 2002 that provide grounds for refusing to register a trade mark that incorporates Māori names and signs.[76] Specifically, the Trade Mark Commissioner must not register a trade mark if 'the Commissioner considers that its use or registration would be likely to offend a significant section of the community, including Māori'. A Māori Trade Mark Advisory Committee has been established to advise the Trade Mark Commissioner whether the proposed use or registration of a trade mark is likely to be offensive to Māori.[77] A similar process was recommended for adoption in the Australian Trade Marks Office.[78] However, there have been no legislative moves towards this by IP Australia.

Issues of offensive trade marks have come up in other parts of the work. In the well-known Washington Redskins football case, a coalition of American Indian artists, activists, and attorneys petitioned[79] in 1992 to the Trademarks Trial Appeal Board to revoke the registration of six trademarks owned by

73 Ibid, s 42.

74 Ibid, s 52(1).

75 Ibid, s 43.

76 Trade Marks Act 2002 (NZ), s 17(i)(b)(ii).

77 Ibid, s 198.

78 Janke, *Our Culture: Our Future*, recommends the establishment of an Indigenous Staffing Unit and an Indigenous Trade Mark Focus Group.

79 Under the Lanham Trademark Act, 'A petition to cancel a registration of a mark' can be submitted and 'any person who believes that he is or will be damaged by the registration' can petition for cancellation of the mark. See generally 15 USC § § 1,064.

Pro-Football, which include the word 'Redskins'.[80] They claimed the racist term and associated images violated the US Lanham Trademark Act 1946, which provided that certain types of mark, including those that 'may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute', must be denied by the Patent and Trademark Office. In 1999, the Trademark Trials and Appeal Board ruled in favour of the petitioners to cancel the federal trademark on these grounds. In September 2003, Pro-Football successfully appealed, with the result that the decision was reversed on the basis that the petitioners had not demonstrated that the trademarks were 'disparaging to a substantial composite of Native Americans' at the time the marks were originally registered in 1967.[81]

Certification marks

The Trade Marks Act 1995 has provisions that allow for registration of certification marks. Certification marks are signs or devices used to distinguish goods and services that possess a certain quality, accuracy or characteristic. The distinguishing characteristics may include geographic origin, quality of material used, or the mode of manufacture.[82] Use of the mark is certified by the registered owner of the certification mark, or by representative organisations approved by the registered owner in accordance with the rules for use.

In 2000, the National Indigenous Arts Advocacy Association (NIAAA) registered the 'label of authenticity' as a certification mark. This mark was designed to denote that a work of art was authentically produced by an Indigenous artist. The label has been applied to goods and services that are of Aboriginal and Torres Strait Islander origin, with the aim of making it more difficult for non-Aboriginal people to pass their works off as if they were authentically Aboriginal. However, although the label is still registered, it is not being used because NIAAA lost its funding in 2003 and is no longer operating.

Breach of confidence

Breach of confidence or trade secrets laws have also been used to protect Indigenous arts and cultural expression.[83] To establish an action, the applicant must show that:

80 *Pro-Football, Inc v Suzan S Harjo et al*, 284 F. Supp. 2d 96, 139 [United States District Court for the District Court of Columbia, 2003], p 2.

81 T. Biolsi (ed), *A Companion to the Anthropology of American Indians*, 2004, Blackwell Publications, North America, p 388.

82 Trade Marks Act 1995 (Cth), s 169(b).

83 S. Gray, 'Aboriginal Designs and Copyright', (1991) 9(4) *Copyright Reporter*, p 8.

- the information has the necessary quality of confidence about it;
- the information was imparted in circumstances under which there was an obligation of confidence;
- there was an unauthorised use of that information to the detriment of the party communicating it.[84]

This area of law has been used to protect Indigenous sacred and secret material. In *Foster v Mountford*,[85] the Court granted an injunction in favour of members of the Pitjantjatjara Council, who took the action to stop the publication of a book in the Northern Territory.

Mountford, an anthropologist, undertook a field trip in 1940 into remote areas of the Northern Territory. Tribal sites and items of deep cultural and religious significance were revealed to the anthropologist by the Pitjantjatjara people. Mountford recorded the information and later wrote a book, *Nomads of the Australian Desert*, which was distributed for sale in the Northern Territory.

The book contained information that was of deep religious and cultural significance to the Pitjantjatjara people. The information was shown to have been given to Mountford in confidence. The Pitjantjatjara people were concerned that continued publication of the book in the Northern Territory could cause serious disruption to their culture and society should the book come into the hands of the uninitiated.

This case illustrates how breach-of-confidence laws have been applied to protect Indigenous arts and cultural expression. To bring a breach-of-confidence action, it is necessary to show that the relationship of confidence existed at the time the information was relayed. However, under Indigenous law, it is not relevant whether such 'secrecy' exists. If sacred material has been disseminated among people not authorised to receive it, then it follows that a breach of Indigenous law has occurred.

Passing off and trade practices

A trader can protect his or her business, goodwill and reputation in an action over 'passing off'.[86] The classic passing-off situation is where one trader represents his or her goods or services as those of another. Passing off may be an avenue for Indigenous interests if the following principles of passing off are met:

- the goods have, or the business has acquired, a certain goodwill and reputation;

84 *Coco v AN Clark (Engineers) Ltd* (1969) RPC 41 (Ch).
85 (1977) 14 ALR 71.
86 *Reddaway v Banham* [1896] AC 199 *per* Lord Halsbury LC at 204.

- the actions of the defendant have caused, or in all probability will cause, the ordinary purchasers of the plaintiff's goods or ordinary customers of the plaintiff's business to believe that the defendant's goods are those, or that the defendant's business is that, of the plaintiff;
- as a consequence, the plaintiff has suffered or is likely to suffer injury in his or her trade or business.[87]

Indigenous interest groups are today gaining reputations as producers from specific regional areas and may therefore be able to show that they have an established goodwill or reputation as Indigenous art and cultural material producers. Consumers are purchasing Indigenous arts and cultural products on the strength of this reputation. Perhaps the main limitation for Indigenous interest groups is showing that the damage, or likely damage, to their goodwill and reputation was brought about by the deception caused by the defendant's conduct.

Trade Practices Act 1974 (Cth)

Under the Trade Practice Act 1974 (Cth), there are remedies for misleading and deceptive conduct.[88] However, these focus on consumer protection and are limited in providing protection for Indigenous artists.

Many products reproducing stylised designs that imitate *rarrk* and other Indigenous designs are marketed as 'Aboriginal', 'Aboriginal-style' or 'Aboriginal inspired'. Indigenous people are concerned that many of these products and designs are not produced by Indigenous people. Further, Indigenous people complain that the use of 'Aboriginal' and 'Indigenous' in the names of products and services by non-Indigenous companies is misleading and deceptive to consumers who are lead to believe that the company's products may be produced by Aboriginal and Torres Strait Islander people.

The Trade Practices Act 1974 (Cth) may provide protection against some types of 'rip-off' behaviour. In the *Carpets* case, von Doussa J found that labelling attached to carpets incorrectly stated that the carpets were produced with the permission of the artists and that royalties were being paid to them. This labelling was also attached to other carpets that had no Indigenous Australian association at all.[89] By using such labelling, the carpet distributors were misleading consumers into believing that copyright in the artworks belonged to the company, or was licensed to it, or that the carpets were approved or made under the licence and approval of the Aboriginal artists. In von Doussa J's judgment, such false and misleading conduct amounted to an infringement of ss 52 and 53.

87 *Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd* [1981] 1 NSWLR 196 *per* Powell J at 204.
88 Trade Practices Act 1974 (Cth), s 52.
89 *Milpurrurru v Indofurn*, above at 248.

Conclusion

The main focus of non-Indigenous Australian intellectual property laws is to provide incentives for the production of intellectual and creative effort. The introduction of moral rights laws into Australia in 2000 has allowed for the protection of the integrity of a copyright work, as well as the right of attribution, but these rights belong to individual creators. There are proposals to recognise Indigenous communal moral rights by amending the Copyright Act 1968, but this is not yet law.

There is a developing Indigenous cultural business industry within which traditional knowledge and arts and culture are applied to tourism, retail and advertising. The use of trade marks can assist Indigenous businesses in this regard, however, as a system to protect Indigenous traditional cultural expression or traditional knowledge generally, this system has limits.

Trade practices laws are relevant to stop the false and misleading practices such as those that occur in the arts and crafts market. These, however, are consumer laws and fall short of recognising rights to Indigenous Australians over ownership of cultural material.

These laws focus on protecting economic rights. So far as Indigenous people seek rights to preserve and protect their culture as envisaged by the draft Declaration on the Rights of Indigenous People, and the rights outlined in *Our Culture: Our Future*, the laws require refocusing. Perhaps a stand-alone law is necessary, or a cultural heritage preservation-based law, to preserve and protect Indigenous Australians' intangible heritage.

Internationally, the World Intellectual Property Organization (WIPO) has established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to discuss intellectual property issues that arise in the context of:

- access to genetic resources and benefit-sharing;
- protection of traditional knowledge, innovations and creativity; and
- protection of expressions of folklore.[90]

The WIPO IGC has developed two important documents: draft provisions for the protection of traditional cultural expressions (TCEs) and draft provisions for the protection of traditional knowledge. It is expected that the draft guidelines will shape future laws and policies relating to Indigenous traditional cultural expressions and knowledge.

90 See the World Intellectual Property Organization's website, www.wipo.int/globalissues.

7 Aboriginal customary law and the common law

The Honourable Justice Bruce Debelle

What is Aboriginal customary law?

A long-existing culture

When the First Fleet arrived in Sydney Harbour in January 1788, the Aborigines had been living in Australia for more than 40,000 years. To the new settlers, the Aboriginal inhabitants of Australia appeared primitive. They had few possessions, no pottery, iron or bronze, no large houses and no tall monuments. But the Aborigines had a society and culture of considerable complexity and diversity. The long cultural heritage of the Aborigines included means by which order was maintained and disputes resolved.

In 1788, there was no single Aboriginal nation and no shared language. It has been estimated that there were as many as 500 tribes or nations, all varying in size and each speaking a different dialect.[1] They each occupied more or less discrete areas and there was considerable diversity of language and culture. This diversity was, in part, the product of different degrees of contact with non-Aborigines and, in part, the product of differences in the environment in which different groups lived. Aborigines of the north coastal regions had had contact with Macassan and Indonesian traders or fishermen while others, for example, central desert Aborigines, had had little contact with others. The food-gathering practices and customs of coastal Aborigines differed from those of desert Aborigines. This diversity resulted in differences in some aspects of the law applying in each tribe or nation. Yet, despite these differences, an 'Aboriginal commonality' has been perceived and some basic generalisations can be made.

1 R.M. and C.H. Berndt, *The World of the First Australians*, 2nd edn, 1977, Ure Smith, Sydney, pp xi–xii and 364 (hereafter cited as 'Berndt').

Recognise the differences

When examining Aboriginal customary law, the white Australian inquirer must look out for and recognise the differences in customary law in different parts of Australia. It is also essential to recognise differences between the Aboriginal legal system and the British legal system introduced to Australia. Care must be taken to avoid preconceptions. The law and legal systems would, for many Australians, be defined as a system of rules enforced by a hierarchy of courts, from the magistrates' courts, through to the District or County courts, Supreme Courts, Federal Courts and up to the High Court. It would also recognise the role of the police force and other law enforcement agencies. Rules of law are identified as consisting of the common law expressed in judicial decisions, statutes made by Parliament, and the plethora of regulations and by-laws made by executive agencies and local authorities. A distinction is made between those rules of law and norms of social behaviour such as rules of etiquette and standards dictated by good manners or ethical and moral values rather than by legal obligation.

In Aboriginal society, there was no system of government in any institutionalised sense. There was no body that made any laws and no hierarchy of courts or other enforcing authorities. There were tribal Elders, but no chieftains nor any ruling class.[2] There was no hierarchical system of government within a tribe or group of tribes. Nevertheless, mechanisms for the maintenance of order and the resolution of disputes existed. When they spoke of law, Aborigines did not distinguish in the way white Australians do between norms of social behaviour and mandatory rules, a breach of which might result in severe consequences. All of this would be understood as law. The law had no separate identity so that a system of legal rules cannot be easily identified. Yet, as Blackburn J observed of the Aborigines at Yirrkala, an Aboriginal community near Gove in the Northern Territory:[3]

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me . . . Great as they

2 There is a debate among anthropologists whether political authority was vested in Elders or in a council of Elders. The former view is held by R.M. Berndt, 'Law and Order in Aboriginal Australia', 1965, pp 167 and 177 and A.P. Elkin, *The Australian Aborigines*, 1976, Angus and Robertson, p 114 (hereafter cited as 'Elkin'). The latter view is held by L.R. Hiatt, *Kinship and Conflict*, 1965, ANUP, pp 141–147; M.J. Meggitt, *Desert People*, 1976, Angus and Robertson, pp 248–250 (hereafter cited as 'Meggitt'); and J. Wilson (1961) *Authority and Leadership in a 'New Style' Australian Aboriginal Community*, unpublished MA thesis, University of Western Australia Pindan, WA, MA Thesis, University of WA.

3 *Milirrpum v Nabalco Pty Ltd and The Commonwealth* (1971) 17 FLR 141 at 267–268.

> are, the differences between that system and our system are, for the purposes in hand, differences of degree. I hold that I must recognise the system revealed by the evidence as a system of law.

White Australian preconceptions or values must, therefore, be avoided. When examining Aboriginal customary law, it is better to ask 'how is order maintained?' or 'by what means are quarrels or disputes resolved?' than to ask 'do Aborigines have a legal system?'

The importance of religion and land

To all Aborigines in Australia, religion was the mainstay of social existence. There was no systematic belief in gods, nor any institutions of priesthood, prayer and sacrifice.[4] The mythical characters of the Dreamtime provided their source of religion, which focused on every aspect of life. They laid down precepts or made suggestions of which people were expected to take notice.[5] They defined the broad rules to be obeyed by both men and women in such matters as sacred ritual, economic affairs, marriage, childbearing and conduct upon the death of relatives. They were the source of Aboriginal life and law. Knowledge and control of certain religious rites, mythology and songs, and possession of sacred objects was vested in a few men of each local group. The authority was not inherited, but rather passed on to men chosen from initiated men.[6] Their special knowledge was kept secret from all uninitiated persons, be they other men, women or children. Women had their own secret-sacred religion and knowledge. Today, the white inquirer might still find a curtain being drawn once questions touch on some of these secret-sacred matters.

The relationship of Aborigines with land was both spiritual and physical. Certain sites or areas of land were of special or sacred importance, some falling within the secret-sacred category. Land was also important as a source of food.

Social organisation

The social organisation of Aborigines was complex. The basic social unit was the family, and a group of families made up a band. A group of bands made up a tribe. In Aboriginal belief, all things in the physical and spiritual universes belonged to one or the other of two classes of moieties. Different social units, therefore, belonged to one moiety or the other. Another important

4 W.E.H. Stanner, 'Religion, Totemism and Symbolism', in Berndt 1965, pp 207 et seq (see above).

5 Berndt, op cit, p 337.

6 K. Maddock, *The Australian Aborigines*, 1975, Penguin, Ringwood, p 43.

social unit was the clan, which is a descent group. Every human being had his clan membership determined at birth. Sections and subsections added to an already complex social organisation.

One of the most important characteristics of Aboriginal society was the concept of kin relationship, which transcended both band and tribe. It is not to be identified with the family system of kinship, which many white Australians might understand. Although the nuclear family was the basic kinship and social unit for Aborigines, there was also a classificatory system of kin relationship that operated throughout Aboriginal society.[7] The system still operates among traditional Aborigines and in modified forms among many non-traditional Aborigines. The details can be quite complex. It is sufficient for present purposes to know that kin relationships extend well beyond familial blood ties and are the basis of all social relationships, indicating the range of behaviour expected: 'It is the anatomy and physiology of Aboriginal society and must be understood if the behaviour of Aborigines as social beings is to be understood.'[8] Thus, everyone in traditional Aboriginal society must be identified as part of a kin relationship so that the two persons concerned will know what their behaviour to one another should be. A person coming into a strange group for trading or ceremonial purposes is always allocated a kinship position, if one is not already held.

Kin relationship resulted in obligations. Rules of kinship regulated such matters as marriage and private arrangements, food gathering, distribution and sharing, sharing of other goods, certain trading relationships, and educational roles. Other aspects of kinship obligations were rules by which certain relatives must be avoided.[9] Serious breaches of the rules would usually be punished, but failure to meet minor kinship obligations would not attract more than expressions of disapproval.

Some aspects of customary law

Except for a few specific areas, our knowledge about traditional Aboriginal life and its laws is sketchy. The task of identifying legal rules is made more difficult by regional variations. Some rules of fairly common application have been identified.

Women, children and uninitiated persons who saw things forbidden to them such as certain *Tjuringa* (sacred objects), a sacred place or sacred ceremony, committed an offence against sacred laws. If a person privy to knowledge or custody of sacred matters were to disclose them to a person not entitled to that information, he too might be guilty of a breach of law. The penalty was often death. In other cases, the offender might be speared.

7 Elkin, op cit, p 84.
8 Ibid, p 85.
9 Ibid, pp 148–149.

Rules permitted or encouraged marriage with certain relatives and prohibited marriage with others. Marriages were normally arranged, usually between a young girl and a man many years older. The girl was sometimes promised before she was born. In the context of incest, according to customary law, a man must not cohabit with his sister, mother or wife's mother. The punishment was death, but if the degree of relationship was not close, banishment from the corporate life of the tribe or some other punishment might suffice.

Adultery and elopement were serious offences and might attract spearing as a penalty. Inflicting serious physical injury might also be punished by spearing. Murder could be dealt with in a number of ways. Firstly, there might be open physical retaliation usually by a member of the family under a kinship obligation to the deceased: that is, what has often been called 'payback'. The kinship obligation would require a certain relative to avenge the death notwithstanding his own personal views. It could not be relied on to put an end to disputes. Blood feuds extending over many years and breaking out into open violence were not unknown.[10] Secondly, compensation in the form of goods may be offered, or demanded, for a death, but acceptance was no guarantee that revenge would not be attempted. Thirdly, where physical vengeance was not practicable, the murderer would be identified to the satisfaction of the victim's relatives. One of them would perform sorcery, or threaten to do so, or claim to have done so if that particular person became ill or died. The fourth method used throughout northern Arnhem Land was the *magarada*, a form of settlement by combat involving a ceremonial running of a gauntlet of spears, usually blunted.

A convenient summary of the rules of customary law as practised by one tribe of Aboriginal people is contained in a study of the Walbiri tribe by Meggitt in 1962, which categorised a number of offences that are commonly recognised by the Walbiri as unlawful forms of behaviour.[11] The totality of the rules expresses the law, *djugaruru*, a term he translated as 'the line' or 'the straight or true way'. He continued:

> The law not only embraces ritual, economic, residential and kinship rules and conventions but also what we would call natural laws and technological rules. The care of sacred objects by the men of one patrimoiety, the sexual division of labour, the avoidance of mothers-in-law, the mating of bandicoots, the rising of the sun, and the use of fire-ploughs are all forms of behaviour that is lawful and proper – they are all *djugaruru*.

Meggitt goes on to point out that, although in pre-contact times Aborigines were probably rarely required to distinguish between rules of law and norms

10 Berndt, op cit, p 346.
11 Meggitt, op cit, pp 251–263.

of polite behaviour, contact has sharpened the distinction. Today, differences can be seen between an offence and poor taste. He is thus able to identify a set of legal rules.[12]

A. Offences of commission:

1. Unauthorised homicide (that is, not decreed as a punishment for another offence).
2. Sacrilege (that is, the unauthorised possession of sacred knowledge and objects and the unauthorised observation of sacred rituals).
3. Unauthorised sorcery (1 and 3 are not easily distinguished).
4. Incest (copulation with actual kin of certain categories).
5. Cohabitation with certain kin (usually classificatory relatives in the categories associated with 4).
6. Abduction or enticement of women.
7. Adultery with certain kin (usually classificatory relatives in the categories associated with 5).
8. Adultery with potential spouses (7 and 8 in effect cover all cases of fornication).
9. Unauthorised physical assault, not intended to be fatal.
10. Usurpation of ritual privileges or duties.
11. Theft and intentional destruction of another's property (exclusive of 2).
12. Insult (including swearing, exposure of the genitals).

B. Offences of omission:

1. Physical neglect of certain relatives.
2. Refusal to make gifts to certain relatives.
3. Refusal to educate certain relatives.

Meggitt has identified the following punishments for these offences.

Punishments

1. Death:
   a. caused by a non-human agency (A2)
   b. caused by human sorcery (A1, possibly A3)
   c. caused by physical attack (A1, possibly A3).
2. Insanity – caused by a non-human agency (A2).
3. Illness – caused by human sorcery (A1, A2, A3, A5, A6, A7, A8; B1, B2).

12 Ibid, pp 256–257.

4. Wounding – attack with a spear or knife, intending to draw blood (A5, A6, A7, A8, A9, A10, A11).
5. Battery – attack with a club or boomerang (A6, A7, A8, A9, A10, A11, A12; B1, B2, B3).
6. Oral abuse – this accompanies all human punishments.
7. Ridicule – this is directed mainly at offences of omission.

The range of penalties is as limited as the range of offences. There is some debate whether ostracism and exile were ever traditional punishments.[13] The state of penalties were, in fact, the maximum, but it was possible for those sympathetic to the offender or his kin to plead for a lesser punishment. Partly because most social behaviour conforms to a regular pattern, partly because of the limited number of possible offences, and partly because of the relative impossibility of offending without others knowing, it was rare that public opinion was divided on the question of whether a person had broken the law. Such popular consensus, of course, does not always mean that he is guilty but it appears that miscarriages of justice were uncommon. Punishment was usually meted out in the public gaze. There was almost no privacy in any camp. The publicity may have been a significant factor determining the general conformity of the people to the more important rules.

Who is subject to Aboriginal customary law?

The change in traditional Aboriginal society as a result of British settlement has altered the extent to which Aboriginal customary law governs the lives of many Aborigines. Policies of settlement and dispossession have displaced some Aborigines from traditional lands and thus affected traditional authority. Other Aborigines have come to reside in cities and rural centres, thus increasing contact with European culture. Although many Aborigines may originally have had no intention of giving up traditional ways, they nevertheless became less inclined to return to them. The availability of medical skills, education and modern technology have all increased the degree of contact with Europeans and European ways. Modern telecommunications and means of travel add further pressures. Aircraft, motor cars, telephones, radio and television provided in remote areas by satellite and other means may lead to a conflict between the desire to take advantage of what Western civilisation has to offer and a retention of traditional lifestyle.

Western society has introduced foreign problems to traditional Aboriginal law. Alcohol and drugs have had a devastating effect, removing the restraints and social inhibitions that regulated Aboriginal society. The capacity to buy food at a store has altered obligations concerning hunting and food gathering. Payments of social service benefits often cut across traditional family

13 Meggitt says that neither ostracism nor exile was practised by the Walbiri: op cit, p 258.

structures and kinship rules. Aborigines seek education for their children. But that very education can undermine traditional authority and lead to questioning of traditional rules and punishments.

Encouraging the establishment of Aboriginal organisations and the granting of land rights might have assisted in some kind of revival of Aboriginal law and culture. But the influences that might displace Aboriginal customary law continue to exist. In addition, the establishment of Aboriginal organisations with office-bearers often being younger Aborigines educated in schools and universities and more experienced in the ways and concepts of the wider Australian community sometimes cut across traditional lines of authority. The granting of land, the impact of mining and the payment of mining royalties also have their effect upon traditional life and culture.

Aborigines today live in a wide variety of communities varying from cities to remote communities. Aborigines represent a little over 1 per cent of the Australian population and about 80 per cent of Aborigines live outside major urban centres.[14] Non-urban Aborigines live in communities that vary enormously in size, character and location. They include small, remote communities, outstations, missions, groups on pastoral properties, pastoral properties owned by Aborigines, and those residing in or on the fringe of country towns.

For many urban Aborigines living in cities and large towns, traditional rules no longer have the force they once did.[15] This is not to say that aspects of kinship and other rules have no place in their lives. More traditionally oriented Aborigines reside in the more remote areas of Australia, some living in small communities and others in large communities numbering over a thousand. Between these two groups of Aborigines is a large number of Aborigines for whom traditional Aboriginal law, culture and ways of life have been extensively modified by residence close to towns in more remote areas. They are sometimes referred to as 'fringe dwellers'.[16]

There is, therefore, an enormous variation in the extent to which Aborigines are governed by Aboriginal customary law. Although these three groups have been identified, generalisations must be avoided. There will be differences in the composition and nature of these groups in different parts of Australia. Nor should it be assumed that in any one area there is any inevitable or regular movement away from more traditional to less traditional ways of life. The extent to which there is any movement from traditional ways of life is influenced by factors such as economic development, the level of Aboriginal and non-Aboriginal population, the degree of government inter-

14 A convenient demographic survey based on 1981 census is found in ALRC 31, paras 29–36.

15 See F. Gale, *Urban Aborigines*, 1972, ANU Press, Canberra; C.D. Rowley, *Outcasts in White Australia*, 1972, Penguin, Ringwood.

16 House of Representatives Standing Committee on Aboriginal Affairs, *Strategies to Help Overcome the Problems of Aboriginal Town Camps*, 1982, Australian Government Publishing Service, Canberra, para 31 and generally paras 15–33.

vention and non-intervention, land rights, the impact of pensions and other inroads on kinship and other traditional obligations, and the internal dynamics of the community. The extent to which Aboriginal customary law will continue to exist will vary from community to community and, as a general rule, will be stronger in more remote communities.

The application of English law

Initially, English law was applied to colonists who had committed offences against Aborigines and to Aborigines who had committed offences against colonists. But the application of English law to Aborigines who had committed offences against one another was less certain and the wisdom of doing so was questioned. Although some, including judges, took the view that, in respect of purely Aboriginal matters, Aborigines should be governed by 'their own ancient usages', the Supreme Court of New South Wales in 1836 in *R v Jack Congo Murrell*[17] decided that English law should apply to offences committed by one Aborigine upon another. The Supreme Court had to deal with two distinct cases in which one Aborigine had been charged with the murder of another. In *Murrell*, the defendant alleged that he was so drunk he could not help the killing. In the other, the defendant relied on Aboriginal customary law. His victim was, apparently, a member of the group that had killed his brother and it was a case of obedience to the Aboriginal custom of revenge killing. The court held that there was no distinction between offences committed by white people upon one another and by Aborigines upon one another:[18]

> Serious cases might arise if these people were allowed to murder one another with impunity, our laws would be no sanctuary to them. For these reasons, the court has jurisdiction.

Although the decision was ultimately regarded as settling the issue, judges in other jurisdictions questioned whether Aborigines should be subject to English law.

In South Australia, Cooper J held the view that it was[19]

> . . . impossible to try according to the forms of English law, people of a wild and savage tribe whose country although within the limits of the province of South Australia, has not been occupied by usurpers, who have never submitted themselves to our dominion and between whom and the Colonists there has been no social intercourse.

Similar views were expressed by Willis J in 1841 in the Supreme Court of

17 (1836) 1 Legge (NSW) 72.
18 Ibid at 73.
19 CSO 511/1840, Advice from Cooper J to the government of South Australia.

Victoria when he said that 'there is no express law which makes the Aborigines subject to our Colonial Code'.[20] Cooper J in South Australia remained unwilling to concede that Aborigines should always be tried for offences under British law. In 1846, an Aborigine was brought before the court for killing another. Cooper J argued that he required a legislative direction if such cases were to be justiciable and the accused was discharged because no competent interpreter was available.[21] In 1848, the judge accepted jurisdiction when an Aborigine was tried for an offence against another, but indicated before the trial commenced that 'in the case of a conviction he would stay any execution required by law and specifically refer the case to the governor'.[22] In Western Australia, views differed as to whether Aborigines should be subject to European law.[23]

The rule in *Murrell* was tempered by a practice of non-involvement of law enforcement agencies in disputes between Aborigines and by decisions not to prosecute for that offence or by mitigating sentences for offences between Aborigines. But the basic rule remained and Aborigines were subject to English law. In the case of criminal law, in practice, both before and after 1836, the law was applied differentially and, especially in remote areas, haphazardly, so that few killings (whether an Aborigine was an offender or victim) were prosecuted.[24]

The rule that Aborigines are subject to the same criminal law as non-Aboriginal Australians was reaffirmed by Mason CJ in the High Court in 1994 in *Walker v State of New South Wales*.[25] Walker, an Aborigine, was charged with an offence against the law of New South Wales. He claimed that the Parliament of New South Wales lacked the power to legislate affecting Aboriginal people or, alternatively, that State legislation affecting Aboriginal people had no operation until it was adopted by them. Mason CJ rejected the claim holding that Australian criminal law does not accommodate a body of law operating alongside it and that there is nothing in *Mabo v Queensland (No 2)* to provide any support for the proposition that criminal laws of general application do not apply to Aboriginal people.[26]

20 *R v Bon Jon, Port Phillip Gazette*, 18 September 1841. The case did not proceed and Bon Jon was handed over to the Protectorate to be educated. He escaped and was later murdered in a payback killing.

21 *Larry v R* (1846) Register, 14, 25, 28 November, Cooper J referred the matter to the Governor; CSO 1564/1851.

22 A.C. Castles, *An Australian Legal History*, citing (1848) Register, 14, 17 June; *Robe to Grey* (1848) 10 July, GRG 2/6/4.

23 P. Hasluck, *Black Australians*, 1942, Melbourne University Press, Melbourne, p 129.

24 R.H.W. Reece, *Aborigines and Colonists*, 1974, Sydney University Press, Sydney, pp 194–195, 225–227.

25 (1994) 126 ALR 321. See also *Coe v The Commonwealth* (1993) 118 ALR 193. The issues involved in the application of one law to all Australians are also noted in *Ngatayi v The Queen* (1980) 147 CLR 1 at 10–11.

26 126 ALR 321 at 323–24.

Notwithstanding that Aborigines and non-Aborigines are all subject to the same law, courts in Australia have from time to time recognised certain aspects of Aboriginal customary law. Most of the recognition has occurred in relation to the criminal law, but there has been significant recognition in aspects of the civil law. Some of those aspects of Aboriginal customary law that have been recognised will now be examined.

What follows is not a complete examination and reference should be made to more detailed studies. Reference should also be made elsewhere to those aspects that have received legislative recognition.[27] The issues involved in recognition have been examined by the Australian Law Reform Commission. A few of its recommendations are noted below, but reference should be made to its report.[28]

The criminal law and Aboriginal customary law

Courts in Australia have, for a long time, taken Aboriginal customary laws into account when determining what is an appropriate penalty for an Aborigine convicted of an offence. The sentencing of convicted Aborigines is dealt with elsewhere in this work and will not now be examined. Courts have also from time to time had regard to customary law when determining the responsibility of an Aborigine for an offence.

Recognition of Aboriginal customary law and of the special problems that Aborigines have when they come into conflict with the criminal justice system occur at each level of the process of investigation, prosecution and trial of an alleged offender. It is convenient to examine them in turn.

Interrogation

Procedural rules and rules of evidence have been modified to have regard for relevant aspects of customary law and the special problems of Aborigines. Those special problems are not limited to language barriers and a lack of understanding of the criminal justice system.[29] They also include concepts of time and distance that often differ from those of white Australians. It is well recognised also that Aborigines have a deference to authority that can lead to a propensity to give answers thought to be expected rather than to state what actually occurred. In addition, rules of customary law may lead to inhibitions in answering questions. The suspect may be unwilling to mention the name of a dead person, or to disclose secret matters, or matters that are someone else's business. The suspect may lack authority to speak on an issue.[30] There may be an avoidance relationship with a translator or someone else involved in the

27 Some examples of legislative recognition are noted in ALRC 31, ch. 35.
28 ALRC 31.
29 The problems are examined in ALRC 31, para 546.
30 See ALRC 31, paras 644 and 645.

interrogation. Differences in language are not confined merely to the need for translation, but also include the difficulties in explaining legal concepts and the different meaning of some words.

In an attempt to overcome these difficulties, Forster J, then a Justice of the Supreme Court of the Northern Territory, formulated a series of guidelines that have become known as the *Anunga* Rules.[31] They are a modification of the Judges Rules, which, since the early twentieth century, have regulated the interrogation of suspects. In 1979, the guidelines were incorporated in a police circular issued by the Northern Territory Police Commissioner.[32] The guidelines require:

- an interpreter to be present if the suspect is not fluent in English;
- the presence of a 'prisoner's friend' (someone in whom the Aborigine has apparent confidence);
- great care in administering the caution (the right to silence) and ensuring it is understood;
- the provision of basic refreshments and substitute clothing if needed;
- no questioning while the person is ill, drunk or tired; and
- reasonable steps to obtain legal assistance if requested.

Recommendations for such guidelines have also been made by judges in South Australia, Western Australia and New South Wales.[33] They have not been implemented in all states. Police departments in Victoria, the Northern Territory, South Australia and the Australian Capital Territory have some system for notifying the local Aboriginal Legal Service after an Aborigine has been arrested.[34] In Queensland, South Australia, the Northern Territory and the Australian Capital Territory, there are guidelines for police questioning Aboriginal suspects.[35] A departure from the guidelines without sufficient reason may result in a judge ruling that the statement obtained from a suspect is inadmissible in the exercise of judicial discretion to exclude such evidence. Thus, a confession may be excluded if there has been a failure to comply with the guidelines.[36]

In order to achieve uniformity throughout Australia, the Australian Law

31 *R v Anunga* (1976) 11 ALR 412.

32 Police Circular – Memorandum No 13 of 1979.

33 See *R v Gibson*, 12 November 1973, Supreme Court of SA (unreported), *R v Williams* (1976) 14 SASR 1 at 6, *Grantham v Thomas*, Supreme Court of SA, No 2808 of 1980 (unreported); *Abdullah v O'Meara*, Supreme Court of WA, Appeal No 44 of 1979 (unreported); *McKellar v South* [1982] 2 NSWLR 950 at 962.

34 Section 1.3.7 Victoria Police Manual; NT Police, General Orders A12 and Q2; s 79A Summary Offences Act, 1953 (SA) combined with General Order 3015, Aboriginals; Australian Federal Police, General Instruction 1 (27 February 1984).

35 For details see ALRC 31, paras 554–560.

36 For example, *R v Ajax* (1977) 17 SASR 88; *R v Williams* (1976) 14 SASR 1; and see generally *R v McKenzie* (1977) 17 SASR 304.

Reform Commission has made recommendations as to rules relating to the interrogation of Aboriginal suspects. In broad terms, they follow the *Anunga* Rules. The Commission has recommended that the guidelines should be enacted in legislation to make it clear both to the police and to the courts that the interrogation rules are to be taken seriously.[37]

Prosecutorial discretion

Although not strictly an aspect of the common law, it is convenient to refer to the discretion invested in both the police and the Crown whether to charge an accused person with an offence and the nature of the offence with which the accused will be charged. Although the discretion is not unlimited,[38] it does enable prosecuting authorities to consider whether a prosecution will be in the public interest and thus determine whether it is appropriate not to prosecute because of the operation of customary law in a particular case. The discretion may be exercised in a number of ways. They include

- non-prosecution for certain offences (for example, in cases regarded as strictly 'traditional' or 'tribal');
- prosecution for a lesser offence, such as reducing murder to manslaughter. In the case of less serious offences, the prosecution of the lesser of two alternative offences may allow a matter to be dealt with locally by a magistrate rather than in a distant centre by the Supreme Court or District Court; and
- entering a *nolle prosequi* by the Crown.

The prosecutorial discretion may be relevant in those cases where Aboriginal customary law, without necessarily justifying or excusing criminal conduct, is a significant mitigating factor, and where the Aboriginal community in question has, through its own processes, resolved the matter and reconciled those involved. Factors relevant in such cases would include the following:[39]

- that an offence has been committed against the general law in circumstances under which there is no doubt that the offence had a customary law basis;
- whether the offender was aware he was breaking the law;
- that the matter has been resolved locally in a satisfactory way in accordance with customary law processes;
- that the victim of the offence does not wish the matter to proceed;

37 ALRC 31, para 573.

38 Cf *R v Metropolitan Police Commissioner, ex parte Blackburn* [1968] 2 QB 118 and *R v Metropolitan Police Commissioner, ex parte Blackburn (No 3)* [1973] QB 241.

39 See ALRC 31, para 478.

- that the relevant Aboriginal community's expectations (or the expectations of each community, if there is more than one) is that the matter has been resolved and should not be pursued further;
- that alternatives to prosecution are available, for example, a diversion procedure; and
- that the broader public interest would not be served by engaging in legal proceedings for little or no purpose.

An example of how the prosecutorial discretion can have regard to Aboriginal customary law in both charging the accused person and in sentencing him is provided in a case in the Supreme Court of South Australia.[40] Fighting had broken out in the course of a dispute at Amata in the Pitjantjatjara lands in north-west South Australia. The accused, Burton, had stabbed another Aborigine in the leg, severing the femoral artery causing a massive blood loss. The other Aborigine died soon after. It appeared that, in the course of the fighting, the deceased had speared Burton in the back of his thigh. After being speared, Burton went to the house and quickly returned carrying a large knife. In accordance with what was said to be the Anungu way of not hitting and running but exchanging one stab for another, the deceased presented his leg to Burton to be stabbed. Burton failed to execute the stabbing in a way to cause minimal injury. After the incident, Burton himself was punished by spearing in accordance with traditional custom. Burton was committed for trial on a charge of murder. The Director of Public Prosecutions had regard to the customary law aspects and charged Burton not with murder, but with manslaughter. When sentencing, Duggan J had regard to the punishment already meted out by the Aboriginal community.

Provocation

The killing of one person by another with an intention to kill or do serious bodily harm is murder. At common law or under the codes, the crime of murder will be reduced to manslaughter if the killing resulted from a sudden and temporary loss of self-control on the part of the killer that was brought about by acts or words of the deceased amounting in law to provocation. Thus, provocation is a defence to murder in the sense that it reduces the charge from murder to manslaughter. To amount in law to provocation, the acts or words must satisfy the following tests:[41]

- they must be done or said by the deceased to or in the presence of the killer; and
- they must have caused in the killer a sudden and temporary loss of

40 *R v Burton* (1994) 18 July, No 81 of 1994 (unreported).
41 *The Queen v R* (1981) 28 SASR 321 at 321–322.

self-control rendering the killer so subject to passion as to make him for the moment not master of his mind; and

- they must be of such a character as might cause an ordinary person to lose his self-control to such an extent as to act as the killer has acted.

Common sense and justice dictate that this concession to human frailty should be limited by the requirement that the provocation would cause an ordinary person to lose self-control lest an exceptionally pugnacious person or a bad-tempered or oversensitive person be liable only for manslaughter, but a sober and even-tempered person would be guilty of murder.[42]

Until the late 1970s, the test of what constituted provocation at law was strictly applied and the concept of what would provoke an ordinary person resulted in an objective test of how a reasonable English man or woman would respond. Except in cases of a most extreme or exceptional character, mere words were not capable of constituting provocation.[43] Thus, a sudden confession of adultery by a wife could not amount to provocation.[44] This was an inappropriate test, because it made no allowance for persons from cultural or ethnic backgrounds quite different from those of the ordinary English man or woman. In 1977, the High Court recognised it was proper to have regard to the ethnic background of the accused.[45] An Italian migrant had killed his wife after she had rejected his continual advances and contemptuously stated her pleasure in promiscuity with neighbouring men. It was held that the issue of provocation had been correctly left to the jury. In 1978, the House of Lords in *Camplin v DPP*[46] reviewed earlier decisions concerning the law or provocation and held that the defendant's age and characteristics were relevant in assessing whether a reasonable man would have been provoked. As Lord Morris said:[47]

> If the accused is of particular colour or particular ethnic origin and things are said which to him are grossly insulting it would be unreal if the jury had to consider whether the words would have provoked a man of different colour or ethnic origin – or to consider how such a man would have acted or reacted.

Since then, Australian courts have held that, when determining provocation, regard should be had to the ethnic or cultural background of the accused. As Cox J of the Supreme Court of South Australia noted:[48]

42 *DPP v Camplin* [1978] AC 705 at 725.
43 *Holmes v DPP* [1946] AC 588.
44 *Bedder v DPP* [1954] 2 All ER 801.
45 *Moffa v The Queen* (1977) 138 CLR 601.
46 [1978] AC 705.
47 Ibid at 721.
48 *R v Dutton* (1979) 21 SASR 356.

> The ordinary man against whom the actions of the accused are to be judged is one possessing all the characteristics and idiosyncrasies of the accused himself – age, sex, race, colour, physical defects and so on – that would have affected his conduct in the circumstances in which the accused found himself, with the exception of any extraordinary excitability or pugnacity that the accused happened to possess.

Thus, when determining whether the words or conduct of the deceased provoked an accused Aborigine, regard would be had to whether those words or conduct would provoke an Aborigine who has a like background and cultural beliefs and influences of the accused.

These developments had been anticipated in the Northern Territory in relation to Aborigines. The Privy Council had in 1946 recognised the inappropriateness of an objective test of how an ordinary person would react when considering an appeal concerning a West African villager.[49] In the 1950s, Kriewaldt J in the Supreme Court of the Northern Territory recognised that regard should be had to the cultural factors that cause an Aborigine to lose self-control. In *R v Patipatu*[50] in 1951, the accused had put his young son in the charge of the deceased woman, but she had left the child by the side of a track and abandoned him there. Patipatu was so enraged by this conduct that he threw a spear at the woman that killed her. The judge directed the jury as follows:

> If you think that in the circumstances prevailing in that particular locality the abandonment of a young child . . . by the person appointed to look after it . . . would cause an ordinary reasonable person in that vicinity and of that description, so to lose control of his emotions as to retaliate with a spear then you would be entitled in this case to find a verdict of manslaughter.

In another case, he declined to apply the English rule that mere words could not constitute provocation. In *R v Muddarubba*[51] in 1956, the defendant had speared the deceased woman after she had used an Aboriginal term that constituted an extreme insult. Kriewaldt J explained:

> In my opinion, in any discussion of provocation, the general principle of law is to create a standard which would be observed by the average person in the community in which the accused person lives. It is clear from the cases decided by courts whose decisions bind me that in white

49 *Kwaku Mensah v The King* [1946] AC 83.

50 [1951] NTJ 18 at 20. This and the following two decisions are noted in N. Morris and C. Howard, *Studies in Criminal Law*, 1964, Clarendon Press, Oxford, pp 93–97.

51 [1956] NTJ 317 at 322.

> communities matters regarded as sufficient provocation a century ago would not be regarded as sufficient today. This suggests that the standard is not a fixed and unchanging standard; it leaves it open, and I think properly so, to regard the Pitjantjatjara tribe as a separate community for the purpose of considering the reaction of the average man. I tell you that if you think the average member of the Pitjantjatjara tribe . . . would have retaliated to the words and actions of the woman spearing her, then the act of spearing is not murder but manslaughter.

Again, in *R v Nelson*,[52] Kriewaldt J directed a jury that it could have regard to customary law when determining whether there had been sufficient time for passions to cool. The deceased had attacked and injured the defendant who then went off and fetched two boomerangs with which he later killed the deceased. At the time of the killing, the defendant was under the impression that the deceased had harmed his wife:

> If the accused in this case were a white person I should have to tell you as a matter of law that the defence of provocation would not be open because on Nelson's story a sufficient time had elapsed between the time he was wounded and the time he struck Dabb for passions to have died down. But the accused is not a white man . . . In the case of a native you may think it right to say that the effect of provocation lasts longer than in the case of a white person.

However, this approach was not always followed in other jurisdictions and it was not until authoritative decisions such as *Moffa* and *Camplin* that it was clear that regard would be had to the cultural and ethnic background of the accused when assessing provocation rather than to some abstract disembodied standard of reasonableness.

There is a question whether three later decisions of the High Court have qualified this principle.[53] In *Masciantonio v The Queen*, the majority of the Court explained the factors by which provocation should be assessed in these terms:[54]

> However, the gravity of the conduct said to constitute the provocation must be assessed by reference to relevant characteristics of the accused. Conduct which might not be insulting or hurtful to one person might be extremely so to another *because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history*.

52 21 March, 1956 (unreported)

53 *Stingel v The Queen* (1990) 171 CLR 312, *Masciantonio v The Queen* (1995) 183 CLR 58, *Green v The Queen* (1997) 191 CLR 334

54 *Masciantonio v The Queen* 183 CLR 58 at 67.

> The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done. But having assessed the gravity of the provocation in this way, it is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control and act in a manner which would encompass the accused's actions.
>
> (Emphasis added)

The emphasised words suggest that it is still relevant to have regard to the racial and ethnic characteristics of the accused when assessing provocation. The question of whether an Aboriginal accused of murder could rely on the defence of provocation would depend on whether an ordinary Aborigine in the same circumstances would have acted in the same way as the accused.

An Aboriginal customary law defence?

There are other areas in which it appears to be appropriate to take Aboriginal customary law into account when assessing responsibility for a criminal act. An Aborigine may believe that he is required by Aboriginal customary law to act in a particular way and the resulting conduct may be an offence against the criminal law. In *R v Isobel Phillips*,[55] the defendant, a woman from the Warumungu tribe, was required by Warumungu customary law to fight in public any woman involved with her husband. Warumungu law also set limits to the fight, which were not exceeded in this case. Anthropological evidence showed that the defendant was under a threat of death or serious injury if she did not respond but the magistrate held that:

> A Warumungu woman of ordinary firmness would have carried out the instructions she was given . . . as the defendant did . . . The threats . . . are backed up by the sanctions of the Warumungu law and, she cannot, as she remains in the Warumungu environment, evade these consequences.

The charges were dismissed on the ground that the defence of duress applied. A defence of duress will not be available if the accused is charged as a principal with murder. Further, Aborigines might have voluntarily acted in accordance with external pressure. In *R v Old Barney Jungala*,[56] Muirhead J commented:

> There is no suggestion that (the defendant) intended to cause the death of this young woman and, I accept the fact that he acted as he believed the law which he respected compelled him to do.

55 Northern Territory Court of Summary Jurisdiction (Mr J.M. Murphy SM) 19 September 1983 (unreported).

56 Supreme Court of NT, 8 February 1978 (unreported).

The defendant was convicted of manslaughter on the grounds of lack of intent to kill, not duress.

The Australian Law Reform Commission considered whether a customary law defence exonerating the defendant from liability in such cases should be created.[57] As Commissioner Crawford has reported,[58] a customary law defence would involve endorsing tribal killings and would deprive persons, including Aboriginal victims of offences, of legal protection. The defence, therefore, raises serious problems of equal protection under the law. The Commissioner concluded that evidence of Aboriginal customary law can be taken into account sufficiently in the general criminal law through the exercise of sentencing and other procedural discretions, and that the customary law defence was neither necessary nor desirable. The Commissioner did, however, recommend the creation of a partial defence, similar to a defence of diminished responsibility, which would operate to reduce the level of liability in particular cases from murder to manslaughter. The advantages of this defence were that it would not involve condoning or endorsing payback killings or woundings, nor would it deprive victims of legal protection or the right of redress. Nevertheless, it represented direct acknowledgment of conflicts that can occur between a general legal system and Aboriginal customary laws and would operate as an adjunct to the sentencing discretion.

The civil law and Aboriginal customary law

Recognition of Aboriginal customary law is not confined to the criminal law. Of paramount importance is the recognition of land rights. Because land rights is the subject of detailed examination elsewhere in another of the chapters in this work, it will not be examined here other than to note the highly significant decision of the High Court in *Mabo v Queensland (No 2)*.[59]

Confidential information

The common law has also recognised the confidential nature of Aboriginal customary law. In *Foster v Mountford*,[60] the common law recognised the secret-sacred aspects of Aboriginal customary law. Mountford was a highly distinguished anthropologist. For more than 35 years he had worked with Pitjantjatjara Aborigines. He wrote a substantial work concerning his research that included photographs, drawings and descriptions of persons, places and

57 ALRC 31, paras 442–453.

58 Crawford J, 'The Recognition of Aboriginal Customary Laws: An Overview' in *Aboriginal Perspectives on Criminal Justice*, 1992, Australian Institute of Criminology, Canberra, pp 65–66.

59 (1994) 175 CLR 1.

60 (1976) 14 ALR 71.

ceremonies with deep religious and cultural significance to the Aboriginal plaintiffs. It included matters that hitherto had been secret. Muirhead J accepted that the publication of the work had caused dismay, concern and anger, and might further disrupt the social system of Pitjantjatjara Aborigines. He issued an interlocutory injunction restraining the publication of the work on the ground that some of the information in the book could only have been supplied and exposed in confidence, a confidence that he found had been recognised by the author in a preface to the work.[61] Thus, the rules in equity as to disclosure of confidential information were applied. The defendants did not seek to set aside the injunction.

Different issues concerning confidential information were examined by the Full Court of the Supreme Court of South Australia in *Coulthard v South Australia*.[62] The issues involved the unauthorised publication of an anthropologist's report concerning a meeting between Aborigines and officers of State and federal governments. In 1987, a dispute broke out between two Aboriginal communities, the Kuyani and Kokotha people, who had competing claims to traditional rights in respect of Coorlay Lagoon near Roxby Downs in South Australia. The Kuyani asked the Aboriginal and Torres Strait Islander Commission (ATSIC) to intervene. ATSIC arranged meetings with both the Kuyani and Kokotha in August 1990. ATSIC also asked officers of the Aboriginal Heritage Branch of the South Australian government to attend the meeting. A meeting was held with the Kokotha on 22 August and with the Kuyani on 23 August.

The issues at the trial concerned the second meeting. Four representatives of government, two from ATSIC and two from the Aboriginal Heritage Branch, were present at the meeting. One of the representatives of the Branch was an anthropologist. He prepared a report of the meeting. At the meeting, three Aborigines made statements that were not only inflammatory in European terms, but were severe breaches of Aboriginal customary law. Each of the three Aboriginal speakers had transgressed, one in uttering a curse and the other two in expressing views on matters about which, by customary law, they had no authority to speak. The anthropologist's report was stolen by an unknown person from the docket in the Branch and copies were circulated in Port Augusta, causing considerable embarrassment to the three Aboriginal speakers. They each brought an action against the government of South Australia claiming, among other things, a breach of confidence.

The plaintiffs' claims were dismissed at first instance and an appeal from the decision was dismissed by the Full Court of the Supreme Court. The Court held that the State of South Australia was not liable because the State could not, in the circumstances, be vicariously liable for the act of an unknown employee who had wrongfully removed the report from the docket,

61 Ibid at 72–73.
62 (1995) 180 LSJS 1.

which was held in a reasonably secure place. However, the Full Court held that the information imparted at the meeting was of a confidential nature and was imparted to officers of government on an occasion that imported an obligation of confidence. Although there had been no resolution or statement that anything said at the meeting was confidential, the Court had regard to the serious nature of the dispute, the sensitive nature of the matters discussed at the meeting and in particular matters related to sacred sites, the fact that it was a private not a public meeting, the fact that the press were expressly excluded from the meeting, and the fact that it was explicit from the nature of the meeting that whatever was said would be regarded as confidential and used only for the purpose of enabling the prospective governments to seek to resolve the dispute concerning Coorlay Lagoon. The Court held that disclosure of what was said at the meeting would be limited to those officers of government involved in seeking to resolve the dispute. This decision also represents the application of well-established principles in equity concerning the duty of confidence to an aspect of customary law.

Copyright

It might be possible for the customary law to be used to protect intellectual property in Aboriginal society. For example, there might be material that is suitable for copyright protection. Copyright might exist in designs or the words of music of a song. Some of the difficulties are examined by Professor Ken Maddock[63] and in another chapter in this work.

Hunting, fishing and gathering

Allied to land rights are traditional rights to hunt, fish and gather food. Aborigines have had to adapt and change to outside influences. Hunting and gathering in traditional societies have been substantially affected by the payment of welfare benefits and the introduction of rations and food bought at community or other stores. Nevertheless, particularly in more remote areas, hunting, fishing and food gathering have continued to be of economic and ritual importance. Modern technology is frequently used and has replaced many traditional weapons or instruments. Guns may replace spears, vehicles enable large distances to be quickly traversed, aluminium boats replace dugouts, fishing nets are made of nylon fibre and fishing gear will bear little resemblance to traditional fishing spears. The decision in *Mabo v Queensland (No 2)* [64] may influence the capacity of the common law to recognise customary rights concerning hunting, fishing and food gathering. The present position is that the common law has not recognised such rights and there is a

63 K. Maddock, 'Copyright and Traditional Designs' (1988) 2 *Aboriginal Law Bulletin*, 34.
64 (1994) 175 CLR 1.

body of legislation that may have cancelled or overridden many customary rights.

The decision in *Mason v Tritton*[65] illustrates the difficulties facing a person seeking to advance a claim for traditional fishing rights. An Aborigine had been charged with having more than the permitted quantity of abalone in his possession contrary to the Fisheries and Oyster Farms (General) Regulations 1989 of New South Wales. He had dived for abalone and had brought 92 to shore. He claimed a traditional right to fish coastal waters near Dalmeny on the South Coast of New South Wales. It was held that he had failed to prove that, in diving for abalone on this occasion, he had exercised a traditional and customary right to fish. It was held that the defendant had failed to prove any recognised system of rules or the content of the rules – for example, did they permit the taking of commercial quantities of abalone? – and whether the defendant was bound by them.

The need for evidence to establish claims was also examined in the Supreme Court of Western Australia in *Taylor v Webb* and *McGinty v Webb*[66]. The appellants had been charged with remaining on premises without lawful authority after being warned by police officers to leave them. The charge related to the occupation by a number of Aborigines of an old brewery site on the Swan River at Perth. The appellants claimed that they were custodians of the land pursuant to Aboriginal law and tradition and, in that capacity, had a right to be on the premises and to invite others to join them. No evidence was led to establish the claim. They were convicted. The Court held that it was necessary for the appellants to lead evidence to establish the asserted right and that they were custodians of the land. Appeals against their convictions were, therefore, dismissed.

Suppression of names

It is contrary to Aboriginal customary law and extremely offensive to many Aborigines to speak of a dead person by name. A number of Australian courts and particularly those in the Northern Territory have recognised this and do not refer to a deceased Aborigine by name. In *R v Bara Bara*,[67] Mildren J of the Supreme Court of the Northern Territory took judicial notice of this aspect of customary law and, when dealing with an Aborigine who had pleaded guilty to manslaughter of another Aborigine, made an order suppressing from publication the name of the deceased. The judge was also influenced to make the order because it was likely to reduce the danger of a

65 (1994) 34 NSWLR 572.

66 Both decisions were delivered by the Full Court of the Supreme Court of WA on 27 November 1990 and are unreported.

67 (1992) 87 NTR 1.

'payback' killing. Thus, the name was suppressed not only in the conduct of the proceedings, but also from publication in the media.

Assessment of damages

Aborigines who have suffered injuries in motor vehicle accidents have sometimes been prevented by their injuries from continuing to participate or engage in traditional practices or undertake traditional responsibilities. Regard has been had to these disabilities when assessing the damages to be awarded for the injuries they have suffered. In *Napaluma v Baker*,[68] the plaintiff had begun to undertake traditional ceremonies of the Pitjantjatjara people and had been initiated. When assessing damages for a loss of amenities resulting from his injuries, Zelling J had regard to the fact that, because of his injuries, further secrets could not be entrusted to him and he would not, in our parlance, rise to higher degrees in Aboriginal society. Accordingly, he was left out of some ceremonies and played a minor passive role in others and was less than a full member of the Aboriginal community. In the Supreme Court of the Northern Territory, regard has been had to tribal customs in assessing the effects of an injury sustained in a motor vehicle accident.[69]

Proof of Aboriginal customary law

The question of the proof of the Aboriginal customary law has not been examined in any detail in this chapter. The question is examined in the Law Reform Commission's report.[70] There must be evidence to prove that the manner in which an Aborigine has conducted himself is, in truth, in accordance with customary law and not simply an angry reaction, say, to a particular event or events. Proof of customary law is highly important in land rights claims. Methods of proof and determining who are qualified experts are important issues as are the ultimate issue in question and the law relating to hearsay. The fact that there are secret aspects of customary law may lead to difficulty, particularly if an attempt is made to test the legitimacy of the claim. These issues will have to be addressed by tribunals dealing with land rights claims.

The future

The recommendations of the Australian Law Reform Commission (ALRC) related to a wide range of matters. They included: evidence and procedure; marriage, children and family; property; the substantive criminal law and

68 (1982) 29 SASR 192.
69 *Weston v Woodroffe* (1985) 36 NTR 34.
70 ALRC 31, ch 24.

sentencing of Aboriginal offenders; secrecy and confidentiality; proof of Aboriginal customary law. Little effect has been given to its recommendations.

When this work was first published in 1997, I commented that recognition of Aboriginal customary law has not been uniform throughout Australia and that, on occasions, it has been haphazard. The lack of uniformity stems from the fact that each State and Territory enacts its own legislation. Although the common law of each of the States and Territories is grounded on the common law inherited from England, judges in each jurisdiction approach matters differently and according to the requirements of each jurisdiction. Although few of the recommendations of the ALRC report have been given legislative force, there has been a long practice in this country of judicial officers (both judges and magistrates) giving effect in appropriate cases to Aboriginal customary law. This has been especially apparent when judicial officers have been sentencing Aboriginal offenders. With some exceptions, the sentences have met with the approval of the relevant Aboriginal community and non-Aboriginal community.[71] As noted earlier, there has also been some recognition in areas of the civil law.

Since 1997, two reports have provided further impetus for the recognition of customary law. The Law Reform Commissions of both the Northern Territory (NTLRC) in August 2003 and of Western Australia (WALRC) in September 2006 have both published reports recommending the recognition of aspects of Aboriginal customary law and cultural practices. The recommendation of the WALRC was in these terms:

> Recognition of Aboriginal customary laws and practices in Western Australia must be consistent with international human rights standards and should be determined on a case by case basis. In all aspects of the recognition process particular attention should be paid to the rights of women and children and the right not to be subject to inhuman, cruel or unusual treatment or punishment under international law.

The Western Australian report dealt with a wide range of issues affecting Aborigines. The subtitle of the report, 'The Interaction of Western Australian Law with Aboriginal Law and Culture', provides an indication of the breadth of issues canvassed.

The proposals in the WALRC report reflect much of what was contained in the ALRC report. Like the ALRC report, it does not seek to establish another legal system but, instead, to provide mechanisms within the Australian legal system for recognising aspects of customary law in appropriate cases. The Commission believed that it was of 'paramount importance' that

71 Some sentencing issues are noted in the report of Western Australian Law Reform Commission (hereafter called WALRC) at 23–26.

all Australian citizens (Aboriginal and non-Aboriginal) enjoy the full protection of Australian law and the rights and obligations it confers.[72]

Neither the ALRC nor the WALRC was willing to recommend a general defence for criminal conduct based on customary law because this would negate equal protection under the law especially for women and children.[73] Like the ALRC, the Law Reform Commissions of the Northern Territory and Western Australia recommended that, where established by evidence, due regard should be had to customary law when it might be a factor relevant to the determination of an appropriate sentence.

The recognition of customary law and culture is sometimes criticised on the ground that it will result in two systems of law. That is to misunderstand the true position. One factor common to the recommendations of the ALRC and the recommendations of the NTLRC and WALRC is that Aboriginal customary law must work within the framework of Australian law. The legal system has always had regard both to the circumstances of the offender and to the circumstances of the offending. Because the cultural background of the offender is relevant when determining the appropriate penalty, it is appropriate to have regard to Aboriginal customary law.

The WALRC report also contains recommendations for recognition of Aboriginal customary law in civil law. They are so extensive that it is necessary to refer the reader to the report.

Each of these three Law Reform Commission reports state that, in those States and Territories where there is an Aboriginal population still subject to customary law, judicial officers have been applying customary law in the sentencing process. The reports reinforce the desirability of that practice. In light of the considered recommendations in three reports from the Law Reform Commissions and given the extensive and widespread consultation that these Law Reform Commissions undertake before making recommendations, recent federal legislation to prevent courts from having regard to Aboriginal Customary Law is somewhat surprising.

On 14 July 2006, the Council of Australian Governments announced proposals to abolish Aboriginal customary law or cultural practices as a relevant factor when determining guilt or when sentencing an offender. Effect has been given to that intent at the Commonwealth level by an Act amending the Crimes Act 1914 of the Commonwealth.[74] The amendments provide that when either determining guilt or when sentencing:

> The court must not take into account any form of customary law or cultural practice as a reason for

72 Ibid at 67.

73 Ibid at 137. The difficulties are noted at 138.

74 Crimes Amendment (Bail and Sentencing) Act 2006 No 171 of 2006.

(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
(b) aggravating the seriousness of the criminal behaviour to which the offence relates.

The amendments also delete from the Crimes Act any reference to cultural background. It is proposed that this legislation be reinforced by complementary legislation in the States and Territories. These amendments have attracted widespread opposition.

The amendments are the product of the concern of governments at the level of family and community violence and sexual abuse of children in some Aboriginal communities. The issue has received particular emphasis in recent years. Aboriginal women and children are victims of violence and sexual abuse at a much higher rate than non-Aboriginal women and children.[75]

The issue has been compounded in some instances by claims that some Aboriginal men and their legal advisors claim that certain violence or sexual behaviour is condoned under customary law. Courts are sceptical of such claims. It is contrary to the law of any society to condone physical violence and sexual abuse. Significantly, the WALRC report states[76] that a number of studies and enquiries have concluded that family violence and child abuse is not traditionally sanctioned in Aboriginal communities. The report calls for recognition of the true characteristics of customary law. Those recommendations have the capacity to reduce the level of social violence and sexual abuse in Aboriginal communities.

The causes of physical violence and sexual abuse in Aboriginal communities are noted by WALRC at 21. They include social and economic disadvantages, unemployment, lack of education and poverty, alcohol and substance abuse, which account for the loss of tradition status for Aboriginal men, and the breakdown of customary law and tradition authority structures.

Although these issues must be urgently addressed, prohibiting courts from having regard to customary law or cultural practices is a mistaken response. The legislation will not prevent violence against women in Aboriginal communities or sexual abuse. If it is thought that legislation is necessary, it is preferable to confine any prohibition of the recognition of Aboriginal customary law to offences of violence against women and sexual abuse rather than to enact legislation of universal application that might have unforeseen adverse consequences. The simple fact is that there are cases quite unrelated to abuse of women and children in which it is entirely appropriate to have regard to customary law and practice when sentencing an offender. If courts are prohibited from considering customary law, penalties and sentences might

75 WALRC at 19, note 8.
76 Ibid at 19–27.

be imposed that will be quite disproportionate to the nature and circumstances of the offending.

There are occasions when the cultural background of an offender will be relevant to the determination of an appropriate penalty or sentence, be that offender Aboriginal or non-Aboriginal. The proposed reforms have the potential, therefore, to operate adversely in respect not only of Aboriginal offenders, but also in respect of those from other cultural backgrounds.

8 Indigenous Australians and sentencing

The Honourable Justice Tom Gray, Sally Burgess and Martin Hinton QC

Why in a book such as this is it considered appropriate to devote a chapter specifically to sentencing? The answer finds its origin in the report of the Royal Commission into Aboriginal Deaths in Custody (hereafter the RCIADIC).[1] The RCIADIC was established in 1987 in response to concern regarding the number and frequency of Aboriginal people dying in custody and discontent with official explanations for those deaths. The Commission found, amongst other things, that:

> [T]he conclusions are clear. Aboriginal people die in custody at a rate relative to their proportion of the whole population which is totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community. But this occurs not because Aboriginal people in custody are more likely to die than others in custody but because the Aboriginal population is grossly over-represented in custody. Too many Aboriginal people are in custody too often.[2]

In fact, the RCIADIC found that, as at 30 June 1989, 'there were 15 times as many Aboriginal people in prison than there were non-Aboriginal people'.[3] That is, for every 100,000 Aboriginal people making up the general adult population of Australia, 1,464.9 Aboriginal people were in prison as compared to only 97.2 non-Aboriginals per 100,000 non-Aboriginal persons.

Sadly, little has changed in the 16 years or so since the RCIADIC reported. According to the Australian Bureau of Statistics, as at 30 June 2006, for every 100,000 Aboriginal people making up the general adult population of Australia, 1,668 were in prison as compared to an overall imprisonment rate for all Australians (Indigenous and non-Indigenous) of 163 per 100,000.[4]

1 RCIADIC, National Report (1991) AGPS.
2 RCIADIC, National Report, Vol 1, ch 1, p 6.
3 Ibid, ch 9, p 225.
4 Australian Bureau of Statistics, *Prisoners in Australia*, 14 December 2006. This publication can be found on the Bureau's website: http://www.abs.gov.au (accessed 15 December 2006). See also Australian Bureau of Statistics, *Corrective Services, Australia*, September 2006.

Aboriginal Australians were 13 times more likely than non-Aboriginal Australians to be in prison as at 30 June 2006. Statistically, it remains the case, therefore, that far too many Aboriginal people are in custody.

That is not to say that the sentences imposed upon those Aboriginal people serving custodial sentences were inappropriate. There is no reason to think that they were anything but appropriate. But it cannot be the case that Aboriginal Australians are inherently more criminal than non-Aboriginal Australians.

The sheer number of Aboriginal people in custody tells us nothing about the reasons why they are in custody. In this regard, the report of the RCIADIC is of great importance. Not only were the Commissioners charged with the responsibility of investigating the 99 deaths of Aboriginal people that occurred in custody, but in addition the Commissioners were authorised to report on issues underlying the individual deaths in custody and, in doing so, to 'take account of social and cultural and legal factors which . . . appear to have a bearing on those deaths'.

The Commission found that personal factors common to those that died 'constantly re-appear in the broad fabric of Aboriginal society'.[5] Those recurring factors in the lives of the deceased and experienced generally in Aboriginal society were as follows: unemployment; a lack of education; childhood separation from natural families through intervention by the State; contact with the police and the criminal justice system at an early stage in life; recurring contact with the police; offending linked to alcohol abuse; alcoholism; a poor standard of health; social marginalisation; and economic debilitation.[6]

The Commission went further and traced the origins of this bleak picture to the implementation of the policies of non-Aboriginal Australia since colonisation, which saw the Aboriginal people dispossessed of their lands. Dispossession is particularly significant. Not only does it mark the 'destruction of the Aboriginal economy', but it 'threatened the Aboriginal culture which all over Australia was based upon land and [the] relationship to land'.[7] Accompanying dispossession was the pursuit by successive governments of policies that had the effect of destroying the spiritual and cultural beliefs of Aboriginal society and progressively disempowered the Aboriginal people

5 RCIADIC, National Report, Vol 1, ch 1, p 6.

6 Ibid, ch 1, pp 6–7; In its 2003 report entitled *Overcoming Indigenous Disadvantage: Key Indicators 2003*, the Steering Committee for the Review of Government Service Provision (SCRGSP, 2003) reported that Aboriginal Australians remain disadvantaged in virtually the same areas of life identified by the RCIADIC. See also, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003*, 2003, HREOC.

7 RCIADIC, National Report, Vol 1, ch 1, p 7.

to the extent where they have become dependent upon non-Aboriginal Australia for virtually everything.[8]

> The consequence of this history is the partial destruction of Aboriginal culture and a large part of the Aboriginal population and also disadvantage and inequality of Aboriginal people in all the areas of social life where comparison is possible between Aboriginal people and non-Aboriginal people. The other consequence is the considerable degree of breakdown of many Aboriginal communities and a consequence of that and of many other factors, the losing of their way by many Aboriginal people and with it the resort to excessive drinking, and with that violence and other evidence of the breakdown of society. As this report shows, this legacy of history goes far to explain the over-representation of Aboriginal people in custody, and thereby the death of some of them.[9]

In recent times, both Aboriginal and non-Aboriginal Australia have done much to turn back the tide of history. However, the statistical evidence referred to above suggests that there remains much to do. So too, many of the chapters in this book, such as those by Tracey Bunda, His Honour Judge Chivell, the Honourable Elliott Johnston AO QC and the Honourable Edward Mullighan QC, indicate that much remains to be done.

In fact, these views have been confirmed by the findings of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander People from Their Families.[10] That Inquiry concluded that '[a]n entrenched pattern of disadvantage and dispossession continues to wreak havoc and destruction in Indigenous families and communities'.[11] The forcible separation of Aboriginal children from their families whether at the instigation of welfare or justice agencies has had, and will continue to have, a profoundly destructive impact on Aboriginal society and culture.

> Social justice measures taken by governments should have special regard to the inter-generational effects of past removals. Parenting skills and confidence, the capacity to convey Indigenous culture to children, parental mental health and the capacity to deal with institutions such as

8 Ibid, ch 1, p 8. A graphic example of the impact of colonisation can be seen in the observations of the South Australian Coroner in Coronial Inquest, November 2002 into the deaths of Kunmanara Ken, Kunmanara Hunt and Kunmanara Thompson (the inquest into petrol sniffing on the Anangu Pitjantjatjara Lands).

9 RCIADIC, National Report, Vol 1, ch 1, p 11 (para 1.4.19).

10 Human Rights and Equal Opportunity Commission: National Inquiry into the Separation of Aboriginal and Torres Strait Islander People from Their Families, *Bringing Them Home*, 1997.

11 Ibid at 559.

> schools, police, health departments and welfare departments have all been damaged by earlier policies of removal.
>
> Unless these conditions are altered and living conditions improved, social and familial disruption will continue. Child welfare and juvenile justice law, policy and practice must recognise that structural disadvantage increases the likelihood of Indigenous children and young people having contact with welfare and justice agencies. They must address this situation.[12]

This is consistent with our own experience and observation from working within the criminal justice system. The 'legacy of history' has been far-reaching and its debilitating consequences continue to plague Australia.

The objectives to be achieved in sentencing have been variously described. In *Webb v O'Sullivan*, Napier CJ remarked that 'the courts should endeavour to make the punishment fit the crime, and the circumstances of the offender, as nearly as may be', bearing in mind that the principal objective was the protection of the public, but, subject to that, mercy should be extended.[13] In *AB v The Queen*, McHugh J commented:

> Many, probably the large bulk of, sentences reflect compromises between conflicting objectives of sentencing. One objective is to impose a sentence that reflects adequate punishment for the culpability of the convicted person, having regard to the community's view concerning the need for retribution, denunciation, deterrence, community protection and sometimes vindication. Another objective is to impose a sentence, with or without conditions, that will further the public interest by encouraging and not discouraging the convicted person to renounce criminal activity and to re-establish himself or herself as a law-abiding citizen. Still another objective is that the sentence should reflect an allowance for those circumstances, personal to the convicted person, which call for mitigation. These objectives and others have to be achieved within a conceptual framework that requires that there should be parity between sentences, that the sentence should be proportional to the circumstances of the crime and that, where more than one sentence is involved, the total sentence should not exceed what is appropriate for the overall criminality of the convicted person.[14]

It is obvious then that the recurring factors experienced generally in Aboriginal society as observed by the RCIADIC and the effects of colonisation

12 Ibid n 10 at 557.

13 [1952] SASR 65 at 66.

14 [1999] 198 CLR 111 at 120–1, see also Hayne J at 156–7; see further *Veen v The Queen [No 2]* [1987–1988] 164 CLR 465 at 476–7; *R v Kear* (1977) 75 LSJS 311.

and dispossession upon the Aboriginal people are highly relevant to the determination by a court of the appropriate penalty to be imposed in a given case.[15] The judiciary has been quick to acknowledge this.[16] For example, in *R v Clarke*, Mullighan J, sitting in the South Australian Court of Criminal Appeal, stated:

> [21] . . . As the law stands at present, it is accepted that aboriginality in itself is not a matter in mitigation. As Brennan J explained in *Neal v The Queen* (1982) 149 CLR 305, a case involving an Aboriginal man, at 326:
>
> > The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic group or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.
>
> [22] It is clear that an Aboriginal offender cannot expect special treatment just because he or she is Aboriginal: *Wanganeen v Smith* (1977) 73 LSJS 139, *R v Fernando* (1992) 76 A Crim R 58, *R v Smith* [2003] SASC 263. However, as those cases acknowledge, aboriginality may be relevant to the sentencing process in a particular case. It is to be expected that in many cases the aboriginality of an offender will be a relevant and important factor in the sentencing process. Many Aboriginal people are marginalised by society and lack opportunities that are more available to others. For many, realisation of legitimate expectations is unlikely. In many cases, there is an inability to fit in with the non-aboriginal community which contributes to isolation and dissatisfaction. However, those general and other similar observations may not be applied as a matter of course.[17]

15 See The Hon Justice Toohey, *Sentencing Aboriginal Offenders*, Paper delivered to the Second International Law Congress, 19–24 June, 1988, Surfers Paradise, Queensland, as quoted and cited in *R v Fuller-Cust* (2002) 6 VR 496.

16 See *Daniel* (1997) 94 A Crim R 96 for a comprehensive survey of the authorities. See further *R v Fuller-Cust* (2002) 6 VR 496; *Frank v Police* (2000) 77 SASR 273; *Ingomar v Police* (1998) 72 SASR 232; *R v Fernando* (1992) 76 A Crim R 58; *R v E (A Child)* (1993) 66 A Crim R 14; *R v Tjami* (2000) 77 SASR 514; *Juli v The Queen* (1990) 50 A Crim R 31; *R v Neal* (1982) 149 CLR 305; *R v Yougie* (1987) 33 A Crim R 301; *R v Rogers* (1989) 44 A Crim R 301; *Jabaltjari v Hammersley* (1977) 15 ALR 94; *Wurramara* (1999) 105 A Crim R 512; *Davey* [1980] 2 A Crim R 254; *R v Miyartatawuy* (1996) 6 NTLR 44. See also J Nicolson SC, 'The Sentencing of Aboriginal Offenders' (1999) 23 Crim LJ 85, and Law Reform Commission of New South Wales, Report 96 (2000) *Sentencing: Aboriginal Offenders*, available online at http://www.cso.nsw.gov.au.

17 [2004] SASC 181.

It is for this reason that, in the first edition of this book, the importance of those representing Aboriginal people in the courts becoming familiar with the impact of colonisation upon their Aboriginal client and accurately relating that history and its subsisting effect before a sentencing court was emphasised.

Aboriginality as a factor to be taken into account in sentencing is most stark where the offending occurs within a discrete Aboriginal community in which traditional means of social control have been weakened by the impact of colonisation or where customary law or traditional ways play a governing role in the explanation or punishment of criminal conduct.[18] However, Aboriginality remains a factor to be considered wherever the individual Aboriginal person chooses to live.[19] At all times, it must be borne in mind that:

> Aboriginal Australians, like any other group within the Australian community, are not homogenous. Every person is a product of different circumstances. Although there are certain matters of more pressing concern to one group over another, it is dangerous to suggest that these problems extend to all members of that community. See eg. C. Charles, 'Sentencing Aboriginal People in South Australia' (1991) 13 Adel LR 90.[20]

Thus, where a court is called upon to consider Aboriginality, the court must consider not only the impact of colonisation, Aboriginal culture and the influence of customary law at the general level, but at the specific level as well. With respect to the latter, this will involve the court in considering how an individual's Aboriginality has impacted upon such things as that individual's ability to participate in the community, his or her ability to access services provided in the community and his or her ability to take advantage of opportunities in the community.[21]

It is important to point out that it is not a matter of an Aboriginal person receiving special treatment. Rather it is a matter of ensuring that the application of the law, which assumes all people to be equal, is, in fact, being applied to equals equally and not to unequals equally. Sentencing requires many value judgments to be made. Value judgments that reflect the judicial officer's

18 See, for example, *Mamarika v R* (1982) 42 ALR 94; *Munungurr v The Queen* (1994) 4 NTLR 63; *R v Shannon* (1991) 57 SASR 14; *Warren, Coombes & Tucker* (1996) 88 A Crim R 78; *Minor* (1992) 59 A Crim R 227; *Hales v Jamalmira* (2003) 13 NTLR 14; *R v GJ* [2005] NTCCA 20. See also ALRC Report No 31, *Recognition of Aboriginal Customary Laws*, 1986.

19 *R v Smith* (2003) 86 SASR 132 *per* Lander J at [61–62], *per* Gray J at [134–135]; *Police v Abdulla* (above) *per* Perry J at [343]–[344].

20 *Russell* (1995) 84 A Crim R 386 *per* P. Kirby at 392; see also *Woodley, Boogna and Charles* (1994) 76 A Crim R 302 at 305–308.

21 See generally, P. O'Shane, 'Back to the Future: Aboriginal Imprisonment Rates and Other Experiences' (1999) 3 FJLR 127.

perception of the individual, their attitude, their value and their potential to contribute to society viewed from the perspective of the sentencer's own values. The extent to which the sentencer perceives an Aboriginal offender's life to vary from the regarded norm will result in greater intervention by the State. In the absence of a full appreciation of Aboriginality in the individual case, therefore, racism by way of the adherence to values, systems, procedures and outcomes that exclude others of a different culture and background and further marginalise them may readily and unwittingly occur.[22] The RCIADIC has alerted us all to the danger of racism in our attitudes, practices and systems that have pervaded Australian history since colonisation and without conscious effort may continue to do so.[23]

In South Australia, the Nunga court provides an example of where the judiciary has adapted its practices on sentencing so as to ensure that it listens to the Aboriginal people and is fully informed as to the relevance of Aboriginality to the imposition of sentence.[24] Similar adaptations to the traditional sentencing process have occurred in many of the other States.

It is equally also important to point out that a sentencer must avoid any hint of paternalism or patronisation.[25]

Of course, it is not just a matter of considering Aboriginality so that the appropriate penalty is imposed minded of the circumstances of the Aboriginal person sentenced. It is also a matter of justice being done and justice contributing to the wider Australian community. In this regard, the criminal justice system works to reinvest the Aboriginal people with the dignity long denied them and contributes to supporting and strengthening the Aboriginal culture, which is crucial to the recovery of Aboriginal society and to Australia moving forward as a whole.

Listening and understanding is important. It is not unreasonable to state that the experience of the Aboriginal people has been that they are listened to, but not heard.[26]

22 See, M. Hinton, 'Sentencing and Indigenous Australians – Addressing Over-representation from Within the Criminal Justice System' in Johnston, Hinton and Rigney (eds) *Indigenous Australians and the Law*, Cavendish, 1997 at pp 127–131. In recent times, mandatory sentencing regimes are an example of indirect discrimination against the Aboriginal people. See, M. Davis, 'Mandatory Sentencing and the Myth of the Fair-Go', Paper presented at the Fourth National Symposium on Crime in Australia, AIC, 2001.

23 RCIADIC National Report, Vol 1, ch 1, pp 9–10.

24 In recent times, this practice has received legislative acknowledgment in South Australia. See Statutes Amendment (Intervention Programs and Sentencing Procedures) Act 2005, s 7 inserting s 9C into the Criminal Law (Sentencing) Act 1988. See also N. Lofgren, 'Aboriginal Community Participation in Sentencing' (1997) 21 Crim LJ 127.

25 *R v Fernando* (1992) 76 A Crim R 58 at 62–63.

26 In fact, the RCIADIC concluded as much: see RCIADIC National Report (1991) AGPS: Vol 1, Overview, p 5. See also H. Wootten, 'Aboriginal People and the Criminal Justice System' in C. Cuneen (ed), *Aboriginal Perspectives on Criminal Justice*, 1992, Sydney, Institute of Criminology.

Assumptions implicit in the application of stereotypes must be avoided. Assumptions implicit in the imposition of a set of values inconsistent with the reality of the person to be sentenced must be avoided if the law is to be applied equally. It is in this regard that the decision of the Victorian Court of Appeal in *R v Fuller-Cust* is particularly interesting.[27]

Mr Fuller-Cust pleaded guilty to a number of offences including multiple counts of rape committed upon two women in violent, humiliating and degrading circumstances. He was sentenced to 20 years' imprisonment with a non-parole period of 17 years.

Mr Fuller-Cust had previously been convicted and imprisoned on more than one occasion for offences of violence and sexual offences. A detailed plea in mitigation was made on behalf of Mr Fuller-Cust lasting four days and involving the hearing and tender of a significant body of evidence. Much of that evidence concentrated upon the personal history of Mr Fuller-Cust disclosing that he was born of an Aboriginal mother, that he was separated from her very early in his life, that he was placed in foster care, was sexually abused by a carer, was admitted to a children's home, had a disrupted and ineffectual education, began to offend and soon came into contact with the criminal justice system resulting in him being incarcerated for lengthy periods. Upon release, alcoholism and difficulty in relationships was apparent. The evidence also demonstrated the impact that this history had upon his emotional and social development. Significantly, the evidence showed attempts by Mr Fuller-Cust to explore his identity, particularly his Aboriginality, in addition to failed attempts to be reconciled with his natural mother. In short, Mr Fuller-Cust exhibited many of the commonly observed attributes of Aboriginal people who have been separated from their families as identified by the National Inquiry into the Separation of Aboriginal and Torres Strait Islander People from Their Families, not to mention the recurring factors identified by the RCIADIC.

Mr Fuller-Cust successfully appealed against his sentence, with the result that it fell to the Court of Appeal to sentence him afresh. In doing so, the Court had to determine what weight should be given to his Aboriginality. Batt JA, with whom O'Bryan AJA agreed, said:

> So far as the applicant's Aboriginality is concerned, the law, as I understand it, is that the same sentencing principles apply to an Aboriginal offender as to any other offender, but there may be particular matters which a court must take into account in applying those principles which are mitigating factors applicable to the particular offender, including disadvantages associated with the offender's membership of the Aboriginal race: *Neal v The Queen: R v Rogers and Murray*; and *R v Fernando*. (The way of life of the offenders in those cases was far different from that

27 (2002) 6 VR 496.

> of the applicant in Geelong and elsewhere in Victoria.) The relevant matter on the evidence here, in my view, is that the applicant was brought up in the care that has been described, separated from his natural parents, and I have already dealt with its significance.[28]

Its significance Batt JA considered to be of minimal weight in the light of the nature and gravity of the offending.[29] What is disconcerting about the comment made by Batt JA is the statement contained in parentheses. That statement tends to indicate a belief on the part of Batt JA that, because Mr Fuller-Cust was not the sort of Aboriginal person who lived on his community's traditional lands in accordance with his community's traditional ways, his Aboriginality was of a degree that did not attract much weight. There is an assumption made that ignores what it has meant to Mr Fuller-Cust to be an Aboriginal person. That assumption suggests that an Aboriginal person necessarily abandons his or her culture proportionate to his or her participation in the broader Australian community. It assumes that Aboriginal culture does not impact upon the life of an Aboriginal person who is educated and lives in the city. That is incorrect and undermines any claim to have correctly understood and weighed the relevance of Mr Fuller-Cust's Aboriginality to the imposition of sentence.[30] By contrast, Eames JA, who was in the minority, considered:

> Considerations arising from an offender's Aboriginality may exist whether the Aboriginal person is living in an urban or rural situation. In any instance the Court is seeking to gain a proper appreciation of the circumstances of the individual offender for the purposes of sentencing, including such factors relevant to that offender as the person's own experience as an Aboriginal person.
>
> When regard is had to the welfare and other expert reports which were tendered before the learned sentencing judge it emerges very clearly that far from his Aboriginality being an irrelevance to the circumstances in which the offending conduct occurred, it is pivotal. Indeed, the history of the applicant has remarkable similarities to many of the cases reported upon by the Royal Commission into Aboriginal Deaths in Custody. The impact of a person being separated from family, endeavouring to regain contacts with that family, being rebuffed in those efforts, and thereupon suffering anxiety about being denied the opportunity to fully embrace his or her Aboriginality, was often addressed in individual reports and in the findings of the final report of the Royal Commission.

28 Above n 27 at [60].

29 Ibid.

30 Op cit, nn 18 and 19. See also R. Edney, 'The Stolen Generation and Sentencing of Indigenous Offenders' [2003] ILB 16.

> The Commissioners recognised the impact of a person, in those circumstances, being socialised not into the family and kin network which would otherwise be the experience of an Aboriginal person living in urban circumstances but being socialised, instead, by the need to survive in institutional communities, including juvenile detention facilities and homes. That is not to say that in all cases of such separation the impact on the child in later years must have been adverse: that possibility, however, needs to be recognised.[31]

The difference in approach is stark. By referring to the judgment of Brennan J in *Neal v The Queen*, Batt JA purports to apply the correct sentencing principle.[32] But does he? Undoubtedly, Mr Fuller-Cust's Aboriginality explains his behaviour. It then necessarily informs the Court of the stressors in his life that, combined, have led him to offend. An understanding of those stressors, in turn, is crucial to the Court determining how the public is best to be protected in the future from the likelihood of Mr Fuller-Cust reoffending. In addition, an understanding of those stressors is crucial to an accurate assessment of the gravity of his conduct in terms of his moral blameworthiness. Further, Batt JA's assumption that the impact of Aboriginality upon an Aboriginal person who is educated and lives in an urban environment is necessarily lower is suggestive of ethnocentrism.[33]

So far, this chapter has sought to point out that Aboriginal people remain over-represented in our prisons, that that over-representation is inextricably linked to the disadvantage that Aboriginal people in Australia continue to suffer, that this disadvantage is the direct consequence of colonisation and dispossession – it is what it means to be Aboriginal in contemporary Australia. Further, that disadvantage or consequence of being Aboriginal in contemporary Australia pervades almost every aspect of an Aboriginal person's life in one way or another and is, therefore, highly relevant to the determination by a court of the appropriate penalty to impose upon an Aboriginal offender. In this connection, there has developed throughout Australia a strong body of case law. In passing, we have also sought to point out that, in accounting for Aboriginality, sentencers must be vigilant against the possibility of applying negative and potentially racist stereotypes, of permitting misguided assumptions about the Aboriginal people to hold sway, of misunderstanding cultural difference and, against the background of that misunderstanding, compounding the disadvantage Aboriginal people suffer by imposing penalties that reflect a value system that does not equate to the Aboriginal offender's reality.

31 Above n 27 at [91–92]. A similar approach was taken by Gray J in *Rae v Police* [2002] SASC 270.

32 (1982) 149 CLR 305: reproduced in the quotation taken from *R v Clarke* above; op cit, n 17.

33 See Council for Aboriginal Reconciliation, Key Issues Paper No 5, *Addressing Disadvantage*, 1994, AGPS, Canberra.

We have also made reference to the importance of ensuring that all relevant information as to an individual's Aboriginality and what it means to him or her as they go about their daily lives is before a sentencer.

At this juncture, we pause to make one further observation: judges sentence in the context of a system that assumes that the imposition of a sentence and the reasons for it will be conveyed to the wider community. It is presumed that everyone charged with a criminal offence understands the workings of the criminal justice system. For those ultimately convicted of an offence, it is necessary that they understand the purposes of their punishment and why a judicial officer has made a particular decision or arrived at a particular penalty. If this understanding is lacking, the whole legal process is meaningless. A defendant's inability to understand the effect of sentencing remarks that are designed to address issues unique or personal to them arguably renders the sentencing process inconsequential and of little wider benefit.

The assumptions that are made by the system are valid in relation to non-Aboriginal Australia, which is serviced by media organisations responsive to the dominant culture. However, a moment's reflection reveals that the same cannot be said in relation to Aboriginal Australia, particularly in relation to Aboriginal people living in remote communities. As the High Court observed in *Ebatarinja v Deland* when speaking about court processes generally:

> The appellant is a deaf mute Aborigine who was born on 2 March 1978. He is unable to communicate except by using his hands to ask for simple needs. He does not know that he has been charged with murder or other offences and is unable to communicate with his lawyers. He is unable to follow legal proceedings. It is possible that he could be taught to communicate through sign language but, even if that can be done, it seems unlikely that it would be done in the near future . . . If the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial. In *R v Willie*, Cooper J is reported to have ordered four Aboriginal prisoners to be discharged on a charge of murder when no interpreter could be found competent to communicate the charge to them.[34]

This observation is particularly relevant to sentencing and the concept of personal and general deterrence.

Personal deterrence aims to prevent the offender from engaging in similar antisocial and criminal behaviour in the future. It operates on the assumption that a convicted offender understands what is being said to them by a judicial officer and that the sentencing remarks have a personal relevance. General deterrence aims to deter others by setting an example of what will occur should they engage in the same kind of behaviour in the future.

34 [1998] 194 CLR 444 *per* The Court at [3].

As the High Court observed in *Ebatarinja v Deland* above, the courts have a duty to ensure that an offender understands what is being said in court and that the necessary arrangements are made for the use of an appropriate translating service. Without strict adherence to these considerations, an offender has no opportunity to reflect upon a judicial officer's remarks or proper awareness of the need to alter their behaviour. Sentencing remarks are almost always spoken and published in English. This means that it is not easy for offenders whose first language is not English to understand or access the remarks at some later time. Many do not to have a sufficient level of comprehension to make meaningful changes to their lives or take the remarks or their sentiments back to their often remote communities in a useable form.

Unless persons within an offender's community are made aware of and understand a court's sentencing remarks, then the remarks will not be appropriately recognised or acted upon. In less remote communities, the media plays a significant role in disseminating information relevant to sentencing. However, in remote communities, it is arguable that such dissemination is not as meaningful or as widespread. Issues of disadvantage and socio-economic conditions provide an explanation, but the other more obvious difficulty is with language comprehension.

In South Australia, some effort has been made on a piecemeal basis to overcome such difficulties. In *R v Scobie* and *R v Mitakiki, R v Umula* and *R v Stevens*, language difficulties arose during the sentencing process.[35] In particular, some words and expressions and legal terminology could not be translated into Pitjantjatjara. Alternative phrases and expressions had to be found and used in an attempt to convey the meaning of the judge and counsel. The process was time-consuming, but necessary.

Although security issues meant that Mitakiki, Umula and Stevens were sentenced in Port Augusta, some seven-and-a-half hours from their homelands, the Court directed that copies of the sentencing remarks be translated into Pitjantjatjara and provided to the offender and other persons within the offender's communities on the Yankunjatjara and Pitjantjatjara lands. Further, arrangements were made for the remarks to be broadcast in Pitjantjatjara by the radio station that serviced the Lands. This unique initiative was undertaken in an effort to address the difficulties experienced in these particular cases and also those faced by offenders regularly appearing before the South Australian courts sitting on the northern circuit.

One downside to the initiatives taken in *R v Scobie* and *R v Mitakiki, R v Umula* and *R v Stevens* was the time taken to implement the judge's directions. The dissemination of the details of the offending and the offender's circumstances quite some time after the event and the sentencing process had

35 *R v Scobie* (2003) 85 SASR 77; *R v Mitakiki*, unreported, 17 December 2002, SASC 269/02; *R v Umula*, unreported, 17 December 2002, SASC 260/02; and *R v Stevens*, unreported, 17 December 2002, SASC 261/02.

concluded effectively re-agitated the matter within the community at a time when, from the offender's perspective, the punitive process had been finalised. However, the effect of proceeding in this way was, for the most part, positive in that a long-standing problem that had seemingly not previously been adequately addressed was identified and resolved.

Solving some of the complex issues associated with the ineffective interpretation of the many Aboriginal languages spoken today in our criminal justice system may go some way towards addressing the disadvantage experienced by remote offenders whose first language is not English.

Of course, it is one thing to acknowledge disadvantage and account for it in determining an appropriate penalty for an Aboriginal offender and explaining it; it is quite another to implement a correctional regime that, amongst other things, is intended to assist an Aboriginal offender in avoiding future contact with the criminal justice system, in addition to assisting him or her to free themselves from the negative aspects of the bonds of colonisation and dispossession. Whatever a sentencer may seek to achieve in imposing a custodial or non-custodial penalty can be undermined absolutely if executive governments, which are responsible for the implementation of such penalties, do not commit the resources necessary to the achievement of these objectives. In fact, it goes further than that. The failure by Executive governments to provide the necessary assistance and services that the Aboriginal people require in order to redress the imbalance that is the product of dispossession and colonisation perpetuates the disadvantage experienced by the Aboriginal people and directly contributes to their over-representation in custody. The RCIADIC found this to be the case and the South Australian case of *R v Scobie* is illustrative of this.[36]

Johnny Scobie was a traditional Pitjantjatjara man who was raised at Indulkana and Coober Pedy in central-north South Australia. His command of the English language was poor. His age was somewhere between 35 and 55 years and he lived between Pt Augusta, Coober Pedy and the Anangu Pitjantjatjara Lands. He had worked on stations and in Aboriginal communities. Like many Aboriginal people in that part of Australia, he had indulged in petrol sniffing and had a long-standing alcohol dependency that had affected his cognitive functioning.

Mr Scobie had committed sexual offences involving children in 1988, 1999 and 2000, resulting in a paedophile restraining order being made against him. Breach of that order saw him returned to the courts and, in particular, the Supreme Court, where the Director of Public Prosecutions sought an order that he be detained indeterminately on the basis that he was incapable of controlling his sexual instincts. That application was unsuccessful, leaving the Court with the task of sentencing Mr Scobie for acting in breach of the restraining order.

36 (2003) 85 SASR 77; See also 'Case and Comment: R v Scobie' (2004) 28 Crim LJ 179.

The failed application for an indeterminate sentence exposed the fact that, despite his being involved with the criminal justice system for more than ten years, the system had never attempted to address the factors that led Mr Scobie to offend. Identifying and addressing these factors highlighted Mr Scobie's need for many of the support services contemplated by the RCIADIC. The result was a perceived tension between assisting Mr Scobie and protecting the community. The solution was for the Court to remain seized of the matter over a period of over 18 months, during which it convened at regular intervals cajoling the executive into providing treatment and services to Mr Scobie that he had never previously received. This necessitated the Court acting in an interventionist and inquisitorial manner in order to obtain the cooperation and commitment of the executive to a management plan that provided a satisfactory level of protection to the community and, in particular, Mr Scobie's community, while at the same time catering for the needs of a traditional Aboriginal man with limited English and impaired cognitive functioning. The result was the imposition of a non-custodial penalty that provided for the ongoing supervision and treatment of Mr Scobie in his own community, with the acceptance and assistance of that community. In this way, the community was best protected.

The recommendations of the RCIADIC featured prominently in the matter. The Court observed the failure of the executive to implement the recommendations and the fact that there had previously been no effective measures in place to address Mr Scobie's offending behaviour. Gray J observed:

> In this case the Royal Commission recommendations were eventually implemented. The proceedings tested their effectiveness. The end result is that after two years, Mr Scobie has been assessed, released from custody, treated, supervised and sentenced. He has been sentenced within his geographically remote community. The community have been protected but at what cost?
>
> The Royal Commission recommendations were made with a view to ensuring that Aboriginal persons involved in the criminal justice system were properly protected by that system. The recommendations contemplate that the benefits be readily available. However, in this case, the recommendations were only complied with on an ad hoc basis because of the court's directions. The full range of sentencing options only became available to the court after considerable effort and perseverance. It is probable that Mr Scobie would have spent less time in custody and that his rehabilitation would have progressed more rapidly if protocols facilitating compliance with the recommendations as a matter of course, rather than on an ad hoc basis, had been established.[37]
>
> . . .

37 (2003) 85 SASR 77 at 96.

> Mr Scobie does not appear to have received any benefit from the Royal Commission recommendations through the 1990s. Had these recommendations been implemented his problems might have been identified, his treatment commenced and his condition resolved more than a decade earlier. The community might have been protected and Mr Scobie could have avoided years of imprisonment. Commentators have remarked about the failure of governments to implement the Royal Commission recommendations despite their general support. It is unlikely that Mr Scobie's experience is an isolated one.[38]

In South Australia, there are other examples of the Supreme Court calling the executive to account by invoking the recommendations of the RCIADIC as now constituting an expression of community sentiment to be taken into account in the exercise of a judicial discretion, or a benchmark against which actions taken by the Executive will be judged.[39] Such a development in the jurisprudence of this country is to be welcomed. It is unfortunate that it has not been matched by action on the part of the Executive in the implementation of the recommendations of the RCIADIC despite the numerous public statements of a commitment to do so. As one of us has written elsewhere, *R v Scobie*:

> . . . .is of great importance because it demonstrates that, despite a commitment by the judiciary to applying principles in sentencing that are sensitive to the impact of history and the consequent plight of Aboriginal people in contemporary Australian society and that, generally speaking, reflect the findings of the Royal Commission into Aboriginal Deaths in Custody (hereafter the RCIADIC), those principles ring hollow if the Executive government does not implement the recommendations of the RCIADIC in a manner that will effectively complement the task and intentions of the judiciary. Furthermore, this is a remarkable case because it will move discussion of sentencing principles that uniquely apply to Aboriginal people from the theoretical to the practical, from matters of debate to issues of explanation and exploration. Led by the judiciary, the Executive government in South Australia has, in the case of Johnny Scobie, unwittingly undertaken a pilot program that has revealed the shortcomings in the past approach of the Executive to the implementation of the recommendations of the RCIADIC and provided direction for the future. It is a particularly valuable pilot program because Johnny Scobie's lifestyle presented many obstacles that are not unique nor unimaginable but are too often referred to in the abstract for reasons of resource implications resulting in them not being adequately

38 Supra n 37 at 110.

39 See for example, *Robinett v Police* [2000] 78 SASR 85; *Gray v Police* (2004) 88 SASR 270.

> tackled by governments. As a guide to governments that have time and again expressed a commitment to the implementation of the RCIADIC, the experience of the court in *R v Scobie* as documented by Gray J is invaluable.
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> . . .
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> It goes without saying that the principle objective of the recommendations of the RCIADIC was to reduce the number of Aboriginal people in custody. Many of the recommendations are promulgated against a background of acknowledging the debilitating consequences of dispossession and the resultant need to empower the Aboriginal people so that they can truly participate in contemporary Australian society as equals. The work of the RCIADIC has starkly illuminated for all what it means to be an Aboriginal in contemporary Australia. It reinforces sentiments expressed in judgements to the effect that the Aboriginality and the overrepresentation of Aboriginal people in custody not only justifies the courts in this approach, but demands that it be adopted.
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> . . .
>
> But it is not all negative. *R v Scobie* demonstrates that the Executive has the capacity and the capability to tackle these issues successfully. Doubtless, each of the government departments involved in the *Scobie* matter is committed to the implementation of the recommendations of the RCIADIC.[40]

In July, 2006, the Council of Australian Governments (COAG) reported that it had agreed:

> . . . that a long-term, generational commitment is needed to overcome Indigenous disadvantage. COAG agreed the importance of significantly closing the gap in outcomes between Indigenous people and other Australians in key areas for action as identified in the Overcoming Indigenous Disadvantage: Key Indicators Report released by COAG in 2003.[41]

This is a welcome statement, albeit that it follows upon many other expressions of commitment made by governments to the Aboriginal people over

40 'Case and Comment: *R v Scobie*' (2004) 28 Crim LJ 179 at 179–180, 182 Mr Scobie has not been in further trouble for offending of this nature. The bond to which he was subjected has now lapsed. In late 2005, Mr Scobie came before the Circuit Magistrates Court at Fregon on the Anangu Pitjantjatjara Yankunytjatjara Lands. He pleaded guilty to failing to give sufficient warning before turning right, failing to truly answer and resisting police. These offences occurred during the Christmas period in Port Augusta. He received a community service order.

41 Council of Australian Governments – Communiqué – 14 July 2006. See http://www.coag .gov.au/meetings/140706.

time and particularly since the report of the RCIADIC was handed down. In the same communiqué COAG reported a deep-seated concern at the high levels of violence and sexual abuse within Aboriginal communities. A commitment was expressed to taking immediate steps to improve the safety of Aboriginal people and the broad framework for a coordinated response. Again, a welcome commitment. However, COAG then stated as follows:

> The law's response to family and community violence and sexual abuse must reflect the seriousness of such crimes. COAG agreed that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. All jurisdictions agree that their laws will reflect this, if necessary by future amendment.[42]

Consistent with this, the Commonwealth government has recently introduced the Crimes Amendment (Bail and Sentencing) Bill 2006, which, as its title suggests, amends the Crimes Act 1914 and prohibits a sentencer from taking into account customary law or cultural practice in assessing the moral blameworthiness of an offender who has committed a federal offence.[43] In the light of the learning of the RCIADIC and the National Inquiry into the Separation of Aboriginal and Torres Strait Islander People from Their Families, this is a retrograde step to be very much regretted. We can do no better than to quote Eames JA in *R v Fuller-Cust*, where His Honour said:

> To ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself. Not only would that offend principles of individual sentencing which apply to all offenders but in this case it would fail to identify the reasons for his offending and, in turn, the issues which have to be addressed if rehabilitation efforts are to successfully be adopted so as to ensure that he does not re-offend and, in turn, to ensure the long term safety of the public.[44]

The judiciary in Australia has done much in its development of sentencing

42 Ibid.

43 It is suggested that COAG's action is a response to a need perceived to arise from cases such as *The Queen v GJ* [2005] NTCCA 20. In that case, a 55-year-old traditional Aboriginal man committed sexual offences upon a 14-year-old Aboriginal girl. The girl had been promised to him in accordance with traditional ways. Those ways permitted him to act as he did. This was considered and accepted by the Crown to be a mitigating factor. The sentence imposed at first instance was one of 24 months' imprisonment suspended upon the accused serving one month. The Crown successfully appealed and a sentence of three years and 11 months suspended upon 18 months being served was substituted.

44 Above n 27 at 79.

principles to address Aboriginality so as to ensure that the law applies to all equally. In so doing, it has embraced and, where possible, applied the findings of the RCIADIC. Many of the chapters in this book demonstrate that Executive governments lag significantly behind the judiciary in their commitment to the Aboriginal people and to redressing disadvantage; of talk of commitment, resources, programmes and protocols, there is much; of effective action, however, there is significantly less.

The RCIADIC provides the blueprint and *R v Scobie* an example of its successful implementation. From a national point of view, the continued pursuit of the recommendations of the RCIADIC are essential to addressing not only the over-representation of the Aboriginal people in our prisons, but also to achieving reconciliation. It is an important nation-building goal that concerns us all. It has been 16 years or so since the RCIADIC reported. Much remains to be done and much must be done.

9 Water

Aboriginal peoples in Australia and their spiritual relationship with waterscapes

Neva Collings and Virginia Falk

In Aboriginal culture in Australia, there is no *clinical* distinction between the land and water, either of water that flows over the land, rests upon it or flows beneath it.[1] Land and water *interface* as 'equal components of "country", all require care and nurturing, and for which there are ongoing *cultural* responsibilities'.[2]

The contrast of Anglo-Australian definitions of what people refer to as the 'environment' is meaningless without direct reference to Aboriginal peoples. To refer to the land and the waters in Australia as simply an evolution of natural processes blatantly ignores the creation stories and Aboriginal law that underpin Aboriginal belief for their existence. A rock is not a rock. A waterhole is not just a waterhole. The meaning of Aboriginal life enriches the qualitative understanding of cultural landscapes and waterscapes in Australia.

In *Millirrpum v Nabalco Pty Ltd*, Blackburn J said:

> There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land, and everything that exists on and in it, are organic parts of one indissoluble whole.[3]

With the advent of Native Title legislation in 1993, the interpretation and evaluation of Aboriginal law and the spiritual connection of Aboriginal peoples in Australia has been a constant reminder that the value systems of Aboriginal peoples and non-Aboriginal Australia are generally in flux and represent long-standing cultural dichotomies in the way in which natural resources management and cultural difference is approached.

Anthony McEvoy, an Indigenous barrister, states:

> We reside in a world where our river systems are managed in a policy

1 Lingiari Foundation *Water Rights Project Onshore Water Rights Discussion Booklet*, February 2002, (emphasis added).

2 Lingiari Foundation p 6 (italics added to emphasise that culture defines actions).

3 (1971) 17 FLR 141 at 167.

> framework designed for extractive purpose [and] there is no room for spiritual considerations and it would be naïve for Aboriginal people to think such a framework has any ability to protect the spiritual aspects of the rivers. It would also be naïve to think that heritage protection, native title or land rights law can protect those spiritual interests.[4]

Indigenous water rights

International standard setting

Unlike Canada, the USA and New Zealand, among others, Australia does not have a domestic treaty, Bill of Rights or Human Rights Act to provide Aboriginal peoples in Australia with legal certainty or a formalised negotiation process at law. Aboriginal Australia has to rely on political 'goodwill' and the third-party status of natural resources management. The few successful Native Title applicants that have basic landholder rights are not representative of the rest of Aboriginal Australia. Certainty and political favour are not aligned with Aboriginal issues.

International laws have had a small, but significant, impact on attaining rights and interests to land and waters. The length of Native Title proceedings in the courts is testimony to Aboriginal peoples' persistence, not to the provision of a 'user-friendly' Native Title process. Given the plethora of international law instruments and committees to drive necessary change, there is still an enormous gap between polity and reality.

Indigenous peoples throughout the world share in the common experiences of Aboriginal Australians. The Indian Treaty Council at the United Nations Permanent Forum of Indigenous Issues, noted:

> Indigenous peoples are witnessing the increasing scarcity of fresh water, and the lack of access that Indigenous communities and other life forms such as the land forests, animals, birds, plants, marine life, and air have to waters, including oceans . . . Indigenous peoples are witnessing governments creating commercial interests in water [that] lead to inequities in distribution and prevent access to the life giving nature of water . . . Water is being treated as a commodity and as a property interest that can be bought, sold and traded in global and domestic market-based systems.[5]

4 T. McEvoy (2006) 'Water – Fluid Perceptions' *Transforming Cultures*, eJournal, 1 (2), p 2.

5 International Indian Treaty Council, *Statement Regarding Water, Climate Change/Global Warming and the Stockholm Convention on Persistent Organic Pollutants (POPs)*, Permanent Forum on Indigenous Issues, Third Session, New York, 10–21 May 2004, Agenda Item 4(b) ('Environment') of the Provisional Agenda, available online at http://www.treatycouncil.org/PDFs/PF3_Agenda4_b_Environment_English.pdf.

The articulation of Indigenous people's human rights is encapsulated in the draft Declaration on the Rights of Indigenous Peoples, in the International Covenant on Economic, Cultural and Social Rights, and the International Covenant on Civil and Political Rights, for example. The Convention on Biological Diversity makes reference to the rights of the land and waters of Indigenous peoples. Further, the Third World Water Forum 2003 produced a Declaration, which recognises:

> . . . the special relationship that Indigenous peoples have with water . . . the environmental threats to water and the right of Indigenous peoples to make decisions at all levels regarding water.[6]

Australia has ratified the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Racial Discrimination Act (RDA) (Cth) 1975 was a result of the parliamentary process. Although it is a difficult matter to legislate and diffuse conditioned racialised belief systems, the RDA 1975 has positively impacted upon Native Title provisions generally. It is yet to be applied in the courts in respect to the new water reforms in Australia and it is far from clear that this will ever happen.

The RDA 1975 creates an obligation on governments to deal with Indigenous interests in a non-discriminatory manner and agencies must exercise their power in a manner that is consistent with it. For example, s 7 of the Native Title Act (NTA) 1993 provides that the NTA 1993 is to be 'read and construed' subject to the provisions of the RDA 1975.[7] The restriction in the allocation of water and access to water may well muster a new legal paradigm that may see the application of the RDA 1975. Further, there may be a strong case for 'special measures' in light of the Schedule in the RDA 1975 pursuant to Article 1 (4) of CERD, which states:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial and ethnic groups or individuals requiring such protection as may be necessary . . .[8]

The rights of Indigenous peoples in international law are expressed, for example, in Article 27 of the ICCPR as 'the right to enjoy culture in community

6 Indigenous Declaration on Water, Third World Water Forum, Kyoto, March 2003.

7 G. McIntyre and G. Carter, 'Future Acts affecting Native Title Offshore and Injunctive Relief', in B. Keon-Coen, (ed), *Native Title in the New Millennium*, 2001, Aboriginal Studies Press, Canberra, p 274.

8 Racial Discrimination Act (Cth) 1975, Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination in the Schedule of the RDA. Section 9 of the RDA should be read to appreciate the breadth of human rights protection.

with other members of the group'.[9] The United Nations committee of CERD recommended that:

> . . . state parties recognize and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources . . .[10]

It is interesting to note that a wide variety of waterscapes such as wetlands have been referred to in the Convention on Wetlands of International Importance (RAMSAR Convention) to 'constitute a resource of great economic, cultural, scientific and recreational value'. Aboriginal Australians would argue that wetlands are the 'kidneys' of the waterscape and filter the floodwaters that allow the good health of the water and the supply of food sources for Aboriginal communities.

The Commonwealth Environment Protection and Biodiversity Conservation Act 1999 and its regulations embody elements of the RAMSAR Convention and the Convention on Biodiversity, but the instruments of international law are mute in acknowledging the primary position of Indigenous peoples within the natural world and signify a passive recognition of Aboriginal peoples in Australia that does not pave the way for any 'practical reconciliation' of past or present inequities in respect of Aboriginal Australia. It strips away the intense and ongoing interrelationship of Aboriginal people with how and why the lands and waters and all living things were made.

From an Aboriginal perspective, a 'cultural significance' does not interpose with commercial exploitation or non-Aboriginal science. Materialism within a spiritual relationship is an uneasy bedfellow, as ethics is with corporate growth.

The ecological sustainable development of Aboriginal waterscapes and cultural landscapes hold 'intergenerational equity', which should be maintained as a living spiritual inheritance valued by every Australian, and not objectified as a historic museum piece. Water management defines Aboriginal creation of water and land in words such as 'ecology', 'biodiversity', 'culture' and 'heritage', 'environmental flows', 'natural flood regimes', 'native vegetation' or 'native flora'. The categorisation of Aboriginal spiritual lands and waters are narrowly dissected into sectors of a whole. In spite of international law, Aboriginal peoples in Australia do not enjoy the global fruits of conventions or draft declarations. A library of research reports recount continued racial disadvantage.

9 ICCPR.

10 Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No 23: Indigenous Peoples (1997), para 5, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN document HRI/GEN/1/Rev.6, 12 May 2003, p 212.

Native Title recognition

The rights and interests of Aboriginal and Torres Strait Islanders to land and waters have been recognised in the Native Title Act (NTA) 1993 within the context of customary non-commercial use. The Native Title legislation and the rigours of the Australian legal system have made progress in reclaiming Aboriginal land and waters highly speculative. Current national and state water reforms have commodified water (for example, in water trading), hence the escalation of water pricing, which may obstruct or extinguish a Native Title claim to customary Aboriginal waters.

The cultural practice of Aboriginal peoples in orally passing down knowledge is considered as hearsay in evidence and the demands for physical sites connecting to unbroken customary practice[11] is no meagre hurdle given the wide-ranging government policies that have controlled every aspect of Aboriginal communities and discredited Aboriginal knowledge.

In *Mabo v Queensland (No 2)*, the recognition of Native Title in Australian law was indisputable:

> Native title has its origin in the traditional laws acknowledged and the customs observed by the Indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common tenure but it is recognized by the common law. There is, therefore, an intersection of traditional laws and customs with the common law.[12]

The NTA 1993, s 212 confirms the Crown's right to use and control the flow of water. Section 211 preserves the right of Native Title holders to fish or engage in other traditional activities and limited rights of access to engage in traditional activities, although the priority of the environment and scientific research is higher than Indigenous interests. The definition of 'waters' in the NTA is defined as 'a sea, river, lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters or bed or subsoil under or airspace over any waters or the shore, or subsoil under or airspace over the shore, between the high and low water mark'.

The word 'traditional', which is defined in the NTA 1993 and qualified throughout the Act, maintains a view of Aboriginal communities in Australia as if existing in a colonial time warp within which spears and hairnets are acceptable and no contemporary adaptation is tolerated. However, the body of knowledge handed down in the Aboriginal family to the next generation does not exist in a vacuum, and this limited view upon which Native Title claims are considered is also fettered by the conversion of leases in perpetuity, Crown land conversions to freehold title, the proposed planning of public purpose areas, and a considerable amount of extinguished title to land and waters.

11 See the Canadian decision *Delgamuuk v British Columbia* [1997] 3 SCR 1010.
12 [1992] 175 CLR 1 *per* Brennan J at 64.

Among the small percentage of successful Native Title claims, the current negative reaction by West Australian and federal governments and other non-Aboriginal stakeholders to the successful *Nyoongar* case in Perth, Western Australia, is extraordinary. In that case, Native Title was granted in the Federal Court for the first time over a small area of a city, excluding offshore islands and land and waters below the low-water mark[13].

The 1998 amendments to the NTA 1993, in particular, the changes to water rights under which Native Title claimants now have a procedural 'right to comment' in place of 'a right to negotiate' as in the NTA 1993, exhibits the 'watering down' and the entrenched aversion to the equitable sharing of Aboriginal cultural areas. In corporate Australia, the hub of negotiation is a key element in bargaining a commercial deal; however, Aboriginal Australians appear to have a modicum of third-party rights, and any legal interest is whittled away by protracted Native Title appeals and legislative amendments to the NTA in order to further limit future management and cultural connection to the land and waters. Native Title decisions as to waters have not faired well.

As reported by the former Aboriginal and Torres Strait Islander Commissioner:

> The grant of future commercial and other interests regarding the use of waters or water resources always take precedence. The effect of these provisions is that governments will be able to grant fishing licences and leases, and permits and authorities in respect of waters without any consideration of the effect that these grants may have on native title interests . . .

In the Water Management Act 2000 (NSW), a Native Title holder is legally entitled to take and use water in the exercise of his or her customary practice, and does not require a water access licence.[14] However, the maximum amount of water that Native Title holders are allowed to take is regulated by law.[15]

To date, the majority of Native Title claims have been over coastal waters with few claims over inland waters. *In respect to a Native Title claim on inland waters*, the extent of legal recognition in law is unclear in some circumstances.[16] The NTA 1993 and the Native Title Amendment Act 1998 require the Native Title applicant to demonstrate that traditional laws and customs confer entitlement and responsibilities in relation to water, including 'where

13 K. Boase, 'Title Over Perth: Celebrations Tempered By Talk of Challenge' (2006) *Koori Mail*, 27 September, p 4. See *Bennell v State of Western Australia* [2006] FCA 1243. Federal Court Appeal in *Bennell* is pending judgment.

14 Water Management Act 2000 (NSW), Div 3 s 55(1).

15 Ibid, Div 3 s 55(3).

16 Jonas Ball, Sinclair Knight Merz Pty Limited, *Inland Waters Theme Report: Australia State of the Environment Report 2001*, 2001, CSIRO Publishing on behalf of the Department of the Environment and Heritage, Commonwealth of Australia, available online at http://www.environment.gov.au/soe/2001/inland/introduction-4.html.

water is seasonally scarce, knowledge of seasonal variation and the capacity to support large communities'.[17]

The Federal Department of Environment and Heritage contends that:

> . . . it is likely that the majority of native title rights granted in respect to inland waters will be confined to activities such as hunting, fishing, gathering, cultural and spiritual activities for the purpose of satisfying the personal, domestic or non-commercial needs of native title holders . . . the vast majority of claims the Crown will retain the existing right to use, control and regulate the flow of water.[18]

The prospect for the legal recognition in Australian law of Native Title rights to water flows that feed into sacred inland water sites such as waterholes is likely. Aboriginal law recognises the existence of water sites that have multiple levels of Aboriginal story and cultural values. It is a well-established common law principle that no one has any property in flowing water and that Australian case law in Native Title has determined that Native Title rights and interests cannot be recognised if to do so 'fractures a skeletal principle' of the Australian legal system.[19] Aboriginal Australia may wait some considerable time for a landmark case to eventuate.

Native Title and future Acts

The effect of s 24HA of the NTA 1993 is to allow governments to regulate and control inland waters and to issue licences to take and use such waters with minimal procedures for the protection of Native Title. Future developments include the adoption of water management plans and the licensing regime.[20]

The effect of the NTA is that where a person has a right obtained through some form of 'valid act' such as a water licence granted by the government, that right is protected. To the extent that Native Title is impaired, compensation applies.[21] In the acquisition of lands, compensation is on 'just terms':

17 P. Lane 'Native Title and Inland Waters' (2000) *Indigenous Law Bulletin*, 4 (29) at 11.

18 Jonas Ball, Sinclair Knight Merz Pty Limited *Inland Waters Theme Report: Australia State of the Environment Report 2001*, 2001, CSIRO Publishing on behalf of the Department of the Environment and Heritage, Commonwealth of Australia, available online at http://www.environment.gov.au/soe/2001/inland/introduction-4.html.

19 J. Altman and M. Cochrane, *Report to COAG from the CEO's Group Discussion Paper* in *Indigenous Interests in Water: A Comment on the Water Property Rights*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 21 February 2003.

20 R. Bartlett, *Native Title in Australia*, 2000, Butterworths, Sydney at p 338.

21 In accordance with the NTA, Division 5, 'where an act of government appeals, amends the management and regulation of surface and subsurface waters and living aquatic waters the Australian Constitution provides compensation to be made'.

but it is unclear how compensation of this type applies to the valuation of water rights and markets.[22]

The New South Wales Native Title Services submission to the Commonwealth in 2003 raised a potential legal issue for Native Title holders, stating:

> . . . the commodification of water interests is likely to trigger the operation of section 24HA of the NTA but, depending on how such schemes are implemented, it may also give rise to consider section 24MA.[23]

The law is not settled on these issues.

The scope of customary water use in Native Title

Where water reforms of the Council for Australian Governments (COAG) generally pertain to private rights, the communal water rights in Native Title legislation, for example, in s 211 of the NTA 1993, are non-exclusive. As a 'non-exclusive right', the traditional owners do not have control over access to water resources or control over who will use the resource.

Morgan, Strelein and Weir in their paper on Indigenous water rights in the Murray Darling Basin support this position:

> The majority of native title rights granted in respect to inland waters will be confined to activities such as hunting, fishing, gathering, cultural and spiritual activities for the purpose of satisfying the personal, domestic or non-commercial communal needs of native title holders . . . the vast majority of claims the Crown will retain the existing right to use, control and regulate the flow of water.[24]

SOME COMMON LAW DEVELOPMENTS IN WATER RIGHTS AND INTERESTS

Post-*Mabo (No 2)*,[25] the status of water rights remains problematic and generally unresolved. The courts have recognised Native Title rights that are

22 J. Altman and M. Cochrane, *Indigenous Interests in Water: A Comment on the Water Property Rights – Report to COAG from the Water CEOs Group Discussion Paper*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 21 February 2003, p 4.

23 NSW Native Title Services Ltd, 'Submission to the Commonwealth Position Paper *Achieving Sustainable Water Management*', 10 February 2003 at p 6. Note, s 24MA applies to legislative Acts and their implications to Native Title holders, that is, 'the effect of the act on native title in relation to the land or waters is not to cause the native title holder to be in a more disadvantageous position than if the person/s held ordinary title'.

24 M. Morgan, L. Strelein and J. Weir, *Indigenous Rights to Water in the Murray Darling Basin: In support of the Indigenous Final Report to the Living Murray Initiative*, Research Discussion Paper No. 4, AIATSIS, 2004 at p 5.

25 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

not exclusive or commercial.[26] Native Title rights and interests to protect sites or areas of significance have also been recognised as including water.

In *Ward v Western Australia*,[27] Native Title was recognised as a 'bundle of rights' on land or waters.

Commonwealth v Yarmirr[28] was the first Australian case to make a decision with respect to Native Title over water. The Federal Court held that non-exclusive Native Title existed over areas of sea; however, an exclusive right could not succeed because a public right to fish in tidal waters exists.[29]

The Spinifex People v Western Australia[30] recognised a Native Title right to take water for the purposes of satisfying a personal, domestic, social, cultural, religious, spiritual or non-commercial communal need. This decision is to date the only Native Title rights recognised in flowing and subterranean waters.

In *Wik*,[31] Native Title rights and interests for the purpose of disposing of natural resources and manufactured items by trade, exchange or gift were recognised by the High Court. The right to dispose of natural resources taken from the waterways for commercial purposes was not recognised. Any Native Title rights to tidal and flowing water conferred on Native Title holders were such rights and obligations as the common law recognises.

Water reform: policy and law

Background

The far-reaching implications of the Commonwealth's National Water Initiatives reforms through the Intergovernmental Agreement between the Commonwealth, States and the Territories mean that for Aboriginal and non-Aboriginal Australians things remain clear in terms of the commodification of water: Australia will buy and sell water as the market price determines its private and public value. Indigenous Australians continue to value water for its cultural values and its social connection to the land and waters and all Aboriginal plants and animals that live and have lived on this continent for eons.

26 O'Donnell, 'Briefing Paper for the Water Rights Project, by the Lingiari Foundation and ATSIC', in *Background Briefing Papers: Indigenous Rights to Waters* at p 99.

27 *Ward v Western Australia* (1998) 159 ALR 483; on appeal to the Full Federal Court (2000) 99 FCR 316; on appeal to the High Court of Australia (2002) 213 CLR 1.

28 *Commonwealth of Australia v Yarmirr* (the Croker Island offshore claim) (1999) 101 FCR 171; on appeal to the High Court of Australia (2001) 208 CLR 1.

29 P. Lane, 'Native Title and Inland Waters' (2000) *Indigenous Law Bulletin* 29 (4) at p 11.

30 Mark Anderson on behalf of *The Spinifex People v State of Western Australia* [2000] FCA 1717.

31 *The Wik Peoples v State of Queensland and ors* (1996) 187 CLR 1.

The core of the recent national water reforms is that water is a part of Australia's 'natural capital', where new regimes include, in most jurisdictions, the *separation* of water access entitlements from land titles, separating water delivery from regulation, implementing revised water management policy and legislation and environmental benefit.[32] The objectives of the Intergovernmental Agreement are the uniform management of water.[33] A clear statement of commitment to Indigenous Australians is absent.

National water policy

The Federal Constitution of Australia relegates the responsibility for the control and management of inland water and waterways to the States. The Australian Constitution does not provide the Australian Parliament with an express power to make laws that regulate and manage inland waters.[34]

The principal forum in the development of a national water management policy is through the Council of Australian Governments (COAG). In 1994, COAG formed the Council of Australian Governments Water Reform Framework to address the past and current water management regimes in lieu of drafting new water reform policy and amending relevant legislation.[35]

The blueprint for the national water reform is the Intergovernmental Agreement on a National Water Initiative, signed initially by five of the seven governments, and by the Tasmanian government in 2006. The West Australian government has declined to sign the Agreement[36]. The signatory governments have agreed to make 'substantial progress' in water reform by 2010.[37] Paragraph 25(ix) of the Intergovernmental Agreement provides that the parties, in relation to water access entitlements and planning frameworks, will 'recognise indigenous needs in relation to water access and management'.[38]

Paragraphs 52(i) and 52(ii) of the Intergovernmental Agreement in relation to Indigenous access to water resources will provide:

(i) inclusion of indigenous representation in water planning wherever possible; and

32 Intergovernmental Agreement on a National Water Initiative Between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory, in the Preamble at p 1.

33 Intergovernmental Agreement, ibid, in the Objectives 23(i).

34 http://www.austlii.edu.au/au/journals/ILB/2004/9.html.

35 http://www.nwc.gov.au/NWC/index.cfm.

36 Ibid

37 http://www.nwc.gov.au/NWC/index.cfm, Intergovernmental Agreement, para 8.

38 Ibid.

(ii) *water plans* will incorporate indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed.[39]

Further, paras 53 and 54, state respectively that water planning processes will take into account the possible existence of Native Title and any water allocation to Native Title holders.[40] Putting aside these paragraphs that 'recognise' an Indigenous component to the new water planning process, this is a modest recognition of Indigenous status in light of international law.

In contrast to national themes of marketing water as 'natural capital', the National Land and Sea Management Conference 2005 in Alice Springs in the Northern Territory made recommendations on Indigenous aspirations in natural resource management that included Indigenous governance, traditional knowledge, caring for country, youth, employment education and training and economic development.[41] Recommendations by Indigenous Australians encompass the spectrum of cultural values with practical community solutions, in autonomy, self-sufficiency and the continuation of Aboriginal knowledge passed on through the generations.

These themes are instrumental to national policy by embodying Indigenous policy into Constitutional and State law to ensure water and the cultural values of Indigenous Australia are not drafted as 'policy on the run'. The use of 'passive' actions such as 'recognise' and 'acknowledge' place little more than a tick in a box and result in cultural mistrust.

National competition policy

In Australia, Aboriginal cultural values are generally regarded as subservient to the economic progress of the nation. Where any public purpose or planning requirement is proposed, the value of Aboriginal sites is doomed. Framed Aboriginal art engages interest; thousand-year-old traditions do not. Natural waterways continue to succumb to the urgency of improving and expanding 'the frontier'.

> Ecological and hydrological sciences were privileged as the authoritative sources of knowledge of the 'environmental values' and its catchment.[42]

39 Ibid.

40 Ibid.

41 Australian Government Natural Resource Management Programme, http://www.nrm.gov.au/.

42 S. Jackson, 'Compartmentalising Culture: the articulation and consideration of Indigenous values in water resources management', (2006) *Australian Geographic*, 37 (1), p 27: Jackson citing Merlan (1989, p 107).

Recognising Aboriginal interests in water

In the space of only several hundred years, and even less in other parts of Australia, there developed an unequivocal law amongst Indigenous peoples of this land and its islands, which regulated the competing interests of all Indigenous peoples. The clarity and knowledge born of sharing areas of land in lean times and the resulting restrictions in land use did not require shelves of legislation or regulations, or a non-familial intervener to interpret the law.

Today, Aboriginal people have to negotiate and litigate in order to have their rights and interests in water and land recognised and affirmed. The competition of other water users is fierce given the emphasis placed upon national productivity quotas, international market investment in Australia and prior water use regimes of allocating water licences. Seasonal cycles of flood and drought have long preceded the arrival of the English establishing their 'settlements'. As the English colony in Australia advanced ever more inland, resistance by Indigenous peoples was an illustration of protecting their land and waters.

Jackson, Storrs and Morrison in their essay on the recognition of Aboriginal interests stated:

> In most catchments, and particularly in those subject to development pressure where catchment planning is most needed, there are also likely to be significant non-Aboriginal interests, such as recreational fishing and tourism. Thus, the intracultural interactions contribute to complex sociopolitical catchment relations, as do the temporary interactions between Aboriginal and settler societies.[43]

Subsequently, the limited jurisdictional access to water for Indigenous customary and non-customary purposes runs counter to overarching international legal principles concerning the rights of Australia's Indigenous people whose matrix of rights associated with water should take priority to ensure sufficient water allocation for living cultural tradition.[44]

The NSW Water Management Act 2000

The NSW Water Management Act 2000 recognises the importance of maintaining the environmental health of the State's water, implementing new provisions on water sharing, new water dealings for licence holders, the

43 S. Jackson, M. Storrs and J. Morrison, 'Recognition of Aboriginal Rights, Interests and Values in River Research and Management: Perspectives from Northern Australia' (2005) *Ecological Management and Restoration*, 6 (2), p 109.

44 N. Collins, 'Water Rights and International Law', in Lingiari Foundation, *Background Briefing Papers: Indigenous Rights to Waters*, 2003 at p 65.

recognition of Native Title holders, and securing water for the environment, among other changes.[45]

Only the New South Wales Act states an open commitment to Aboriginal peoples to 'provide for the sustainable and integrated management of water sources of the State'. The objects of the Act refer to 'benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water'.[46]

The Water Management Principles expressed in s 5 of the Act refer to, inter alia, in respect to Aboriginal peoples:

> (2) Generally: . . .
> (e) geographical and other features of indigenous significance should be protected;
>
> (f) geographical and other features of major cultural, heritage or spiritual significance should be protected . . .[47]

Further, the establishment of management committees within the State, appointed by the Minister, creates positions for 'at least two committee members who must be Aboriginal, to represent the interests of Aboriginal people'.[48]

Native Title rights are recognised as a 'basic landholder right' in s 55 of the Act, which entitles Native Title holders to exercise their legal rights to take and use water, conditional to the regulations of the Act.[49] This does not authorise the construction of a dam or water bore without a water supply approval.[50]

Historically in New South Wales, the Water Act 1912 was passed to facilitate the development and use of water, applying to rivers above the tidal limit and to groundwater. The basic rights attributed to the Water Act 1912 were the riparian right for stock and domestic use, and any recognition of Aboriginal rights of interests was absent.

The water reform process in NSW established the development of Macro Water Sharing Plans in ss 5(3) and 9(1)(b) of the Water Management Act 2000, in consultation with the Catchment Management Authority. The water-sharing plans came into effect on 1 July 2004 to regulate sharing water between the environment and water users, tying water licences to the water-sharing plans. The cultural values of Aboriginal people have been acknowledged in three areas:

45 http://www.dipnr.nsw.gov.au/water/faq/faq7.shtml.
46 Water Management Act 2000, NSW, No 92, s 3 of Chapter 1, at p 2 of the Act. Reprinted July 2004.
47 Water Management Act 2000 NSW No 92, in Chapter 2, Part 1, Division 1, s 5 at p 4.
48 Ibid, pp 9–10, Part 2, ss 11–14.
49 Ibid, s 55(1) and (3) of the Act, p 32.
50 Ibid, s 55(2)(a)(b) of the Act, op.cit.

- cultural flow protection – to retain water in rivers and aquifers for specific cultural reasons in conjunction with the water-sharing plans;
- cultural licences – to allow access for Aboriginal people to extract water from rivers or aquifers for cultural purposes through a special purpose permit limited up to 10 megs per year; and
- commercial licences – to provide conditional extraction of water for Aboriginal people from some aquifers and some coastal rivers in high flow only, as a non-tradable licence.[51]

Environmental flows are distinct from a cultural flow: 'Rather than being synonymous with environmental flows, water flows which are needed to protect cultural values should be seen as overlapping.'[52] The Western ideological construction of Aboriginal cultural values strips the inherent nature of its endemic culture, which in turn minimises Aboriginal consultation and engagement in the use of water. In the Water Management Act, the word 'environment' is defined as all living things to include human beings.[53] From a customary Aboriginal perspective, the environment and culture are enmeshed.

> In circumstances where rights to water are being turned into a commodity and schemes for tradable water rights being expanded, it becomes increasingly important to ensure that Aboriginal cultural flows are secured in legislation as a non-tradable interest.[54]

The current status of water licences has also been amended. The NSW Water Management Act 2000 removed the requirement that only a landholder could have a water licence. Other changes are in making water licences available 'forever'. Also, the commencement of a public register for all access licences and the introduction of legislated water trading are new shifts in water management.

The changes to the nature of water licences may have a significant impact on Aboriginal people in NSW, given that, in previous times, water licences were available only to landholders and the majority of Aboriginal people had neither the financial capacity or legal status during the race-based policy and legislation to own land.

51 'Considerations for Designing Aboriginal Consultation for Macro Water Sharing Plans', 25 May–2 June 2006, Vol 1, Department of Environment and Conservation, NSW.

52 D. Craig, 'Indigenous Property Rights to Water: Environmental Flows, Cultural Values and Tradable Property Rights', Chair of Desert Knowledge, Charles Darwin University; Director, Indigenous Rights Program, Centre for Environmental Law, Macquarie University at p 14.

53 Water Management Act 2000, at p 288.

54 D. Craig, citing J. Behrendt and P. Thompson, *The Recognition and Protection of Aboriginal Interests in NSW Rivers*, OCP 1008, Healthy Rivers Commission of NSW, November 2003, pp 55–60.

> . . . it was those people who had water licences under the 1912 Water Act who were able to then convert such licences into water licences under the Water Management Act 2000. The result was that Aboriginal people were dispossessed of their water rights.[55]

Future amendments in the water-sharing plans and the development of case law under the Water Management Act 2000 and other related legislation may, in time, shed some light on the courts' interpretation of the water reform processes.

The NSW Aboriginal Water Trust

The Aboriginal Water Trust was proposed following the enactment of the Water Management Act 2000 and extensive consultation with peak Aboriginal organisations, particularly the NSW Aboriginal Land Council and NSW Native Title Services.[56]

The objectives of the Water Trust are to assist Aboriginal people in NSW to expand or establish water-based enterprises to enhance the participation of Aboriginal communities in the commercial water market through the provision of grant funding and other financial assistance.[57] Eligible projects can include the purchase of a water licence as a component of a business plan, the preservation of Aboriginal water knowledge through a breadth of culturally appropriate media, and other related water infrastructure requirements.

In contrast to the water-sharing plans and other water reform processes on a Commonwealth and State level, which embrace a balancing process of 'competing interests', the Water Trust is solely concentrated on Aboriginal projects in water and includes an eligibility criteria that incorporates the importance of Aboriginal cultural values in the grants process. This model is overseen by an Aboriginal Advisory Committee, which proposes projects to the Minister of the Department of Environment and Climate Change, formerly the Department of Natural Resources, to be funded.

55 T. McAvoy, 'Water-Fluid Perceptions' (2006) *Transforming Cultures*, eJournal, 1 (2).

56 Annual Report (2003–2004), 'Management and Use of Water', Department of Infrastructure, Planning and Natural Resources, Sydney.

57 Op cit.

10 Land rights, Native Title and Indigenous land use agreements

Fred Tanner

The Merriam people of the Torres Strait are 'entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands'[1]

Background

For the first 200 years of European settlement in Australia, governments and the courts refused to acknowledge Aboriginal traditional rights over lands. During that time, Australia had harboured two 'societies' that were separated by barriers of inequity and injustice, one with human and citizen rights and the other with none. Pastor Bill Hollingworth, in his address to the Council of Aboriginal Reconciliation, said: 'Our moral and legal rights have been neglected.'[2] It is not surprising then that Professor Garth Nettheim considered the High Court judgment in *Mabo* 'to be one of the most fundamental ever to have been considered by the High Court – fundamental at least in the sense of going to the very foundation of the Australian nation'[3] or that, as a consequence of that judgment, '[t]he legal and political position of Aboriginal and Torres Strait Islander people in relation to the non-Aboriginal Society must now be significantly different in a variety of ways'.[4]

Prior to the *Mabo* decision, the implementation of land law was dealt with by the colonising legislatures. The myth of *terra nullius* perpetuated that Aboriginal and Torres Strait Islander people had no valid interests in land outside of what was conferred by statute.[5] The law applied in Australia was that of the British Empire, which relied upon the presumption that the original inhabitants had no legitimate rights to land.[6]

1 *Mabo & Ors v The State of Queensland & Ors [No 2]* (1992) 175 CLR 1 at 217.
2 'Reconciliation and the *Mabo* Case', *Australia and Human Rights: Where To From Here? 15–17 July 1992, ANU.*
3 Profesor G. Nettheim, *Aboriginal Law Bulletin*, 2 (56), June 1992.
4 Ibid.
5 For example, Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), Pitjantjatjara Land Rights Act (SA) 1981, Maralinga Tjarutja Land Rights Act (SA) 1984.
6 *Cooper v Stuart* (1989) App Cas 286, 291.

In *Millirpum v Nabalco Pty Ltd* (*Gove*), which was brought in the Northern Territory, the Yirrkala people of the Gove Peninsula sought to halt mining on their traditional lands. The action failed. Blackburn J concluded that the 'doctrine of communal Native Title does not form and never has formed, part of the law of any part of Australia'.[7] His Honour reached this conclusion after an examination of Native Title decisions in other common law jurisdictions, which it is now widely concluded were misconceived.[8] Blackburn J recognised that groups of Aborigines in the Gove Peninsula area of the Northern Territory had a 'subtle and elaborate' system of law, highly adapted to their country,[9] and links to identifiable tracts of land that he described as primarily spiritual – but he also held that the doctrine of communal Native Title did not form and had never formed part of the law of any part of Australia. The decision was not appealed and the focus in Australia shifted for the next twenty years to securing Indigenous rights to land through legislation (land rights legislation) rather than by action in the courts.

In *Gove*, Blackburn J followed the decision of the Privy Council in *Cooper v Stuart*, despite the evidence. His judgment was criticised for supporting the *terra nullius* argument and for holding that communal title was never part of Australian common law.[10]

> Australia had been considered a ceded rather than conquered colony because of the European view that there was no unified political and legal system or authoritative representative with whom to negotiate a settlement and the terms of colonisation.[11]

In *Mabo*, Brennan J stated:

> The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of municipal law that territory (although inhabited) could be treated as a 'desert uninhabited' country. The hypothesis being that there was no local law already in existence in the territory . . . Ex hypothesi, the indigenous inhabitants of the settled colony . . . were thus taken to be without laws, without sovereign and primitive in their social organisation.[12]

Historically, it had been accepted that the land in the new colony was vested in

7 *Millirpum v Nabalco Pty Ltd* (1991) 17 FLR 141 (SC(NT)) at 244–245.

8 R. Bartlett, *Native Title in Australia*, 2nd edn, 2004, LexisNexis Butterworths Australia, pp 11–13.

9 *Millirpum v Nabalco Pty Ltd* (1991) 17 FLR 141 (SC(NT)) at 267.

10 A. Bradbrook, S. MacCullum and A. Moore, *Australian Real Property Law*, 1991, p 28.

11 N. Peterson and M. Langton (eds), *Aborigines, Land and Land Rights*, 1983, Australian Institute of Aboriginal Studies. Ruskin Press, Melbourne, p 3.

12 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 36.

the Crown. This was based upon the feudal landholding system of England. In this regard, *Calvin's Case* was considered the leading case.[13] Although that case had nothing to do with the colonies, the judges expressed a view that a 'new possession might be acquired, one by descent and the other by right of conquest'.[14] Despite this, several subsequent cases showed contrasting views.[15] In *Dutton v Howell*, for example, Sir Bartholomew Shower stated that 'settlers in unoccupied lands should be treated differently from those in conquered territories'.[16] On the other hand, Sir William Blackstone considered the concept of the power of the mother country over colonial possessions and concluded that settled colonies were those 'where the lands are claimed by right of occupancy only finding them desert and uncultivated, and peopled from the mother country'. Further he stated that not all of the laws of England were applicable to the settled colonies and that only those laws that were suitable were adopted by the colonies.[17]

The above commentary shows differences of approach to the classification of Australia at the time of the arrival of the colonisers. How do you determine if there are inhabitants who, from a European standard, are considered to be primitive? Eighteenth-century jurist Vattel, argued 'that a distinction should be made between "cultivated" and "uncultivated" lands in determining whether they could be obtained by conquest'.[18] This formed the basis of the principle of *terra nullius* upon which Australia was considered to have been 'settled'.

Land rights

Aboriginal people have occupied Australia for over 60,000 years and have evolved with the land, changing it and changing with it. Land is not only about the rocks, soil and minerals, but also a sustainable environment of which Aboriginal people are very much a part. Land for Aboriginal people is the core of their spirituality and sense of belonging; it is this concept that has been misunderstood. Europeans did not understand Aboriginal society and or their land 'ownership' system.

Native Title is the legal recognition of the rights and interests that Aboriginal people have in land and waters according to their traditions, laws and customs. A successful Native Title claim results in a determination setting out the rights and interests of the Native Title holders over the relevant piece of land.

By contrast, Aboriginal land rights arise under statutory schemes set up by federal, State and Territory parliaments. Statutory rights under these schemes

13 7 Co. Rep. 2a (1608): 77 ER 377, 2St. Tr 559.
14 A. Castles, *An Australian Legal History*, 1982, Law Book Company, p 1.
15 *Craw v Ramsay* (8) Vaughan 274 (1670); 124 ER; *East India Co v Sandys* 10 St Tr Col 371.
16 Castles above n 14, p 9.
17 Blackstone Commentaries Book 1, 2 at page 111.
18 Emer de Vattel, *The Law of Nations*, Dublin, MDCCXCII. Ch XVIII, pp 84–86.

are generally held by organisations representing the traditional owners of land. The concept of land rights for Aboriginal people provides a statutory basis whereby Aboriginal organisations can acquire title to land. Land rights legislation provides the strongest form of tenure for Aboriginal people, it provides inalienable Aboriginal freehold title to the land and the near-exclusive power to control development; however, it can be leased with the informed consent of traditional owners.

Land rights developed from the recommendation of Justice Woodward, Royal Commissioner into Aboriginal Land Rights, that lands be transferred to Indigenous peoples. The recommendation was applied in an inconsistent manner across the States and Territories, giving rise to the range of legislation that exists today. [19]

Indigenous Australians who make a land rights claim seek a grant of freehold or perpetual title to land from the relevant Commonwealth, State or Territory government. Land rights schemes are in place in the Northern Territory, Queensland, New South Wales, South Australia and Victoria. A title document to the land is issued and held by a community or an organisation, not by individuals. Restrictions may apply on selling or dealing with the land.

Native Title

The recognition of common law rights and interests of the Aboriginal and Torres Strait Islander people in land in 1992 and subsequent Native Title Act 1993 arguably provided a mechanism for the recognition of those rights and interests within the Australian legal system independent of the land rights legislative schemes.

The introduction of the Native Title Act 1993 (Cth) was seen as a mechanism for establishing a legislative regime to support the recognition of Native Title by the courts.[20] The recognition in Australian law that some Indigenous people continue to hold rights to their lands and waters that come from their traditional laws and customs created a significant shift in the balance of power with respect to land.

Native Title exists as a bundle of rights and interests in relation to land and waters where the following conditions are met:

19 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), Pitjantjatjara Land Rights Act 1981 (SA), Maralinga Tjarutja Land Rights Act 1984 (SA).

20 The objects of the Native Title Act 1993 (Cth) were:

- to provide for the recognition and protection of Native Title;
- to establish ways in which future dealings affecting Native Title may proceed and to set standards for those dealings;
- to establish a mechanism for determining claims to Native Title;
- to provide for, or permit, the validation of past acts, invalidated because of the existence of Native Title.

- the rights and interests are possessed under the traditional laws currently acknowledged and the traditional customs currently observed by the relevant Indigenous people;
- those Indigenous people have a 'connection' with the area in question by those traditional laws and customs; and
- the rights and interests are recognised by the common law of Australia.[21]

The Native Title Act 1993 also established the National Native Title Tribunal.[22] The responsibilities of the Tribunal include processing claimant applications for the recognition of Native Title made by Indigenous Australians.

For Indigenous people, Native Title existed even without the enactment of the Native Title Act because it is a form of title recognised by the common law. Native Title is about their history, culture and law. However, for the purposes of the Native Title Act, it is only where Indigenous people can establish that they have continued to follow their traditional laws and customs and maintained a link with their country that has not been extinguished that they may succeed in obtaining a determination by the Court.

Applications for Native Title may include the following areas:

- vacant or unallocated Crown land;
- some reserve lands;
- some types of pastoral lease;
- some land held by or for Aboriginal people or Torres Strait Islanders;
- beaches, oceans, seas, reefs, lakes, rivers, creeks, swamps and other waters that are not privately owned.[23]

Native Title does not affect public access areas such as parks, recreation reserves and beaches, nor does it take away anyone's valid rights and/or interests in land. Excluded are:

- residential freehold;
- farms held in freehold;
- pastoral or agricultural leases that contain grants of exclusive possession;
- residential, commercial or community purpose leases; and
- public works such as roads, schools or hospitals.[24]

Native Title rights claimed depend very much on the Native Title holders' traditional laws and customs and the capacity of Australian law to recognise the

21 National Native Title Tribunal website factsheets, available online at http://www.nntt.gov.au/publications/index.html.

22 For further details, see http://www.nntt.gov.au/.

23 http://www.nntt.gov.au/publications/index.html.

24 Ibid.

rights and interests emanating from those traditional laws and customs. Common terminology used in Native Title applications include, the right to possess and occupy an area to the exclusion of all others (often called a right of exclusive possession), and supplementary to this the right to control access to, and use of, that area.[25] Native Title rights claimed may also include a set of non-exclusive rights (where there is no right to control access to, and use of, the area). These may include the right to:

- live on the area;
- access the area for traditional purposes, such as camping or for ceremonies;
- visit and protect important places and sites on the area;
- hunt, fish and gather food or traditional resources such as water, wood and ochre on or from the area;
- teach law and custom on the area.[26]

Regardless of which Native Title rights are being claimed, they are still subject to Australian law in the same way as other peoples' rights. Native Title holders do not have the right to veto any future development; however, any third party may have to take their rights and interests into account. This sharing is sometimes called 'coexistence'. For example, a Native Title holder may have the right to go into and use an area where another person, such as a pastoralist, has the right to run a cattle business. Coexistence in a Native Title context means that both sets of rights are recognised over the area, but that the Native Title rights cannot interfere with the pastoralist going about his or her lawful business.[27]

Native Title representative bodies

Native Title representative bodies (NTRBs) are recognised under the Native Title Act 1993 (NTA). NTRB functions and powers are detailed in Division 3, Part 11 of the NTA,[28] and involve providing support to Native Title claimants

25 Ibid.
26 Ibid.
27 Ibid.
28 Native Title Act 1993, s 203B. Functions of representative bodies:

(1) A representative body has the following functions:
  (a) the facilitation and assistance functions referred to in s 203BB;
  (b) the certification functions referred to in s 203BE;
  (c) the dispute resolution functions referred to in s 203BF;
  (d) the notification functions referred to in s 203BG;
  (e) the agreement making function referred to in s 203BH;
  (f) the internal review functions referred to in s 203BI;
  (g) the functions referred to in section 203BJ and such other functions as are conferred on representative bodies by this Act.

and holders to make various applications under the NTA (including claimant and compensation applications) and to respond to proposed future acts ('future acts' are any proposed activity/development on land or waters that may affect Native Title rights). NTRBs also have a role in the negotiation of Indigenous land use agreements (ILUAs), which are voluntary agreements about the use and management of land or waters made between one or more groups and others (such as miners, pastoralists and governments). An ILUA is legally binding on all parties.

The Australian government resources NTRBs for this purpose from an allocation of funds provided for the Native Title system as a whole, and also provides operational and strategic support so that NTRBs can perform their statutory functions in accordance with their approved strategic and operational plans.

The Native Title Amendment Act 1998

A year after the commencement of the Native Title Act, there were still many aspects of the law that remained unresolved. The uncertainty between Native Title, pastoral and mining interests continues to be one of the biggest debates. The High Court's decision in *Wik*[29] upset the pastoralist and the farming

Other laws may confer functions.

(2) The functions conferred on a representative body by this Act are in addition to, and not instead of, any functions conferred on the representative body (whether in its capacity as a representative body or otherwise) by or under:

(a) any other law of the Commonwealth; or
(b) a law of a State or Territory.

Representative bodies to perform functions:

(3) Except as mentioned in ss 203BB, 203BD or 203BK, a representative body must not enter into an arrangement with another person under which the person is to perform the functions of the representative body.

Priorities of representative bodies:

(4) A representative body:

(a) must from time to time determine the priorities it will give to performing its functions under this Part; and
(b) may allocate resources in the way it thinks fit so as to be able to perform its functions efficiently;

but must give priority to the protection of the interests of Native Title holders.

29 See L. Strelein, *Compromised Jurisprudence: Native Title Cases since* Mabo, 2006, Aboriginal Studies Press, p 173: 'The majority (4:3) held that pastoral leases issued under Queensland lands Rights Acts of 1910 and 1962 did not necessarily extinguish all incidents of Aboriginal title. Where an inconsistency arises between the rights enjoyed by native

community, who had hoped for some certainty in their tenure and therefore minimal interference from others.

In 1998, the newly elected Commonwealth Liberal–National Coalition government sought to reform the Native Title Act in order to provide greater certainty and workability. The government's response became know as the 'Ten-Point Plan'.[30] This plan promised 'bucketloads of extinguishment'.[31]

The Native Title Amendment Act 1998 (Cth) resulted in a significant reduction of the protection previously provided under the common law. The reforms included:

- validating new grants by state governments;[32]
- validating renewals of leases issued before 1994;[33]
- confirmation that extinguishment is permanent;[34]
- confirmation of extinguishment to freehold, leasehold and other tenures;[35]
- expanding the rights of government authority over water and airspace;[36]
- expanding the threshold for registration of applications;[37]
- diminishing or removing the right to negotiate, and the introduction of more limited rights to notification and comment to various classes of act;[38] and
- suspension of the Racial Discrimination Act.[39]

Indigenous land use agreements

The Native Title Amendment Act (1998) included the introduction of Indigenous land use agreements (ILUAs). As indicated above, ILUAs are

title-holders and the rights conferred upon the lessee, Native Title rights must yield to the extent of the inconsistency to the rights of the lessee. The Court recognised that Native Title could coexist with the interests of other parties in particular land.' (See *Wik Peoples v Queensland* (1996) 187 CLR 1.)

30 Ibid – Initial Native Title Amendment Bill introduced in June 1996, with further amendments in June 1997.

31 Ibid – now infamous quote from Tim Fischer, Deputy Prime Minister and Minister for Trade, quoted in J. Brough, 'Wik Draft Threat to Native Title', *Sydney Morning Herald* (Sydney) 28 June 1997. See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report*, July 1996–June 1997 (Human Rights and Equal Opportunity Commission, Sydney, 1997), pp 59–100.

32 Native Title Act 1993, ss 21–22H.

33 Ibid,ss 24IA–24ID.

34 Ibid, s 237A.

35 Ibid, ss 23A–23JA: schedule 1.

36 Ibid, s 24HA.

37 Ibid, ss 24GA–24GE.

38 Ibid, s 190.

39 Ibid, ss 24HA, 24KA–26D, 36A, 42A, 43A.

voluntary agreements made between parties who have, or wish to gain, an interest in the area that is, or may be, subject to Native Title. ILUAs are negotiated between all the parties. They are inclusive in nature, and once agreed upon, are binding on all parties.

The Native Title Act 1993 (as amended) (Cth) (NTA) allows for three specific types of ILUAs:

- body corporate agreements;[40]
- area agreements:[41] and
- alternative procedure agreements.[42]

ILUAs can be about practically anything. They can be used to assist in the settlement of Native Title determinations, to govern future acts and to assist in defining the exercise of Native Title rights and interests, and other interests in respect to land and waters. Once an ILUA has been agreed and registered under the NTA, it becomes a binding contract on all parties to the agreement.

It is important to understand several matters about the role and functions of the ILUA provisions of the NTA. It is important to understand that it is a complex piece of legislation and equally important to note that some Aboriginal people will have difficulties understanding the legalities of the NTA provisions. This is even more important when considering Aboriginal people who have very limited comprehension of English or speak it as a second or third language.

That the ILUA provisions allow for three different types of ILUA to be negotiated can be seen by people as complicating what they perceive to be a simple matter. This is further complicated when explaining to a developer/proponent that the ILUA provisions may provide a useful alternative to the 'right to negotiate' (RTN) procedures.

The right to negotiate is a procedure under the Native Title Act 1993 that will make sure that some of the things that can affect Native Title (called future acts) are valid. The primary types of future act to which this process applies are the grant of mining leases and some compulsory acquisitions. These future acts require negotiations between Native Title parties, the government and the proponent. The right to negotiate is not a right to stop or veto projects from going ahead, but it does give Native Title parties a right to have a say about the project.

The right to negotiate applies to a future act if either the area it relates to is covered, wholly or partly, by a registered Native Title claimant application, or the Federal Court has determined that Native Title exists in the area

40 Ibid, ss 24BA–24BI.
41 Ibid, ss 24CA–24CL.
42 Ibid, ss 24DA–24 DM.

concerned and there is a registered Native Title body corporate for that area. The registered Native Title claimants or the registered Native Title body corporate is the Native Title party that has the right to negotiate.

The right to negotiate does not apply to all future acts, such as the construction of public works or the management of water. In these circumstances, claimants and Native Title holders may have other procedural rights such as the right to be notified, to comment or to be consulted, to object and to be heard by an independent umpire.

The right to negotiate is triggered when a government issues a 'section 29 notice' that states that the government intends to undertake a future act that is subject to that procedure. The notice is given by placing an advertisement in major newspapers. It must also be given directly to any Native Title parties and the Native Title representative body for the area.

People who claim to hold Native Title in the area, but have not yet made a Native Title claimant applications, have three months from the date given in the s 29 notice to file a claim if they want to have the right to negotiate about the proposed future act. To get that right, their claim must also be registered within four months of the date given in the notice.

If the right to negotiate applies, the government, the developer and the registered Native Title parties must negotiate 'in good faith', at least about the effect of the proposed development on the claimants' registered Native Title rights and interests, with a view to obtaining the agreement of the Native Title parties to the future act being done.

There is a fast-track process ('the expedited procedure') for future acts. This process arises when the government asserts in a s 29 notice that the future act can be fast-tracked, usually where minimal impact on Native Title is expected, such as with some mineral exploration and prospecting licences. If the expedited procedure is used and there is no objection by Native Title parties, the future act can be done without negotiation.

Native Title parties can object to a proposed future act being fast-tracked. They have four months from the date given in the s 29 notice to lodge an objection application. If the objection is successful, the negotiation in good faith process is required. If the objection does not succeed (or if there is no objection), the proposed future act can go ahead without a negotiation process.

The Native Title Act provides for States and Territories to set up their own bodies to handle future act matters apart from the Tribunal. Currently, only the South Australian Environment, Resources and Development Court handles the right to negotiate matters.

The ILUA scheme allows for a broad number of matters that can be negotiated. The nature and scope of each particular ILUA is governed to some extent by the type of activity and the likely impact on each party's rights and interests. The scope can range from comprehensive State-based or regional ILUAs, to small mining tenement access agreements, to production agreements, and can include provision for public and private purpose infrastructure

(i.e. gas pipelines and Telstra installations), and voluntary arrangements about access and the use of land.

ILUAs are becoming an increasingly useful tool to assist in the resolution of Native Title applications. This allows the Federal Court to avoid having to deal with the practical on-the-ground exercise of reaching decisions on Native Title rights and interests, because these are negotiated as part of and included in the ILUA. This enables the parties to secure clarity and certainty.

It is important when considering an ILUA that a clear understanding is obtained of what the impact may be on the existence of Native Title. It may well be that a proposed future act has such a minimal impact on Native Title that an ILUA is not the most suitable tool to use. The use of the RTN provisions under the Federal or State-based regime may provide for an acceptable solution.

In most cases, the type of activity that government or proponents wish to undertake may determine the usefulness of the ILUA's provisions. ILUAs are most useful when there is a suitable amount of time to negotiate, where the establishment of a long-term relationship is an important factor, and where compensation is likely to arise.

There are a number of factors that can affect the ILUA negotiations. The parties need to understand the statutory requirements to ensure that the ILUA can be registered. The procedural provisions of the NTA are difficult to explain and understand.

There are a number of parties involved in the negotiations of an ILUA and particular parties may be required to carry out specific functions to assist in the registration process, i.e. Native Title representative bodies may be required to carry out certification and authorisation functions.[43] It is important that the parties are familiar with these provisions.

Owing to the requirement of exclusivity of the ILUA scheme, the process of identifying all potential Native Title holders and informing them of the contents of the proposed ILUA so as to ensure their involvement in the negotiation process is vital for success. If the process fails to be inclusive, it may leave the ILUA being subject to an objection on the basis that another group has not been involved in the process and therefore questions the validity of the certification and authorisation process.

While Native Title claimant groups may entrust a smaller group of people to engage in negotiations, it important to understand that, at various times, it will require a more comprehensive consultation process to be undertaken. This will ensure that the smaller group has involved the larger group that it represents, and thereby been inclusive in its decision-making process and thus truly acted in a representative capacity.

Native Title groups are not well resourced to participate in negotiations. Adequate resourcing is especially critical if the Native Title group is within an

43 Ibid, s 203BE (1), (2) and s 251B.

area where there is high activity requiring the group to respond to other stakeholders and statutory time frames. It is not unusual for claimants to seek financial assistance to ensure that they are able to participate. To address this, Native Title representative bodies are usually requested to certify, or in some cases become parties to, the ILUA. This then creates resource difficulties for NTRBs, because they have other claimant groups requesting assistance for other matters. Further, NTRBs have to ensure that they are meeting their other statutory obligations.

In attempting to meet all parties' expectations, it is important from the start to set the parameters that guide negotiation. Most ILUAs are commercial in nature and it is important that the parties agree that this will be the basis for continued negotiations.

Realistic time frames must be set for the conduct of negotiations. These will need to include the ability to inform the Native Title party about the proposal, and allow cultural decision-making processes to happen. Part of this process may require the Native Title party to obtain legal or expert advice about certain aspects of the proposal.

Federal, State and/or local governments participate as a party or facilitator. Their involvement will depend upon the level of support for the proposal. Local governments often find it difficult to provide financial support and, as a consequence, do not take an active role in the process. Having said that, however, this approach is not a consistent approach and some local councils have assisted in other ways to allow for proponents to engage actively with the Native Title parties (i.e. free use of council facilities).

Obviously, State governments have an important role to play in any proposed ILUA. Their roles are governed by the fact that they must be parties to specific ILUAs.[44]

Conclusion

The evolution that has lead to the current level of recognition of Aboriginal and Torres Strait Islander rights and interests in land and water has been the product of a complex and delicate debate. The complexity has been a result of the changing political and public view of what rights and interests Aboriginal and Torres Strait Islander people should have, if any, and in relation to the rights that can be recognised and/or accommodated within the laws of Australia.

Historically, Aboriginal and Torres Strait Islander interests in land and water have not been recognised. This was based upon the notion that Australia was inhabited by an Indigenous population that did not have recognised institutions and laws. Therefore the law that applied was that of

44 See ss 24BB(e), 24BD(2), 24CB(e); 24CD(5), and s 24DE; s 24BH(I)(a)(ii); s 24CH (1)(a)(ii); s 24EBA.

England. Where any rights and interests had been granted, it was within the context of the Australian law and originally through the legislative framework provided for by the land rights legislation. This recognition was not universal and was limited in its application.

The recognition of Native Title rights and interests in the *Mabo* decision changed the way in which land and interests in land were to be managed in the future. This decision created a backlash against Aboriginal and Torres Strait Islander people, the judiciary, sympathetic support groups and individuals and the governments of the day, on the part of the general non-Aboriginal and Torres Strait Islander population, and powerful lobby groups such as the Farmers' Federation. It was hardly surprising that the Commonwealth Liberal Government sought a significant number of the changes to the Native Title Act, in order to ensure the validity of the existing interests granted to the non-Aboriginal and Torres Strait Islander population.

The current process of mediation allows for Aboriginal and Torres Strait Islander people to seek recognition and involvement in the future management of the land and water in Australia. Whilst this may be seen as a significant step in the right direction, there remains a greater obligation and responsibility on the Aboriginal and Torres Strait Islander peoples of Australia to legitimise their claim.

The courts will continue to play a major role in defining the rights and interests of Aboriginal and Torres Strait Islander people in land and water. The ability of the courts to ensure that recognition is legally obtained and recognised will depend upon the acceptance of the impact of colonisation and the ability of Aboriginal and Torres Strait Islander people to assert their rights and interests and connection to country.

The decisions so far have not only changed the face of history, but also the direction and future for Australia. Time will tell as to the impact that the legal and moral debates that have taken place will have on the relations between non-Aboriginal Australians and the first and original inhabitants and owners of Australia.

11 Letters Patent, Native Title and the Crown in South Australia

Daryle Rigney, Steve Hemming and Shaun Berg

> . . . Provided always that nothing in those our Letters Patent contained shall effect or be construed to effect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own Persons or in the Persons of their Descendents of any Land therein now actually occupied or enjoyed by such Natives . . .
>
> *Letters Patent*, 1836[1]

> While the colonization of South Australia will thus afford the means of protecting the 'Aborigines' from personal violence, the locations of the colonists will be conducted on the principle of securing to the natives their proprietary right to the soil, wherever such right may be found to exist.
>
> First Annual Report of the Colonization Commissioners for South Australia, 1836[2]

Introduction

The 1834 Colonization Act[3] and the subsequent Royal Proclamation contained in the Letters Patent of 1836 are the markers for the formation of the colonial Province of South Australia. Collectively, the documents set out the geographical boundaries of the colony, determine the establishment of the Colonization Commissioners to oversee the founding of the colony and provide for various other economic, social and political directives including the recognition of Indigenous people's proprietary rights to land. In their First Annual Report, the Colonization Commissioners devote two pages to the 'treatment of Aborigines'.

Soon after the lodgment of this report, there followed the familiar colonial pattern of seizing Indigenous people's land and the cultural, social, economic

1 Letters Patent available online at National Archives of Australia, *Letters Patent establishing the Province of South Australia 19 February 1836* (UK) (2000–05). Documenting a Democracy, available online at http://www.foundingdocs.gov.au/item.asp?sdID=38 (accessed 18 May 2006).

2 First Annual Report of the Colonization Commissioners of South Australia, 1836, p 8.

3 Act 4 & 5 William IV, CAP 95, 1834: 665.

and political marginalisation of Indigenous peoples.[4] In South Australia, land appropriation occurred without treaty settlement or compensation, and in this chapter we examine whether land and water were properly acquired from Indigenous persons living upon the land on or about the time of the Act in order to make South Australia a British province. This chapter then looks at current issues relating to continuing settlement and the unresolved issues of Indigenous property rights and Native Title, including approaches to negotiating Indigenous land use agreements (ILUAs) in South Australia. We conclude by outlining the effort of the Ngarrindjeri Nation[5] to engage a fairer system for negotiated settlement using current international examples of best practice.

In 1928, Ngarrindjeri man Rueben Walker wrote an account of his life for the South Australian Museum's ethnologist Norman B. Tindale.[6] Walker witnessed the early years of the British invasion of his people's land. He was raised by his grandparents and saw the pain of loss through the eyes of their generation. In his life history, he took the opportunity to ask a question that generations of Indigenous people in Australia have asked: 'Is there anything that the white fella got that he didn't steal?'[7] It is a question that is both provocative and provides a direct insight into the issues addressed in this chapter.

Our common sense dictates that when asked whether land acquisition was proper or not, the answer should be: if a person or group owns land, it needs to have acquired the land from another as the result of a consensual act.[8] Further, our own sense of fairness demands that the law should intervene if property or rights are acquired other than by a consensual act. This notion is manifest in numerous laws that we all live by on a day-to-day basis. It is a cornerstone of our existence and fosters acquisition of land by fair means. For us to be comfortable with ourselves, we must know that a consensual act presupposed the creation of the Province of South Australia.[9]

4 Ibid n 2.

5 The Ngarrindjeri people are the traditional owners and custodians of the land and waters of the Lower River Murray, Kurangk (Coorong), Murray Mouth and adjacent marine areas extending far out to sea. Collectively, we refer to all of these environments as 'Ngarrindjeri Country'.

6 R. Walker, 1938, 'Manuscript', in N. B. Tindale's *Journal of South East of South Australia*, Vol. 2, South Australian Museum Archives.

7 R. Walker in Ngarrindjeri Ramsar Working Group, 'Ngarrindjeri Perspectives on Ramsar Issues' in *Draft Coorong and Lakes Alexandrina and Albert Ramsar Management Plan*, Appendix 8, 1999, South Australian Department for Environment, Heritage and Aboriginal Affairs, Adelaide, p 4.

8 If the requisite consensual act is a policy requirement to foster good and proper relationships and has not been complied with, then we have a moral obligation to consider our position, but if the consensual act was required as a matter of law, then we have a legal obligation to facilitate a remedy to the wrong.

9 Until *Mabo v Queensland (No 2)*, the law accepted that Australia was settled peacefully and that Indigenous people had no law that could be recognised by common law, etc.

In South Australia, the process of non-Indigenous settlement continues with unresolved issues concerning Native Title and property rights for Indigenous peoples. In 1999, the State government, the Aboriginal Legal Rights Movement (SA), the SA Farmers' Federation and the South Australian Chamber of Mines and Energy developed a statewide approach to negotiating Indigenous land use agreements.[10] ILUAs are being presented to Indigenous nations as a fair and reasonable process for negotiations between the Crown and the Indigenous claimant group as a form of settlement for past grievances. Indigenous nations such as the Ngarrindjeri are considering the implications of negotiation with the State through this statewide process and, in doing so, are paying attention to the complexities of the position of Indigenous peoples within historical national and international contexts. Critically exploring national and international examples in relation to issues of, and processes for, negotiated 'settlement' are increasingly important to the Ngarrindjeri leadership in order to establish benchmarks for better practice.

Since 2001, the Ngarrindjeri Nation has independently negotiated agreements with local councils, industry groups and institutions that provide recognition for traditional ownership of lands and waters. These agreements have been termed *Kungun Ngarrindjeri Yunnan* (KNY)[11] agreements. The agreements are based on a principle of recognition. They set the foundations for new relationships and usually contain an apology that recognises the injustices done to the Ngarrindjeri Nation.[12] The KNY agreements are in the spirit of the call for treaties between Indigenous and non-Indigenous Australians. As Pat Dodson said in The Wentworth Lecture, 2000:

> For Aboriginal Australians the hope has always been for governments to enter into serious dialogue about our position in the nation and for the constitution to recognize us as the first Australians, with our Indigenous rights, obligations and responsibilities respected and recognized. There has never been any agreement about how we might progress this fundamental dilemma. They have been met with obstruction and deferral. The reasons often given have been that the electorate will not support them to do so.[13]

10 See P. Agius and J. Davies, 'Post-*Mabo* Institutions for Negotiating Coexistence: Building a Statewide Negotiation Process for Native Title in South Australia', Proceedings of the Third Joint Conference of the New Zealand Geographical Society and the Institute of Australian Geographers, 2001, University of Otago, Dunedin, pp 5–13.

11 *Kungun Ngarrindjeri Yunnun* translates as 'Listen to what Ngarrindjeri people are saying'.

12 See S. Hemming and T. Trevorrow, '*Kungun Ngarrindjeri Yunnan*: Archaeology, Colonialism and Reclaiming the Future' in C. Smith and M. Wobst (eds), *Indigenous Archaeologies: Decolonizing Theory and Practice*, 2005, Routledge, London.

13 P. Dodson, 'Beyond the Mourning Gate – Dealing with Unfinished Business', 2000, Wentworth Lecture Series, AIATSIS, Canberra, p 13.

One of our greatest challenges is to work out individually and collectively how to respond to these issues. This can be doubly challenging for us because we live in a very limited democracy under which there are only two political parties to choose from; it is especially so if there is no discernible difference between their respective views on particular issues. It means that the legislature, the structural limb of our government that is charged with responding to our issues, cannot or will not respond. We are left to our own devices, to work it out ourselves, without leadership, without focus, but with the distraction of the background political noise of different views and different arguments. And so, on one level, both Native Title and the ILUA process are described as efforts aimed at practical reconciliation and reconstruction of a nation through a new relationship. This 'new' relationship, though, is being developed under existing infrastructure. It is a product of the colonial infrastructure that is based on a singular sovereign, where the primary focus is upon protecting the construction of singular Crown sovereignty.

In such a complex environment, where Indigenous interests are secondary to State interests, we need to make some aspects of the matter as simple as we can. We need to recognise plainly that some things have occurred that are simply wrong, morally and/or legally, and that responsibility needs to be taken for these wrongs. To this end, we can hope to better understand ourselves, inform our discussion and make better decisions, so that response to wrongs are not reinscriptions of colonial processes.

Surprisingly, to our knowledge, this issue of a wrong has not been considered in any depth by our courts and the limited number of works that deal with the issue tend to be historical rather than legal. These historic texts do not exist for the purpose of determining the relevance of facts to the legal causes of actions. They assist by providing us with a guide to documents and sources that will need to be checked and contextualised for our own purposes.

For example, there appears to be a clear indication in the relevant legal documents existing around and after the creation of the Province of South Australia that consent was required from Indigenous Australians prior to land being acquired. What was the legal basis for the required consent? If consent was not based upon legal protection, was it simply a matter of 'good politics' in dealing with existing inhabitants?

Further, to understand the context of the advice and decisions being made at the relevant time, the context of those decisions from a legal perspective must be understood. For example, if the Crown Solicitor provided advice to the Colonial Office that land could only be acquired by consent of the Indigenous people, what was the relevant law that gave force to that advice?

We need to begin exploring the issue from a legal perspective in order to ensure that there is a greater potential for justice to be achieved, or alternatively, if the facts do not bear the issue out, for the matter to be put to rest. Our contribution will be to provide a platform for further investigation, and the basis for a discussion of the topic in the legal and broader community. It is not presupposed in our analysis that we can provide a full explanation of

the issues at this time or that we can, without undertaking a thorough analysis of the primary materials, provide more than a directive to further and better understanding of the issues.

Acts, instructions and Letters Patent

The Ngarrindjeri analysis of the complexities of the position of Indigenous peoples within national and international legal frameworks has raised questions about the establishment of South Australia. These questions have been necessary because the relationship between Australian governments and Indigenous people is often fractured as a result of imbalances in power, and the unwillingness of Commonwealth and State governments to address the institutional and constitutional basis of colonial societies. This position enables the protection of their legitimacy in controlling Indigenous peoples and their rights, interests and cultures. Hence, there is always a struggle, which is incapable of resolution other than by Indigenous Australians giving way to the expression of Australian governmental control. This is borne out in the manner and form of the creation of the Province of South Australia and the response by the South Australian government in its dealing with Indigenous Australians.

The Crown was authorised to create the Province of South Australia by Act 4 & 5 William IV, Cap 95, 1834 (South Australia Act 1834 (UK)), which was assented to on 15 August 1834.[14] South Australia was the only British colony to be authorised by an Act of Parliament; all other British colonies had been established by Executive action.[15]

The Preamble of the South Australia Act 1834 declared that the area of southern Australia 'consists of waste and unoccupied lands which are supposed to be fit for the purposes of colonization'.[16] This Act provided for the appointment of three or more commissioners to execute certain parts of the Act.[17] The Colonization Commissioners for South Australia[18] were 'empowered to declare all the lands of the said province . . . to be public lands open to purchase by British subjects'.[19]

The Province of South Australia was established and its boundaries defined by Letters Patent issued on 19 February 1836, pursuant to the power vested by the South Australia Act 1834. The Letters Patent contained the following proviso:

14 Act 4 & 5 William IV, Cap 95, 1834, s 1.

15 P. A. Howell, 'The South Australia Act, 1834' in D. Jaensch (ed.), *The Flinders History of South Australia: Political History*, 1986, p 26.

16 Ibid, n 14, Preamble by J. M. Main, 'The Foundation of South Australia' in D. Jaensch (ed.), *The Flinders History of South Australia: Political History*, 1986, pp 1, 8.

17 Act 4 & 5 William IV, Cap 95, 1834, s 3.

18 Ibid, n 17 s 4.

19 Ibid, n 17 s 6.

> Provided Always that nothing in those our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own Persons or in the Persons of their Descendants of any Lands therein now actually occupied or enjoyed by such Natives.[20]

The Colonial Office insisted that the colony could only proceed subject to the land being purchased from the Indigenous population and that such transactions were to be supervised by a government-appointed protector.[21] In response, the Commissioners prepared a draft plan 'for securing the rights of the aborigines, and arrangements for purchasing the land of the natives'.[22]

The Commissioners discussed the treatment of Aboriginal people in their First Annual Report to the Colonial Office.[23] They stated:

> We propose that the *cessions of territory* over which the Aborigines may have any proprietary right shall not only be perfectly voluntary upon their part, but shall be considered as involving a stipulation that the Aborigines by whom the ceded lands may have been occupied or enjoyed shall be permanently supplied with subsistence, and with moral and religious instruction.[24]
>
> (Emphasis added)

They also said that the process for the management of the protection of Indigenous proprietary rights would be such that:

> The Colonial Commissioner is required to furnish the Protector of Aborigines appointed by your Lordship with evidence of the faithful fulfillment of the bargains or treaties which he may effect with the Aborigines for the cession of lands which they may have occupied or enjoyed; and it will be the duty of the Protector of Aborigines not only to see that such bargains or treaties are faithfully executed, but also to call upon the Executive Government of the Colony to protect the Aborigines in the undisturbed enjoyment of the lands over which they may possess proprietary rights, and of which they are not disposed to make a voluntary transfer.[25]

20 Letters Patent available online at National Archives of Australia, *Letters Patent establishing the Province of South Australia 19 February 1836* (UK) (2000–05), Documenting a Democracy, available online at http://www.foundingdocs.gov.au/item.asp?sdID=38 (accessed 18 May 2006).

21 H. Reynolds, *The Law of the Land*, 3rd edn, 2003, p 131.

22 Papers delivered by Colonel Torrens relating to the Third Period (from the gazetting of the Commissioners to the departure of the first Governor), paper No 3, Appendix to the Second Report of the Select Committee on South Australia, p 158.

23 First Annual Report of the Colonization Commissioners of South Australia, 1836, p.8.

24 Ibid, n 23.

25 Ibid, n 23.

The South Australia Act 1834 was amended by Act 1 & 2 Victoria, Cap 60, 1838 (UK) (1838 Act (UK)), which was assented to on 31 July 1838. The Preamble of the 1838 Act sets out the proviso contained in the Letters Patent in relation to the rights of any Aboriginal natives.

South Australia's second governor, George Gawler, pushed for a policy of creating reserves for the exclusive use of the Aborigines in every district that came up for sale.[26] The Select Committee on South Australia recommended the creation of reserves in South Australia of 'any lands which it may be found necessary so to reserve and set apart for the occupation and subsistence of such Aboriginal Inhabitants'.[27] The following year, 1842, the Waste Lands Act was introduced, which provided that land could be exempt from sale or reserved 'for the Use or Benefit of the aboriginal Inhabitants of the Country'.[28]

The Waste Lands Act (Act 5 & 6 Victoria, Cap 36, 1842 (UK), which was assented to on 22 June 1842, established a system of disposing of the 'Waste Lands of the Crown'[29] in the Australian colonies. The Waste Lands Act provided that land could be exempt from sale or reserved 'for the Use or Benefit of the aboriginal Inhabitants of the Country'.[30] The Act authorised and required the governor in each of the colonies to convey and alienate any waste lands of the Crown to the purchaser(s).[31]

The South Australia Act 1842 (Act 5 & 6 Victoria, Cap 61, 1842 (UK)), which was assented to on 30 July 1842, repealed and replaced the South Australia Act 1834 and the (amended) 1838 Act.[32] The South Australia Act 1842 provided for the government structure in South Australia to be the same as other colonies.

The Colonization Commissioners were directed that dealings with Aborigines (sic) should have the following objectives:

> . . . to guard them against personal outrage and violence; to protect them in the undisturbed enjoyment of their proprietary right to the soil, wherever such right may be found to exist; to make it an invariable and cardinal condition in all bargains and treaties made with the natives for the cession of lands possessed by them, in occupation or enjoyment,

26 Reynolds, *The Law of the Land*, 3rd edn, 2003, pp 163–164.

27 British Parliamentary Papers, No 119, 1841, Resolution XXI, quoted in Reynolds, above n 26, p 169.

28 Act 5 & 6 Victoria, Cap 36, 1842 (UK), s 3.

29 Act 5 & 6 Victoria, Cap 36, 1842 (UK) (Waste Lands Act); s 23 defines the term 'Waste Lands of the Crown'.

30 Ibid, n 28, s 3.

31 Ibid, n 28, s 5.

32 The South Australia Act, 1842 (UK), s 1; *De Rose v State of South Australia* [2002] FCA 1342, *per* O'Loughlin J at [235].

> that permanent subsistence shall be supplied to them from some other source . . .[33]

In each of these references there is a presupposition that the land is owned by the Indigenous inhabitants. An examination in relation to the basis of this presupposition is required. It is noted that there has been a view expressed that, because of the inconsistency between the Letters Patent and the South Australia Act 1834, the former referring to Indigenous inhabitants and the latter referring to the land being 'waste and unoccupied lands',[34] the former has no legal force. Further, we note that the reference to the rights of Indigenous inhabitants in the 1838 Act was included in the Preamble. That said, the Waste Lands Act 1842 and The South Australia Act 1842 refer to the rights of Indigenous inhabitants in a manner consistent with the requirement of consent for the acquisition of land.

There has been some judicial consideration of the Letters Patent and their legal status. However, these cases have been in relation to land rights claims in the Northern Territory. The Northern Territory was not part of the Province of South Australia when it was established. The Letters Patent have been held only to have application to land within the boundaries of the Province of South Australia at the time of establishment.[35]

In *Milirrpum v Nabalco Pty Ltd*, Blackburn J considered whether the Letters Patent were a constitutional guarantee of Aboriginal rights. After concluding that the proviso only related to 'lands therein', meaning 'land within the boundary of the Province as defined in the Letters Patent',[36] he went on to state:

> . . . in my opinion the proviso was not intended to be more than the affirmation of a principle of benevolence, inserted in the Letters Patent in order to bestow upon it a suitably dignified status.[37]

Blackburn J continued:

> It is impossible to see how, if the proviso to the Letters Patent is to be construed as either giving or preserving to any persons any proprietary rights in any lands of the Province, it was not repugnant to the express provisions of the Act, and thus invalid to that extent.[38]

33 First Annual Report of the Colonization Commissioners of South Australia, 1836, p 8.

34 Act 4 & 5 William IV, Cap 95, 1834, Preamble; see also discussion of H. Reynolds, *The Law of the Land*, 3rd edn, 2003, p 151.

35 *Fejo v Northern Territory of Australia*, 1998, 195 CLR at 139 [78]; 156 ALR 721 at 746–747 [78].

36 *Milirrpum v Nabalco Pty Ltd* ('Gove Land Rights Case'), (1971) 17 FLR 141 at 277.

37 Ibid, at 281.

38 Supra, p.281.

There has been little consideration of how these issues would be resolved regarding a claim in South Australia. Any judicial comment regarding South Australia has been obiter.[39] The matter was referred to in the case of *De Rose Hill v South Australia*, but not judicially determined. In *De Rose Hill v South Australia*, O'Loughlin J characterised the legislation relating to pastoral leases in South Australia as reserving rights for Aboriginal people in the land.[40] The first such legislative Act was an Order in Council proclaimed on 7 November 1850, which allowed for the Commissioner of Crown Lands of SA to draft a provision in pastoral leases for the reservation of rights of Aboriginal people in land.[41] A similar requirement was contained in subsequent legislation, for example, the Pastoral Act 1893 (SA) Sch A, the Pastoral Act 1904 (SA) and the Pastoral Act 1936 (SA).[42] The Pastoral Land Management and Conservation Act 1989 (SA) also provides for the rights of Aboriginal people to be reserved in respect of pastoral land.[43] The relevant section provides that 'an Aboriginal person may enter, travel across or stay on pastoral land for the purpose of following the traditional pursuits of the Aboriginal people'.

The important point to be made here is that commentators have time and again dismissed the Letters Patent without in-depth consideration. The exception has been Henry Reynolds, whose examination has largely been from an historical viewpoint. The issue remains whether or not there is a legal question to be answered: was international law practice regarding colonies followed in the settlement of South Australia? Was the reference to rights of Indigenous inhabitants in the Letters Patent (and other founding documents and Acts) simply an 'affirmation of a principle of benevolence', i.e. a political act?

39 As n 35.

40 *De Rose v State of South Australia*, 2002, FCA 1342 at 239.

41 Above n 40 at 239. Note: The first South Australian legislative Act that affected Aboriginal people in pastoral areas was an Order in Council that was proclaimed on 7 November 1850. It allowed the then Commissioner for Crown Lands of SA to draft a provision in pastoral leases for the reservation of rights for Aboriginal people in land. That theme (of a reservation of rights) was to continue in subsequent legislation. For example, Sch A to the Pastoral Act 1893 (SA) ('the 1893 Pastoral Act') contained a requirement that all such leases were to contain a reservation in favour of Aborigines of the State. That requirement was continued in the 1904 Pastoral Act and the Pastoral Act 1936 (SA) ('the 1936 Pastoral Act'). Consequently, all pastoral leases that were issued by the State had reservations regarding the rights of Aboriginal people to have access to pastoral lands. As Dr Foster noted in his report, the policy of the Colonial Office toward Aboriginal people at the time of South Australia's foundation was one of protection. In making that observation, he referred to the recommendations of the 1837 Report from the Select Committee on Aborigines (British Settlements), which stressed the importance of ensuring that officers in charge of Aboriginal welfare be independent of colonial governments.

42 Above n 401 at 239.

43 Pastoral Land Management and Conservation Act 1989 (SA), s 47.

Other measures undertaken by government

It is also helpful to consider other measures undertaken by government with respect to how the relevant authorities in the colony of South Australia responded in dealing with Indigenous inhabitants. One proposal outlined in the First Annual Report of the Colonization Commissioners for South Australia was for the creation of a permanent fund for educating the Indigenous population so as to increase their usefulness to the development of the colony and to 'possess in their reserves property increasing in value as the Colony expands'.[44] Funding for the plan was to be instituted by a proposal under which:

> . . . lands as may be ceded by the natives to the Colonization Commissioners shall be sold under the condition, that for every 80 acres conveyed the party to whom the conveyance is made shall pay for four-fifths, or 64 acres only; the conveyance to be made subject to a stipulation, that at the expiration of a term of years, hereafter to be decided, the lands so conveyed shall be divided into five equal parts; one of these parts, or 16 acres to be resumed as a reserve for the use of the Aborigines, and the remaining four parts, or 64 acres, to remain with the proprietor as his freehold.[45]

This plainly demonstrates the reaction by the Colonial Commissioners to the requirements of the founding documents and Act, and indicates the relevance of the instructions from the Colonial Office. Such instructions and the response to them appear to indicate that the requirement of consent from Indigenous persons was a legal matter, not a political act. If the response was a political act, then the proportion of the response was a matter of good conscience, but if the response was as a result of a legal requirement, then the response can be tested in terms of whether it was legally appropriate.

It is clear in the Acts, instructions and Letters Patent that the colony of South Australia was established at a time when British colonial policy recognised the need to protect the property rights of Indigenous people. James Stephens, the Permanent Undersecretary at the British Colonial Office, and Sir George Grey, Undersecretary of State for War and the Colonies, were instrumental in framing the King's instructions contained in the Letters Patent, and the Colonization Commissioners demonstrated their planned intentions to comply with these instructions in the First Annual Report of the Colonization Commissioners of South Australia. Governor John Hindmarsh also conveyed an intention to support the principles of the Letters Patent, as they relate to the Indigenous population, in the First Proclamation of South Australia as a British Province on 28 December 1836, when he publicly stated:

44 First Annual Report of the Colonization Commissioners for South Australia, 1836, p 10.
45 Above n 44, p.9.

> It is alas, at this time especially, my duty to apprise the Colonists of my resolution to take every lawful means of extending the same protection to the NATIVE POPULATION as to the rest of His Majesty's Subjects, and of my firm determination to punish with exemplary severity, all acts of violence or injustice which may in any manner be practiced or attempted against the Natives, who are to be considered as much under the Safeguard of the law as the Colonists themselves, and *equally entitled to the privileges* of British subjects.
>
> (Emphasis added)

One would quite reasonably think that this protection extends to the property rights of Indigenous people. In the South Australian context, there is nothing in the law or the Constitution that prevents the State government from acting justly and fairly to Indigenous peoples – or from honouring the instructions provided in the Letters Patent or the plans of the First Colonization Commissioners or the words of Governor John Hindmarsh on Proclamation Day 1836. For Indigenous people such as the Ngarrindjeri Nation, the instructions and promises made in each of these documents on behalf of the Crown contained the original promise of a just settlement.

Old Protectors, new Protectors: colonialism's continuities

From the earliest days of South Australia's European 'settlement', the State or the Crown used what was fundamentally ethnographic research to map Indigenous interests in the country. In 1837, the Colonial Secretary instructed William Wyatt, the Ad Interim Protector of Aborigines, to learn about Indigenous customs and most importantly to determine whether Indigenous people had permanent dwellings to clear the land for occupation by European settlers. Given the powerful non-Indigenous interests in land and associated resources, and the Eurocentric notions of tradition and civilisation, information 'gathered' by the Crown provided little or no opportunity for Indigenous people to defend their interests. When anthropology developed as a recognised academic discipline in the twentieth century, the genealogies of cultural research had long been directly linked to questions of the authenticity of land occupation.

Lisa Strelein, in her recent book *Compromised Jurisprudence*, takes up colonialism's continuities in making the following point:

> The settlement reached in the Mabo case was compromised. The discriminatory treatment of Indigenous peoples' rights undermined its foundations as a just settlement of the acquiring sovereign with those whose sovereignty was rested from them. The doctrine that the courts have developed since then, using the legislation as a cloak, builds upon those discriminatory aspects. The denial of Indigenous law as an ongoing normative system that continues to allocate rights and interests and

> judgments about authenticity and the vulnerability invested in native title by the rules of extinguishment together compromise the coherence of the native title jurisprudence.[46]

In his critique of Justice Dawson's dissenting judgment in *Mabo v Queensland (No 2)*, Henry Reynolds (1996) drew attention to the importance of developments on colonial policy leading up to the establishment of South Australia. Reynolds argues that Dawson J:

> . . . did not give sufficient attention to the growing concern about Aboriginal property rights in the Colonial Office from 1836 onwards, as evidenced by numerous references to Native Title rights in the memos and dispatches of James Stephens, Sir George Grey, Lord Glenelg or Earl Grey and particularly in the *Letters Patent* issued to the South Australian Colonizing Commission.[47]

Reynolds goes on to write that:

> Colonial Office policy for South Australia manifested this new attitude towards Indigenous land rights. The first test for the new policy came with negotiations between the Colonial Office and the South Australian Colonizing Commission in 1835–1836. The Undersecretary (Permanent Head) James Stephen made his position clear when drafting the Letters Patent and determining the boundaries of the new colony. In an internal memo to Lord Glenelg he wrote about the difficulty of fixing the boundaries. 'How this can be done', he observed, 'in a Terra incognito I cannot image, nor how it can be done at all with any due regard to the rights of the present Proprietors of the Soil . . .'. Ten days later, Glenelg wrote to the Colonizing Commissioners referring to the same problem. He noted that the Colony might extend very far into the interior of New Holland and embrace in its range numerous Tribes of People whose Proprietary Title to the Soil we have not the slightest grounds for disputing'. Taken together these two documents written by the Minister and his Permanent Head, are of critical importance. They represent a milestone in British official policy towards Australia.[48]

In 1840, Matthew Moorhouse, one of the first Protectors, rode with the punitive expedition to the Rufus River where Indigenous men, women and children were shot by police, army, overlanders and volunteers. There was considerable emphasis on protecting the property of the settlers, but little attention

46 L. Strelein, *Compromised Jurisprudence: Native Title Cases Since* Mabo, 2006, Aboriginal Studies Press, Canberra, p 141.

47 H. Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation*, 1996, St Leonards: Allen & Unwin, p 24.

48 Above n 47, p 27.

given to instructions given to the colonists by the British Crown – the Letters Patent. As noted earlier, the Colonization Commissioners provided a clear plan for their protection of Indigenous property rights. These promises were soon forgotten and trespassing on Indigenous land was not questioned. Not all non-Indigenous people accepted this situation. Sub-Protector George Mason was one supporter of Indigenous rights and so too was Edward Bates Scott. In the 1860s, Scott instituted a system for allowing Indigenous men to apply to the Crown for land under a licensing system.[49] Indigenous people at the same time understood this system as an attempt to compensate for the alienation of Indigenous lands.

A letter from Stephens dated 4 July 1834 to John Shaw-Lefevre, Undersecretary of State for War and the Colonies, regarding the 'Draft of a Bill to erect South Australia into a British Province and to provide for the Colonization and Government thereof', is important here. In the letter, Stephens questions the power to be given to the Colonization Commissioners:

> It appears to one that this Bill would induce a further very serious encroachment on the principles of the English Government. The three Commissioners would be exercising a function which, for the most obvious and weighty reasons, it has been usual to confine to the Lords Commissioners of the Treasury. . . . But to the Board [of Commissioners] to be appointed under this Bill would be assigned by Parliament that function, so far as respects the receipt and administration of the revenue of South Australia. The Board would at once, collect, remit and expand, creating at their pleasure any number of Officers, and bestowing upon them any extent of enticement.[50]

Stephen is also unambiguous in his view that it is the responsibility of the Crown to direct the founding of the Colony:

> It is a project in which no individual has an interest separate or distinguishable from the public at large. There are no joint stocks – no proprietary body – no chartered company. It is simply a plan for selling the lands of the Crown, by the agents and nominees of the Crown, and applying the proceeds to the foundation of a Colony to which, at the expense of the Crown, poor persons are to be conveyed as emigrants. That a loan is to be raised in the first instance cannot convert this design

49 R. Foster and M. Paul 'Married to the Land: Land Grants to Aboriginal Women in South Australia, 1848–1911', (2003) *Australian Historical Studies*, No 121, April.

50 Letter dated 4 July 1834 from James Stephen providing his legal opinion on the Draft Bill to erect South Australia into a British Province to John Shaw-Lefevre, Undersecretary of State for War and the Colonies. The request for advice to be provided came at the command of Secretary of State for War and the Colonies, Mr Spring Rice.

> from a public to a private undertaking. The government of this nation would long since have abdicated their functions altogether, if it had ever been acknowledged that measures entered upon by means of funds borrowed under the sanction of the State, were to be conducted by the lenders or by any other than the constituted authorities of this Kingdom.[51]

This point is important because the government of South Australia is the direct heir of the Colonization Commission and it is this government that negotiates settlement with Indigenous groups. The question becomes: what legal responsibility does the government of South Australia have for delivering, or not delivering, the treaties and protections of Indigenous rights that were promised and instructed? Indeed, it seems that the current processes established by the State for negotiated settlement via ILUAs reinforce the status quo – a status quo that is fractured by its genesis in the British Crown, who provided the instructions regarding Indigenous rights in the Letters Patent.

The global context: negotiating with the Crown in the twenty-first century

In December 2003, the Ngarrindjeri Nation presented a 'Ngarrindjeri Proclamation of Dominium' to the South Australian government. The Proclamation reminded the government that the Ngarrindjeri Nation had never ceded sovereignty to the Crown. The Ngarrindjeri further informed the government that they were seeking a process of recognition and agreement-making in relation to their future well-being. In doing so, the Ngarrindjeri recognised that engagement with other Indigenous nations through an effective programme of nation-to-nation diplomacy and strategic alliance would positively add to the local process of agreement-making. In addition, it would bring value to both the Ngarrindjeri Nation and Australian governments concerning such matters as the protection of cultural properties, natural resource management, Native Title, education, research and scholarly exchange, and provide a framework for mutually beneficial trade and commerce. International alliances of this nature with other First Nations are a proactive, strategic attempt to develop new international support for local interests and 'situated knowledges'.[52]

51 Above n 50.

52 See S. Hemming, D. Rigney and M. Pearce, 'Justice, culture and economy for the Ngarrindjeri nation', in E. Potter, A. Mackinnon, and S. McKenzie, (eds) *Just Water: Cross-Disciplinary Conversations on Water Culture, Use and Meaning in Australian Society*, Carlton, Vic., Melbourne University Press. In press.

An example of strategic international linkage for the Ngarrindjeri occurred in June 2004 at the National Congress of American Indians (NCAI),[53] where a resolution proposed by the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) of Oregon, 'to establish a special committee of Tribal delegates to meet with Indigenous Nations of the Pacific Rim'[54] was passed. Building upon the initial resolution the NCAI Special Committee on Indigenous Nations Relationships at its 61st Annual Convention in October 2004, the Congress recommended a series of working meetings on key questions relating to the development of a United League of Indigenous Nations. The Ngarrindjeri attended both meetings[55] and gave presentations proclaiming their support for the establishment of a Ngarrindjeri Ngiangampe (treaty–trade partnership) with other First Nations to address issues of common concern and in furtherance of common goals particularly as they relate to the governance, and the environmental, economic, social and political interests of Indigenous communities.[56]

Governance in this context is not unproblematic. It moves beyond being merely a matter of State authority to being a matter of authority and legitimacy in other social arrangements at local, national and international levels. Indigenous peoples organising across geopolitical boundaries constitute a potential challenge to colonial and post-colonial processes of state formation, which are typically framed via discourses of 'discovered territory' and 'unoccupied land'. International points of intersection for Indigenous peoples make it more difficult for the dominant nation state-based political interests to simplify and obscure the details of local political struggle.

Broadening the audience beyond the isolation of the Australian domestic arena at a time of great uncertainty for Indigenous peoples is important. For example, in 2005, discussions between the Ngarrindjeri Nation, the Aboriginal

53 In early 2003, Daryle Rigney met Alan Parker, a Cree man from Rocky Boy Reservation and Professor of Native Law and Policy at Evergreen College, Washington State, in Aeteoroa, New Zealand. The meeting led to discussion with other scholars and Indigenous leaders to consider the establishment of an international forum on Indigenous strategies of self-determination. The Ngarrindjeri Nation leadership acknowledge Professor Parker for his efforts with the Confederated Tribes of the Umatilla Indian Reservation and the National Congress of American Indian in this most important initiative.

54 National Congress of American Indian, Resolution MOH 04–005, available online at http://www.ncai.org/ncai/data/resolution/midyear2004/04–005.pdf.

55 First meeting: NCAI Mid Year session, Uncasville, Connecticut, 20–23 June 2004. In attendance: Tom Trevorrow, Elder and Chair, Ngarrindjeri Heritage Committee, Ngarrindjeri Nation, and Steve Hemming, Adviser to Ngarrindjeri Heritage Committee and the Ngarrindjeri Native Title Management Committee. Second meeting: NCAI 61st Annual Convention, Fort Lauderdale, Florida, October 10–15, 2004. In attendance: Daryle Rigney, Ngarrindjeri & Director, Yunggorendi, First Nations Centre for Higher Education and Research, Flinders University.

56 Other Indigenous peoples represented in the initial discussions and subsequent resolutions of the NCAI include the New Zealand Māori, Native Hawaiians, Native Alaskans and the Navajo.

Legal Rights Movement (ALRM) and the Crown Solicitors Office Indigenous Land Use Agreement (CSO ILUA) negotiating team focused on whether the Ngarrindjeri were prepared to enter into an ILUA with the State of South Australia. At a public Ngarrindjeri Nation meeting held in late 2005, the ALRM and the CSO ILUA negotiating team outlined the process and benefits to be gained from entering into an ILUA, as well as a few select examples of objects that had been negotiated with other South Australian Indigenous nations. The ALRM and the CSO ILUA negotiating team also indicated that the range of subjects that could be negotiated in an ILUA process was open-ended, subject to agreement from the negotiating parties. Further, in response to a question asked at the meeting, the CSO ILUA negotiating team stated that this range of subjects included the process developed as the framework for ILUA negotiations.

Once ALRM and the CSO ILUA negotiating team opened the opportunity for dialogue, Daryle Rigney, who had been following international processes for negotiations between the State and Indigenous peoples on behalf of the Ngarrindjeri leadership, presented an alternative process for the consideration of the Ngarrindjeri Nation based upon the British Columbia Treaty Process (BCTP) model.[57] The Ngarrindjeri acknowledged that this process was specifically targeted at a treaty process that was not part of the ILUA process; nevertheless the BCTP offered a set of principles and practices that could bring a greater level of fairness and balance to the statewide process 'offered' in South Australia. For example, among other matters not evident in the South Australian statewide ILUA process, the BCTP stated: that non-Indigenous interests are represented by the State government;[58] the need for a framework of protocols for negotiating agreements, including how the negotiations should proceed, based upon engaged commitment, fairness, impartiality, effectiveness and a clear understanding of the parties' duties

57 In proposing a model based on the British Columbia Treaty Process, the Ngarrindjeri leadership recognised that the model was not without its difficulties and was problematic, but that it represents a far more equitable process than was being proposed by the statewide ILUA process in South Australia, which is heavily weighted so as to minimise costs to the present generations of South Australians but to ensure a level of finality to the negotiated settlements and historical grievances of Indigenous Australian nations. See T. Alfred, 'Deconstructing the British Columbia Treaty Process', 2000, available online at http://www.delgamuukw.org/research/bctreatyprocess.pdf (accessed 21 March 2007), for a comprehensive analysis of the BC Treaty Process.

58 Under the statewide ILUA process in South Australia, non-Indigenous interests are represented at the 'Main Table' by the State government, the South Australian Farmers Federation, the South Australian Chamber of Mines and Energy and other key stakeholders. Indigenous nation interests at the 'Main Table' are represented by the Aboriginal Legal Rights Movement, a State and federally funded 'community-controlled organisation'. Under the ILUA process, individual Indigenous nations such as the Ngarrindjeri Nation are designated as part of what is termed the 'Side Table', which is compromised of the ALRM and all Indigenous nations in South Australia.

and responsibilities; the establishment of a commission to ensure fairness and impartiality, as well as to ensure that all parties have the resources to be able to negotiate and reach agreement effectively; and a six-stage process for negotiations.[59]

Justice can be measured and benchmarked against best practice through comparison with other contexts as well as through accepted ethical and moral standards. The South Australian government's reliance on a particular institutional framework for their statewide process of making ILUAs appears out of step with international counterparts. The Ngarrindjeri Nation's recommendation of a fairer process in line with a relevant international example has not been taken up as a transformational strategy for Indigenous development. This marks a continuation of what Taiaiake Alfred called the 'classical strategies of the State' in relation to any perceived challenge to its singular sovereignty. These strategies include:

> . . . outright denial of indigenous rights; a theoretical acceptance of indigenous rights combined with an assertion that these have been extinguished historically; and legal doctrines that transform indigenous rights from their autonomous nature to contingent rights, existing only within the framework of colonial law.[60]

Conclusion

The critical reflections made here are not meant to constitute a comprehensive critique. What is intended is to raise and reflect upon the establishment of the colony of South Australia and, in particular, the Letters Patent and the instructions of the Colonial Office.

59 The six stages of the British Columbia Treaty Process are: Stage 1: submission of a statement of intent to negotiate an agreement to the Commission; Stage 2: preparations to negotiate, including preliminary discussion criteria to be used to determine the readiness of a party to negotiate, identification of the research needed to be undertaken to enable negotiation to occur and receiving funding submissions from the parties to develop and conclude the negotiations; Stage 3: the negotiation of a framework agreement that nominates the subjects and objects for negotiation and establishes a timetable for the negotiations to enable the Commission to evaluate progress; Stage 4: negotiating an Agreement in Principle, where parties confirm their ratification of the process and have opportunity to review the emerging agreement; Stage 5: negotiations to finalise the agreement that formally embody the principles that underpin the agreement, providing an implementation plan and resolving outstanding technical and legal issues in the settlement (not an opportunity to reopen issues already settled); Stage 6: implementation of the agreement, including the implementation legislation and authorities required along with a recommitment to goodwill and effort by both parties. For a more detailed outline of the BCTP, see http://www.bctreaty.net/.

60 T. Alfred, 'Sovereignty' in J. Barker (ed), *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*, 2005, University of Nebraska Press, Lincoln and London, p 36.

It is clear that, in 2007, the offers being made to Indigenous people in South Australia fall far short of the promises made by the Crown and the Colonization Commissioners in 1836. The South Australian State government has actively opposed Native Title claims and has invested enormous resources in a process of settling claims in the guise of the Indigenous land use agreement scheme. These ILUA negotiations are constructed to foster healing, growth and development and to give a sense of conclusion to historical Indigenous claims. However, the nature of the British colonisation of South Australia and, from this perspective, the struggle over the question of settlement is still being actively considered, and needs to be examined, responded to, and resolved in a fair and equitable manner.

On 28 December 2006, at the site of Hindmarsh's Proclamation of 1836, the South Australian Minister for Aboriginal Affairs and Reconciliation declared that 'the failure to meet the promise contained in the documents establishing this settlement . . . [has] been the cause of much loss and suffering for Aboriginal people'.[61] The Minister went on to say that he 'believes we [South Australia] must recommit ourselves to the promise made to Aboriginal South Australians at this place 170 years ago'.[62] The adoption of any other position that is less than a recommitment to past promises, instructions and legislation maintains the relationship between colonised and coloniser, where popular majority political and economic calculations take precedence over Indigenous rights. Alternatively, a positive and proactive response from the State government to the will of the Minister for Aboriginal Affairs and Reconciliation would set a path to a potentially new and reinvigorated relationship between the State and Indigenous peoples of South Australia.

61 Honourable Jay Weatherill MP, Minister for Aboriginal Affairs and Reconciliation, 170th Proclamation Day Speech, Glenelg, 28 December 2006, p 6.

62 Above n 31.

12 Human rights and reconciliation in contemporary Australia (1991–2006)

The Honourable John von Doussa QC and Tom Calma[1]

Part 1: Background

Reconciliation could be as significant in Australia's history as the federation process in 1901. It is a process that can allow for an acknowledgment of the wrongs of the past, the making of amends where appropriate, and moving forward with a renewed and principled relationship involving the full recognition and respect for the human rights of all Australians, including Indigenous peoples.[2] However, for reconciliation to be true and lasting, the parties need to participate on equal terms and enter into genuine consultations in a spirit of goodwill, in order to repair and recast their relationship.

Australia's decade of reconciliation began with great promise in 1991 when, for the first time, the federal Parliament set out to transform positively the relationship between Indigenous and non-Indigenous Australians. It established the Council for Aboriginal Reconciliation (CAR) to undertake extensive national consultations on the potential scope of reconciliation, and to make recommendations to the federal Parliament about how to achieve reconciliation in the longer term.

However, on its election in 1996, the Howard Government began to distance itself from the CAR process and to define its own reconciliation process. It announced its intention to focus on practical measures to address Indigenous disadvantage primarily in the areas of health, education, housing and employment, believing that '[p]ractical measures in these key areas [will] have a positive effect on the everyday lives of Indigenous Australians'.[3]

1 The Honourable John von Doussa is the President of the Human Rights and Equal Opportunity Commission, and Tom Calma is the Aboriginal and Torres Strait Islander Social Justice Commissioner and Acting Race Discrimination Commissioner.

2 Throughout this chapter, we refer to Aboriginal and Torres Strait Islander peoples as 'Indigenous peoples'. In doing so, we acknowledge the distinct cultures and societies of different Aboriginal peoples and Torres Strait Islanders. The term 'peoples' is also used to recognise the collective dimension of the livelihoods of Indigenous peoples, with distinct cultural beliefs that differentiate them from other Australians.

3 Senator Ferris, *Hansard – Senate,* 27 November 2003, pp 17,990–17,991.

Characterising much of the CAR reconciliation process as 'symbolic' and of little practical value, the government rejected out of hand what many Indigenous peoples regarded as essential elements. These included the negotiation of a treaty, an apology and the payment of compensation to members of the Stolen Generations, and formal acknowledgment of Indigenous peoples' legal rights as the First Australians. The government regarded negotiation of these issues as a potential threat to national unity that would give Indigenous peoples separate rights and privileges as compared to the rest of the population. These views were encapsulated in the Prime Minister's oft-repeated suggestion that all Australians should 'focus on the things that unite us, rather than the things that divide us'.[4]

The government's ongoing focus on practical reconciliation has meant that issues of critical concern to both Indigenous and non-Indigenous Australians remain outside the narrow parameters of the debate, in the territory of 'unfinished business'. It was therefore not unexpected, when CAR presented the Australian Parliament with the Reconciliation Documents[5] and its Final Report[6] in 2000, that these met with a cool reception from the government. While affirming recommendations in the documents that aligned with its practical reconciliation agenda, the government rejected almost all of CAR's recommendations[7] and, in effect, emasculated the reconciliation process.

The Human Rights and Equal Opportunity Commission, and in particular the Aboriginal and Torres Strait Islander Social Justice Commissioner, have been among the critical voices of the government's record on reconciliation. Successive Social Justice Commissioners have monitored and analysed the government's record on practical reconciliation and its conformity with Australia's human rights obligations.[8] They have publicly reported to the federal Parliament in the annual Social Justice Reports and the Native Title Reports on the inadequacies and shortcomings of the government's approach,

4 The Hon J. Howard 'Address at the presentation of the Final Report to Federal Parliament by the Council for Aboriginal Reconciliation', *Transcript*, 7 December 2001, p 2.

5 The Documents for Reconciliation include the *Roadmap to Reconciliation*, CAR, Canberra, 2000, available online at www.austlii.edu.au/au/other/IndigLRes/car/2000/10/, and *The Australian Declaration Towards Reconciliation,* CAR, Canberra, 2000, available online at www.austlii.edu.au/au/other/IndigLRes/car/2000/12/pg3.htm.

6 Council for Aboriginal Reconciliation, *Australia's Challenge*, CAR, Canberra, 2000, available online at www.austlii.edu.au/au/other/IndigLRes/car/2000/16/.

7 See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, Human Rights and Equal Opportunity Commission, Sydney, 2002, pp 196–199 and 205–207, available online at http://www.hreoc.gov.au/social_justice/sjreport_01/chapter6.html.

8 Section 10 of CAR's Reconciliation Bill 2000 proposed that each year's social justice report include consideration of the national progress towards reconciliation from a human rights perspective. The Aboriginal and Torres Strait Islander Social Justice Commissioner at the time decided that his legislative functions allowed him to take up this recommendation in absence of the passage of the Reconciliation Bill 2000. Each year's report since has addressed the human rights dimensions of reconciliation.

as well as steps that need to be taken to achieve reconciliation and address Indigenous disadvantage. This chapter summarises many of the findings and recommendations that are elaborated in those reports.[9]

Part 2: A human rights perspective on practical reconciliation

One of the criticisms from successive Social Justice Commissioners is that practical reconciliation denies human rights principles their rightful place in the reconciliation process. It asks Indigenous peoples to participate in the existing mainstream system, rather than requiring that system to adapt or accommodate Indigenous cultural distinctiveness. It therefore seeks to maintain, rather than to transform, the relationship of Indigenous peoples to the mainstream society, which runs counter to the spirit of reconciliation.

A human rights-based approach to reconciliation would begin with an acknowledgment of the impact of historically derived disadvantage on Indigenous peoples, and facilitate measures that are both culturally appropriate and responsive to the inequity already experienced by Indigenous peoples. The only way to renew a lasting and meaningful reconciliation process is by adopting an approach that recognises and protects all Indigenous peoples' rights in the social and economic, civil and political, and cultural spheres.

This section of the chapter outlines the key areas where Australia needs to incorporate human rights-based approaches in order to address Indigenous disadvantage effectively and progress genuine reconciliation. It refers to the international human rights standards against which Australia should be measuring its performance and specific reforms that governments need to embrace and champion so as to ensure that the human rights of all Australians are advanced.

The recommendations contained in this section are not exhaustive, given the limited scope of this chapter. However, they encapsulate the minimum acceptable level of action required of governments if real progress is to be made to achieve a reconciled Australia.

Commitments to address Indigenous disadvantage

Many indicators highlight that, in contemporary Australia, Indigenous peoples are still excluded from the social and economic life of the nation. For example:[10]

9 References to the considerations of various issues in the reports are included in the footnotes. All the social justice reports are available online at www.hreoc.gov.au/social_justice/sj_reports.html, and the Native Title reports at www.hreoc.gov.au/social_justice/nt_reports.html.

10 See further the statistics published online by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner at www.hreoc.gov.au/social_justice/statistics/index.html.

- in 2002, Indigenous peoples were less than half as likely as a non-Indigenous people to have completed a post-secondary qualification;[11]
- at the 2001 Census, the unemployment rate for Indigenous peoples was 20 per cent; three times higher than the rate for non-Indigenous Australians;[12]
- in the period 1996–2001, there was an estimated difference of approximately 17 years between Indigenous and non-Indigenous life expectancy.[13]

There is now a prospect that the inequality gap could get worse. With a significant proportion of Indigenous peoples in younger age groups, there is the additional challenge to programmes and services of being able to keep up with the future demands of a burgeoning population.[14]

Successive Australian governments have acknowledged that Indigenous disadvantage is a serious human rights issue that has to be addressed through the reconciliation process, and more broadly through legislative and policy reforms.[15]

One of the benefits of linking reconciliation to the need to address Indigenous disadvantage has been the conclusion of a series of national commitments at the intergovernmental level that are designed to progress both. For example, the Council of Australian Governments (COAG) committed to its Reconciliation Framework in November 2000.[16] It noted that while 'governments have made solid and consistent efforts to address disadvantage and improvements have been achieved . . . much remains to be done in health and the other areas of government activity'.[17] Subsequent COAG communiqués have built on this commitment and given content and meaning to it.

11 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage, Key Indicators 2005*, 2005, Productivity Commission, Melbourne, p 3.26.

12 Australian Institute of Health and Welfare and Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2005*, ABS cat. no 4704.0, 2005, Commonwealth of Australia, Canberra, p 66, available online at www.aihw.gov.au/publications/ihw/hwaatsip05/hwaatsip05.pdf.

13 Ibid, p 148.

14 See further Australian Bureau of Statistics, *Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001*, ABS cat. no 4713.0, 2002, Commonwealth of Australia, Canberra, p 18.

15 See, for example, the second and third periodic reports of Australia to the Committee on the Rights of the Child (submitted 29 December 2004, UN Doc: CRC/C/129/Add.4, p 5) and the 14th periodic report of Australia to the Committee on the Elimination of Racial Discrimination (submitted 1 April 2004, UN Doc: CERD/C/428/Add.2, paras 80–81).

16 See the commentary in 'Reconciliation and Government Accountability', Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003*, 2004, Human Rights and Equal Opportunity Commission, Sydney, p 7, available online at www.hreoc.gov.au/social_justice/sjreport03/data/chap2.html.

17 Council of Australian Governments, Communiqué, 3 November 2000, available online at www.coag.gov.au/meetings/031100/index.htm#reconciliation.

In April 2002, COAG agreed to commission a regular report against key indicators of Indigenous disadvantage in order 'to measure the impact of changes to policy settings and service delivery and provide a concrete way to measure the effect of the Council's commitment to reconciliation through a jointly agreed set of indicators'.[18] Known as the Overcoming Indigenous Disadvantage Framework, it reports on progress in addressing both the larger, cumulative or 'headline indicators' that provide a snapshot of the overall state of Indigenous disadvantage (such as life expectancy) and a number of supporting 'strategic change indicators' to measure progress within the shorter term.[19] Ultimately, the Framework is built on the vision that: 'Indigenous people will one day enjoy the same overall standard of living as other Australians. They will be as healthy, live as long, and participate fully in the social and economic life of the nation.'[20]

In June 2004, COAG then agreed to a National Framework of Principles for Government Service Delivery to Indigenous Australians in order to 'underpin government effort to improve cooperation in addressing (Indigenous) disadvantage'.[21] This was followed in July 2006 by COAG's decision that a long-term, generational commitment is needed to overcome Indigenous disadvantage. It agreed on the importance of closing the inequality gap in key areas of disadvantage as identified in the Overcoming Indigenous Disadvantage Framework.[22]

At time of writing, a working group has been established to propose how to build clearer links between (among others) the Overcoming Indigenous Disadvantage Framework, the National Framework of Principles for Delivering Services to Indigenous Australians and the Reconciliation Framework. The working group will report back to COAG by December 2006.[23]

In some areas of disadvantage, national strategic frameworks have been created, notably the Indigenous housing[24] and health[25] frameworks. At the federal and State government levels, many plans and strategies also exist.

18 Steering Committee for the Review of Government Service Provision, op cit, available online at: www.pc.gov.au/gsp/reports/Indigenous/keyindicators2005/index.html.

19 Overcoming Indigenous Disadvantage Framework, available online at www.pc.gov.au/gsp/reports/Indigenous/keyindicators2005/index.html.

20 Ibid.

21 Council of Australian Governments, Communiqué, 25 June 2004, available online at www.coag.gov.au/meetings/250604/index.htmťachments.

22 Council of Australian Governments, Communiqué, 14 July 2006, available online at www.coag.gov.au/meetings/140706/index.htm∞digenous.

23 Ibid.

24 Australian Housing Ministers Conference, *Building a Better Future: Indigenous Housing to 2010*, available online at www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/community-indig_housing_2010.htm.

25 National Aboriginal and Torres Strait Islander Health Council, *National Strategic Framework for Aboriginal and Torres Strait Islander Health: Framework for Action by Governments*, 2003, NATSIHC, Canberra, also discussed further below.

The combination of these commitments provides a substantial foundation from which to address Indigenous disadvantage.

A whole-of-government approach to the restructure of administrative arrangements for Indigenous affairs[26]

Changes were introduced in July 2004 to the administration of Indigenous affairs at the federal level. Known collectively as the 'new arrangements', they form the basis of inter-governmental efforts to implement COAG's commitments to Indigenous disadvantage, including the Reconciliation Framework.

There are both positive and some negative aspects to the changes.

Particularly in areas like health, it has long been recognised that developing a whole-of-government approach was a necessary first step to any sustainable effort to address Indigenous inequality and disadvantage.[27] Thus it is a welcome development that, under the new arrangements, all government departments are required to coordinate their service delivery to Indigenous peoples through the adoption of whole-of-government approaches, with a greater emphasis on regional planning and service delivery. It is also an objective that bilateral agreements between the federal and state and territory governments be arranged and service delivery be coordinated and complementary.

New agreement-making processes also hold great promise. Under the new arrangements, it is intended that governments will directly engage with Indigenous peoples at the local level through Indigenous coordination centres, where Indigenous communities can interface with 'solution brokers', who navigate through all the levels and sectors of government to negotiate solutions for community problems.

Agreement-making, where possible and/or appropriate, is to be done in accordance with the principle of mutual obligation. That is, a community will be expected to give something in return for service delivery through, for example, shared responsibility agreements.

Some of the negative and concerning aspects of the new arrangements will be discussed below. However, as a result of the commitments listed above and the whole-of-government approach now developing, we have perhaps never been as well placed to turn around much of the disadvantage faced by Indigenous peoples.

26 See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004*, 2005, Human Rights and Equal Opportunity Commission, Sydney, ch 3, pp 67–142, available online at www.hreoc.gov.au/social_justice/sjreport04/3NewArrangements.html; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, 2006, Human Rights and Equal Opportunity Commission, Sydney, pp 99–219, available online at www.hreoc.gov.au/social_justice/sjreport05/chap3.html.

27 For example, see the National Aboriginal Health Strategy Working Group, *National Aboriginal Health Strategy,* 1989, AGPS, Canberra.

Linking practical reconciliation commitments to targets and benchmarks

While the COAG commitments and the whole-of-government approach to Indigenous disadvantage are welcome and significant changes, the 'practical reconciliation' approach does not represent a significant departure from the way in which Indigenous disadvantage was addressed prior to its introduction.

Perhaps the factor that is most striking in its absence from the practical reconciliation approach is the lack of a time frame for achieving equality. As a result, there is no sense of urgency associated with overcoming Indigenous disadvantage which one might expect given the extent of the inequality.

We should not be timid about setting a time frame for realising the solid commitments of government. For example, the goal of equality in health and life expectation contained in the National Strategic Framework for Aboriginal and Torres Strait Islander Health has not been set within an achievable time frame. In fact, it explicitly avoids imposing health status targets or benchmarks on progress. Each jurisdiction will be responsible for determining its own specific initiatives, priorities and time frames. Progress will be monitored against baselines set out in the Aboriginal and Torres Strait Islander Health Performance Framework.[28]

Also striking in their absence from the practical reconciliation approach are achievable targets and benchmarks against which governments' performance can be measured and evaluated. Appropriate targets or benchmarks that are negotiated between governments and Indigenous peoples, for example, could supplement the Overcoming Indigenous Disadvantage Framework and provide a mechanism whereby governments could be held accountable for any shortcomings.

As a result of this failure to link practical reconciliation to targets and benchmarks, practical reconciliation is not aligned with Australia's human rights obligations to *progressively realise* Indigenous equality.

Australia's ratification of international human rights instruments requires that our government does much more than simply acknowledge the existence of inequality and make general commitments to overcome this situation at some unspecified time in the future. Human rights laws provide a system for ensuring the accountability of governments and ensuring equality is achieved as quickly as is reasonably possible, as set out in Text box 1.

Text box 1: Progressive realisation

The human rights instrument most relevant to Indigenous disadvantage is the International Covenant on Economic, Social and Cultural Rights (ICESCR). Important rights in the Covenant include the right to an adequate standard of living, including adequate food, clothing and

28 National Aboriginal and Torres Strait Islander Health Council op cit, pp 39–40.

housing (Article 11); the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12); and, the right to education (Article 13)[29]. Other instruments also touch on social and economic rights.[30]

Article 2 sets out how governments should realise the rights in the Covenant. It is the activating provision in the ICESCR: It states:

1. Each State Party to the present Covenant undertakes to take steps . . . to the *maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant by *all appropriate* means, including particularly the adoption of legislative measures. (*emphasis added*)
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The non-discrimination principle outlined above (in Article 2(2)) applies to all human rights. It establishes a baseline position that all people are entitled to be treated equally and to be given equal opportunities. Where this does not occur, Article 2(1) allows governments to introduce special measures to address the lack of equality experienced by a particular group within society. This includes a group defined by race, such as Indigenous peoples in Australia. Practical reconciliation is consistent with a human rights approach to the degree it reflects this sense of obligation.

The obligation 'to take steps' in Article 2(1) means that governments must progressively fulfil the rights set out in the Covenant and must do so without delay. Steps must be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.[31] This is known as the 'Progressive Realisation' Principle.

Progressive realisation requires that governments identify appropriate

29 The International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, available online at http://www1.umn.edu/humanrts/instree/b2esc.htm.

30 For example, in relation to the right to health, see also: Article 25 (1) of the Universal Declaration of Human Rights (UDHR); Article 24 of the Convention on the Rights of the Child (CRC); Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

31 Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 3: The Nature of States Parties' Obligations*, contained in UN Doc: E/1991/23, 14 December 1990, para 2.

indicators, in relation to which they should set ambitious but achievable benchmarks, so that the rate of progress can be monitored and, if progress is slow, corrective action taken. Setting benchmarks enables government and other parties to reach agreement about what rate of progress would be adequate. Such benchmarks should be:

- specific, time bound and verifiable;
- set with the participation of the people whose rights are affected, to agree on what is an adequate rate of progress and to prevent the target from being set too low; and
- reassessed independently at their target date, with accountability for performance.[32]

The following description (in relation to the right to health) serves to illustrate the content of the obligation to undertake steps 'to the maximum of available resources' in Article 2(1):

> In determining whether an action or an omission amounts to a violation of the right to health, *it is important to distinguish the inability from the unwillingness of a government to comply with its obligations. A government which is unwilling to use the maximum of its available resources for the realisation of the right to health is in violation of its obligations.* If resource constraints render it impossible for a government to comply fully with its obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations.[33]

Adequate funding of policies and programmes

The history of approaches to Indigenous disadvantage both before and after they were linked to reconciliation show that Australian governments have been unwilling to fund policies and programmes based on need and, as a result, plans have failed.[34]

32 United Nations Development Programme, *Human Development Report 2000*, as quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, 2003, HREOC, Sydney, p 101.

33 United Nations Committee on Economic, Social and Cultural Rights, General comment 14 (2000): The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), op cit, para 47. Emphasis added.

34 See for example, Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, 2001, CGC, Canberra.

Again, to use health as an example, current spending on programmes is inadequate to meet the need in Indigenous communities. There remains an estimated $250–570 million per annum shortfall in funding required to provide equality of access to primary health care for Indigenous peoples when compared to that enjoyed by the non-Indigenous population.[35] The Commonwealth Primary Health Care Access Program is the main vehicle for funding Aboriginal community-controlled health organisations and the establishment of new services in this area. It has a recurrent funding base of $54.8 million.[36] The 2005–06 Budget announced an additional $40 million for primary health care for the four years until 2008–09,[37] but there remains a significant budget shortfall in this vital area.

However, there are no incentives for, or requirements on, Australian governments to commit resources to improving Indigenous health that are commensurate with need in the National Strategic Framework. As it states:

> Provision of financial resources to implement the [National] Strategic Framework will depend on fiscal management strategies and competing funding priorities as determined by each jurisdiction's budget processes.[38]

It is not acceptable to state continually that Indigenous disadvantage is tragic and ought to be treated with urgency, and then fail to fund programmes so that they are capable of meeting need or of raising the standard of Indigenous health to that of the general population. We must start stating loudly that a *plan that is not adequately funded to meet its outcomes cannot be considered an effective plan.*

It cannot be said that government efforts are operating (as required by Article 2 of the International Covenant on Economic, Social and Cultural Rights) at the 'maximum of available resources'. A projected 2006–07 Budget underlying cash surplus of $10.8 billion, on top of nine successive

35 For the range of estimated need see J. Deeble, *Expenditures on Aboriginal and Torres Strait Islander Health 2003*, 2003, AMA, Canberra, p 5; Access Economics, *Indigenous Health Workforce Needs*, 2004, Australian Medical Association, Canberra, p 36: Econtech, *Costings Models for Aboriginal and Torres Strait Islander Health Services*, Aboriginal and Torres Strait Islander Primary Health Care Review: Consultant Report No 3, 2004, Commonwealth of Australia, Canberra, p xi.

36 J. Dwyer, K. Silburn, and G. Wilson, *National Strategies for Improving Indigenous Health and Health Care*, Aboriginal and Torres Strait Islander Primary Health Care Review: Consultant Report No 1, 2004, Commonwealth of Australia, Canberra, p 16.

37 Department of Immigration, Multiculturalism and Indigenous Affairs, *Indigenous Budget Measure 12: Primary Health Care Access Programme – Additional Funding*, (factsheet) available online at http://www.atsia.gov.au/budget/budget05/c_fact_sheet_12.pdf, July 2005 (accessed 3 August 2005).

38 National Aboriginal and Torres Strait Islander Health Council, op cit, p 40.

budget surpluses[39] at the federal level, suggests that resource availability is not the issue. It is not credible to suggest that government efforts have been, or are being, held back by an inability to take action. Resourcing should be increased to the maximum extent possible and rolled out in accordance with regional plans and benchmarks.

In the Social Justice Report 2005, Commissioner Calma presented a human rights-based campaign to address Indigenous health inequality that serves as a model for the alignment of the government's practical reconciliation approach with human rights-based approaches.[40] The primary recommendation was that the governments of Australia commit to achieving equality of health status and life expectation between Indigenous and non-Indigenous people within 25 years. Commissioner Calma emphasised that in rolling out a human rights-based approach to Indigenous health, governments must build on existing structures such as the National Strategic Framework, and incorporate a number of monitoring mechanisms to make sure that governments are accountable.[41]

Recognising the right to self-determination

Despite the chorus of claims that declare that self-determination is a 'failed experiment', it has never really been put into practice in Australia post-colonial contact. For too long, Indigenous peoples have been administered and governed, or part-administered and governed, by others.

For many Indigenous peoples, self-determination is viewed as essential for the full realisation of all other human rights and should be at the heart of the reconciliation process.[42]

The right to self-determination is a mechanism for re-empowering Indigenous peoples within society. In the context of reconciliation, it also helps to remedy the destruction of Indigenous governance structures, economic bases and cultures that have occurred in the past, thereby providing a strong foundation for a renewed relationship.

However, the current Australian government has consistently viewed self-determination as a threat to national unity that, if realised, could lead to the establishment of 'separate rights', or in the extreme, the secession

39 See Australian government '2006–2007 Commonwealth Budget' available online at www.budget.gov.au/, 2006.

40 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, 2006, Human Rights and Equal Opportunity Commission, Sydney, p 9, available online at www.hreoc.gov.au/social_justice/sjreport05/chap2.html.

41 Ibid.

42 See, for example, the World Health Organization, Geneva Declaration on the health and survival of Indigenous peoples, concluded during an international consultation on the health of Indigenous peoples. The Preamble states that the right of self-determination is vital to health outcomes: see Indigenous Peoples' Centre for Documentation, Research and Information (doCip), *doCip Update,* Nos 32–33, November 1999/February 2000, doCip, Geneva 2000, www.docip.org.

of Indigenous peoples from Australia. It has openly rejected recognising the right of self-determination since 1998 on the grounds that it is 'a distraction from the real tasks and priorities at hand', namely, practical reconciliation.[43]

The right to self-determination, as it applies to Indigenous peoples in Australia, is set out in Text box 2 and elaborated further in subsequent sections of this chapter.

Text box 2: Self-determination as a human right of Indigenous peoples[44]

The right to self-determination is contained in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Australia is a party to both of these covenants and is bound to act in compliance with their terms. Common Article 1 reads as follows:

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Article 1 does not define self-determination, or the forms it may take. In terms of whom it applies to, Article 1 states that self-determination is a right of 'all peoples'. There is, however, no internationally agreed definition of 'peoples'.

Article 3 of the Draft Declaration on the Rights of Indigenous Peoples[45] seeks to declare that Indigenous peoples are in fact a 'peoples' within the meaning of the term. It states:

43 J. Herron, *Statement on Behalf of the Australian Government at the 17th Session of the United Nations Working Group on Indigenous Populations,* Minister for Aboriginal and Torres Strait Islander Affairs, Canberra, 29 July 1999, p7, See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, 2000, HREOC, Sydney, pp 8–11, available online at www.hreoc.gov.au/social_justice/sjreport_02/chapter2.html.

44 For a commentary on these provisions, see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1999*, 2000, HREOC, Sydney, pp 89–97.

45 Hereafter referred to as the 'Draft Declaration'. For a discussion on the progress of the Declaration, see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Parliamentary Briefing on the Draft Declaration on the Rights of Indigenous peoples*, 12 October 2006, available online at www.hreoc.gov.au/speeches/social_justice/drip_parliamentary_briefing.html.

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The Draft Declaration was adopted by the UN Human Rights Council in June 2006 and will be considered for adoption by the General Assembly in late 2007.[46]

Facilitate Indigenous peoples' participation in relevant decision-making processes

At the core of the right to self-determination for Indigenous peoples in Australia is the achievement of their full and effective participation in Australian society on equal terms.

However, 'equal treatment' does not equate to 'same treatment'. The failure to provide Indigenous peoples with the same opportunities as other Australians in the past means that if governments now insist on their identical treatment, they will simply perpetuate the status of Indigenous peoples as the most disadvantaged group in Australia. The onus is not on Indigenous peoples to fit into the existing mainstream system, but on governments to recognise and accommodate the cultural distinctiveness and diversity of Indigenous peoples so that their participation can occur in a culturally appropriate manner.

Nor is self-determination about the creation of separate rights. It is about inclusive government, in which Indigenous peoples *participate* in determining their priorities and destiny. As well as self-determination, principles relating to non-discrimination, equality before the law and minority group cultural rights have been interpreted as requiring this type of participation.[47]

46 Ibid.

47 For an overview of the relevant human rights principles, see United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Doc: E/C.19/2005/3, 17 February 2005, Annex IV, available online at http://daccessdds.un.org/doc/UNDOC/GEN/N05/243/26/PDF/N0524326.pdf?OpenElement, and United Nations Working Group on Indigenous Populations, *Expanded Working Paper Submitted by Mrs Antoanella-Iulia Motoc and the Tebtebba Foundation Offering Guidelines to Govern the Practice of Implementation of the Principle of Free, Prior and Informed Consent of Indigenous Peoples in Relation to Development Affecting their Lands and Natural Resources*, UN Doc: E/CN.4/Sub.2/AC.4/2005/WP 1, 14 July 2005, Available online at www.ohchr.org/english/issues/Indigenous/docs/wgip23/WP1.doc.

Consideration of what constitutes effective participation has given rise to the principle of 'free, prior and informed consent'.[48] At the international level, this principle is gaining wide acceptance. For example, United Nations agencies are guided by what is known as the 'common understanding of a human rights-based approach to development cooperation',[49] which recognises that people are key actors in their own development, rather than simply passive recipients of services.

In brief, the principle of free, prior and informed consent integrates the following concepts.

- *Free*: requires no coercion, intimidation or manipulation.
- *Prior*: requires that consent has been sought sufficiently in advance of any authorisation or commencement of activities, and respects time requirements of Indigenous consultation and consensus-building processes.
- *Informed*: requires that information is provided that addresses the purpose, scope, obligations and impact of any proposed activity.
- *Consent*: requires that consultations be undertaken in good faith, on a basis of mutual respect, and with full and equitable participation. It also requires that Indigenous peoples can participate through their own freely chosen representatives and customary or other institutions, and ultimately it must allow the option for Indigenous peoples to withhold their consent.

The principle of free, prior and informed consent has recently received important international endorsement by the United Nations General Assembly. In adopting the Program of Action for the Second International Decade of the World's Indigenous People, five key objectives were agreed for the Decade. They include:

> Promoting the full and effective participation of Indigenous peoples in decisions that directly or indirectly affect them, and to do so in accordance with the principle of free, prior and informed consent.[50]

In fact – legal obligations aside – it is common sense that governments risk

48 The Aboriginal and Torres Strait Islander Social Justice Commissioner collaborated with the Secretariat of the United Nations Permanent Forum on Indigenous Issues on this issue, co-hosting a workshop in Brisbane in August 2005 entitled 'Engaging the Marginalised'. The full report from the workshop is available online at www.hreoc.gov.au/social_justice/conference/engaging_communities/index.html.

49 United Nations, *The Human Rights-Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies*, 2003, United Nations, New York available online at: www.unescobkk.org/fileadmin/user_upload/appeal/human_rights/UN_Common_understanding_RBA.pdf.

50 United Nations, *Draft Programme of Action for the Second International Decade of the World's Indigenous People*, 2004, available online at www.un.org/esa/socdev/unpfii/en/second_programme_of_action.htm.

failure if they develop and implement policies about Indigenous issues without engaging with the intended recipients of those services. Bureaucrats and governments can have the best intentions in the world, but if their ideas have not been subject to the 'reality test' of the life experience of the local Indigenous peoples who are intended to benefit from them, then government efforts will fail in the medium to long term.

Ensure independent Indigenous representation at local, regional and national levels

In 2004, the federal Parliament abolished the Aboriginal and Torres Strait Islander Commission (ATSIC), which had operated as the peak national Indigenous representative body since 1990. With its abolition, Indigenous peoples lost an elected national network of 35 regional councils, just at the time when the federal government was asking them to participate in a major overhaul of Indigenous policy, programme design and service delivery. Arguably, there was no need to make the introduction of the new arrangements conditional on the abolition of ATSIC. The government's decision to do so has proven to be a serious setback for reconciliation in this country and a breach of Indigenous peoples' right to self-determination.[51]

A challenge for the new arrangements for the administration of Indigenous affairs is to ensure that there are processes through which Indigenous peoples can be represented at all levels of decision making. However, significant gaps remain in Indigenous representation at the local, regional and national levels under the new arrangements.[52]

With no replacement body for ATSIC, Indigenous peoples find themselves in a paradoxical position. The new arrangements are built on a commitment to regional and local engagement, but this local engagement is to be established through national processes that do not consistently involve the participation of Indigenous peoples.

Mechanisms such as the National Indigenous Council, whose members are appointed by the federal government to advise it on Indigenous issues, are not sufficient to ensure appropriate representation of Indigenous peoples in national decision-making processes.[53]

At the regional level, it is also vital that representative bodies are

51 See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004*, op cit, pp 67–139, available online at www.hreoc.gov.au/social_justice/sjreport04/3NewArrangements.html; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, op cit, pp 110–135, available online at www.hreoc.gov.au/social_justice/sjreport05/chap3.html.

52 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, op cit, pp 110–135, available online at www.hreoc.gov.au/social_justice/sjreport05/chap3.html.

53 Ibid.

established. These bodies must also have the capacity to link to local, as well as state and national levels. These are, in fact, envisaged under the new arrangements. However, to date only two such bodies have been funded nationally. While there are some promising developments in this area, improving regional representation must be an urgent priority for governments.[54]

There are also concerns for the quality of participation and engagement occurring at the local level. As noted, where possible and appropriate, this will occur through shared responsibility agreements (SRAs), which are based on mutual obligation principles.[55]

The SRA process raises complex issues of human rights compliance. These relate to ensuring the effective participation of Indigenous peoples in the agreement-making process (on the basis of their free, prior and informed consent), as well as ensuring that the content of SRAs is consistent with human rights standards. For example, it is critical that the obligations on Indigenous communities under an SRA amount to positive measures to fulfil human rights commitments and do not place restrictions on the accessibility of basic entitlements or essential services.

Although, at the time of writing, some 200 SRAs have been completed, most of the developments in relation to the SRA process are recent or not yet fully in place. The negotiation, implementation and impact of these agreements will be closely monitored by the Aboriginal and Torres Strait Islander Social Justice Commissioner and will be the subject of future Social Justice Reports.

Comprehensively address Indigenous law and justice issues

The year 2006 marked the 15th anniversary of the report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). This four-year investigation concluded that the reason so many Indigenous people were dying in custody was the disproportionate rate at which they were being arrested and imprisoned. Sadly, there have been few positive developments in relation to Indigenous incarceration since the Royal Commission. Indigenous peoples' over-representation in prisons has worsened[56] and new problems have emerged. For example, Indigenous women are currently the fastest growing prison population in Australia with a national imprisonment rate that is

54 Ibid.

55 See the Australian government 'SRA and RPA' website: www.indigenous.gov.au/sra.html.

56 In 1991, when the RCIADIC reported, Indigenous peoples comprised 14 per cent of the prison population. In 2005, approximately 22 per cent of prisoners in Australia were Indigenous. See Australian Bureau of Statistics, *Prisoners in Australia 2005*, ABS cat no 4517.0, 2005, Commonwealth of Australia, Canberra, p 5.

20 times that of non-Indigenous women.[57] The situation for young Indigenous people is similarly alarming.

Australia is overdue a thorough debate on how to address the complex issues surrounding Indigenous justice and law. In the interests of furthering reconciliation, that debate needs to be cross-cultural and it needs to examine how Indigenous peoples' customary law can be integrated into the Australian legal system.

Customary law is often misunderstood. However, it is an essential component of Indigenous self-determination. It is a means of self-governance and of dispute resolution, an ordering principle by which communities can control their own lives. It is also one aspect of the right of Indigenous peoples, as a minority group in Australia, to 'enjoy their own culture, to profess and practice their own religion, and to use their own language', as required by Article 27 of the International Covenant on Civil and Political Rights (ICCPR).

Any debate about Indigenous customary law must begin with an acknowledgment that international human rights standards provide the overarching legal framework. This will ensure that an appropriate balance between the interests of individuals and Indigenous group interests can be struck. It will also establish at the outset that there is no place in Australian society for practices that are inconsistent with the human rights of women and children.[58]

Law and order issues in Indigenous communities, including violence against women and children, have been the subject of a significant amount of media attention in recent years. One positive outcome of these debates has been the organisation of an Intergovernmental Summit on Violence and Child Abuse in June 2006 and the provision of extra government funding and programmes to address these issues within the practical reconciliation agenda.

However, it is vitally important that the current focus on what is sometimes falsely characterised as a 'new' objective of addressing abuse and violence in Indigenous communities does not occur at the expense of the 'old' objectives set out in the RCIADIC. Indigenous family violence and child abuse must be reduced, but so too should rates of Indigenous incarceration. Integrating customary law into the Australian legal system could play a vital role in helping to achieve this balance. However, customary law is often rejected out of hand because of simplistic and ill-informed arguments about the problems

57 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004*, p 15, available online at www.humanrights.gov.au/social_justice/sjreport04/2WalkingWithTheWomen.html#3.

58 See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *The Integration of Customary Law into the Australian Legal System*, Speech given at the National Indigenous Legal Conference, NSW, 23 September 2006, available online at www.hreoc.gov.au/speeches/social_justice/integration_of_customary_law.html.

that could arise when two different legal systems operate in the same jurisdiction. Too often, debate stops at this point. It fails to explore the possibility of how one legal system can and must support the other.

Indigenous customary law and the mainstream legal system should not be regarded as mutually exclusive. Although its recommendations were not implemented, the 1986 Australian Law Reform Commission Report on Aboriginal Customary Law resulted in one of the most comprehensive and authoritative works on how to reconcile the two systems of law.[59] More recently, the Western Australian Law Reform Commission has set out practical ways in which customary law could be recognised so that Indigenous communities have the power to apply their customary laws and practices in the punishment and rehabilitation of their members.[60]

Promising developments in other jurisdictions include the Sentencing Amendment (Aboriginal Customary Law) Act 2004 (NT),[61] which was introduced in response to recommendations from the Northern Territory Law Reform Committee. The purpose of the Act is to prevent the introduction – by non-Indigenous lawyers in the main – of information to the courts that is ill-informed or incorrect in terms of customary law, and thereby maintain the integrity of customary law within the judicial process.[62] Such measures are essential if the general community is to develop an understanding of customary law and confidence in its ability to contribute to just outcomes for both the victims and perpetrators of crime.

Furthermore, almost all Australian jurisdictions have now instituted some process to engage Indigenous communities and integrate customary laws into criminal sentencing procedures more effectively. Whether it be the incorporation of restorative justice processes or the use of diversionary schemes for young offenders, there is scope for these modifications to impact positively on Indigenous incarceration rates. Similarly, the advent of Circle Sentencing (NSW), the Murri Court (Qld), the Koori Court (Vic) and the Ngunga Court (SA) have the potential to make inroads in reducing Indigenous incarceration rates. These developments are in their infancy and will continue to be the subject of evaluation by the Aboriginal and Torres Strait Islander Social Justice Commissioner and others.

However, at the time of writing, the Australian government is seeking to

59 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, AGPS, 1986, available online at www.austlii.edu.au/au/other/IndigLRes/1986/1/.

60 Western Australian Law Reform Commission, *Aboriginal Customary Laws, Final Report,* 2006, WALRC, Perth, available online at www.lrc.justice.wa.gov.au/.

61 L. Roth, *Law and Order Legislation in the Australian States and Territories: 2003–2006*, Briefing Paper No 12/06, NSW Parliamentary Library Research Service, 2006, p 47.

62 See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee inquiry into Aboriginal Customary Law in the Northern Territory*, May 2003, available online at www.hreoc.gov.au/social_justice/customary_law/nt_lawreform.html.

amend the Commonwealth Crimes Act 1914 effectively to exclude consideration of cultural background and customary law in sentencing discretion and bail applications for Commonwealth crimes. Efforts are also under way to oblige the States and Territories to adopt similar amendments.[63] If these amendments succeed, it is likely that many of the innovative practices being developed and tested at the State level will be wound back.

The Commonwealth Amendment is a response to media coverage and the ensuing public debate about court decisions in which Aboriginal customary law has been used as a mitigating or relevant factor in sentencing offenders who violently assaulted women and children. These decisions and the debate that followed have caused the widespread misconception that Indigenous customary law condones child abuse or violence against women.[64]

In fact, violence against women and children is a result of the breakdown of customary law in the communities where it occurs. It is, in that sense, a further legacy of dispossession and the cultural dislocation experienced in many communities. Customary law is a form of social organisation that is designed to protect vulnerable community members, especially women and children. It is the perpetrators of violence who do not respect customary law.

If the government's intention is to clarify and strengthen justice systems for Indigenous peoples, then it is logical that existing systems of law that advance human rights should be reinforced and strengthened. If Indigenous communities are not supported to self-regulate and if governments seek to reduce the standing of internal governance systems, this could further diminish systems of law within those communities.

Use communal title land as a basis for Indigenous economic development

In 1992, the High Court's decision in *Mabo*[65] overturned the legal doctrine of *terra nullius* ('land belonging to no one') that had prevailed from the British colonisation of Australia. The *Mabo* decision led to the creation of the Native Title claims process under the Native Title Act 1993 (Cth), as well

63 See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *The Integration of Customary Law into the Australian Legal System*, op cit; Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Affairs Committee on the Crimes Amendment (Bail and Sentencing) Bill 2006*, available online at www.hreoc.gov.au/legal/submissions/crimes_amendment.html.

64 There have been some recent high-profile cases in which the courts have come under scrutiny for providing inadequate sentences for very serious crimes. One such case is the 'promised bride case', *The Queen v GJ* [2005] NTCCA 20, in which the accused received a 24-month sentence with 23 months suspended for a conviction of sexual intercourse with a minor and aggravated assault. While the accused pleaded guilty to both charges, it was argued in mitigation, that he was exercising a customary right and that he was unaware that what he did was against the law.

65 *Mabo and Ors v Queensland (No 2)* (1992) 175 CLR1.

as the establishment of the Indigenous Land Fund, in recognition that dispossession would result in many Indigenous peoples being unable to assert Native Title.

Since 1992, governments have sought to establish a system to recognise Native Title and regulate its coexistence with other interests in land, with mixed results. For example, at the time of writing there had been 95 Native Title determinations, 64 of which found that Native Title exists in the determination area.[66] A total of 264 Indigenous land use agreements had been registered, relating to mining and infrastructure developments, co-management of land, access arrangements and consultation protocols, to mention only a few.[67] In addition, various levels of government have negotiated agreements with Indigenous peoples relating to heritage and the management of State and Territory national parks.

However, developments in Native Title law present significant barriers to Indigenous economic and social development. Amendments to the Native Title Act in 1998[68] and subsequent decisions of the High Court have made Native Title harder to recognise and easier to extinguish.[69] Governments have had the opportunity to override legislatively the narrow and difficult test for recognition, and the conversely expansive test for extinguishment, but they have not done so.

The capacity for Native Title to contribute to Indigenous economic development is also hampered by the fact that Native Title policies have not been integrated into broader policy objectives. For example, new arrangements for the administration of Indigenous affairs do not include Native Title in its

66 National Native Title Tribunal website, as at 9 January 2007. See www.nntt.gov.au/applications/determinations.html.

67 For a more detailed overview of ILUAs by subject, see www.nntt.gov.au/ilua/bysubjectmatter_index.html.

68 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998,* 1999, Human Rights and Equal Opportunity Commission, Sydney, pp 52–71, available online at www.hreoc.gov.au/social_justice/nt_reports.html#2005; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999,* 2000, Human Rights and Equal Opportunity Commission, Sydney, pp 13–32, available online at www.hreoc.gov.au/social_justice/nt_reports.html#2005; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2000,* 2001, Human Rights and Equal Opportunity Commission, Sydney, ch 5, available online at www.hreoc.gov.au/ social_justice/nt_report/chap5.html.

69 For a consideration of the High Court's decisions in: *Commonwealth v Yarmirr, Yarmirr v Northern Territory* [2001] HCA 56 (11 October 2001); *Western Australia & ors v Ward & ors* [2002] HCA 28 (8 August 2002); *Wilson v Anderson and ors* [2002] HCA 29 (8 August 2002) and *Members of the Yorta Yorta Aboriginal Community v Victoria & ors* [2002] HCA 58 (12 December 2002). With respect to the recognition and extinguishment of Native Title, see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002,* 2003, Human Rights and Equal Opportunity Commission, Sydney, ch 5, available online at www.hreoc.gov.au/social_justice/ntreport02.

'whole-of-government' approach, isolating the Native Title process from broader economic development goals.

Economic development is often portrayed as unrelated or antithetical to the traditional relationship that Indigenous peoples have to their land. But ownership of land, including traditional ownership, can be viewed as ownership of an asset from which development can take place. For example, many mining agreements struck with Native Title parties provide them with monetary benefits, social development programmes, employment and training opportunities. These arrangements are a direct result of the legal recognition given to the traditional relationship that Indigenous people have with their land.

As a result, programmes are not widely available to improve funding to Indigenous entities to assist traditional owners to use their Native Title rights for economic benefit. To date, there has been no direct federal funding for prescribed bodies corporate[70] and most struggle to discharge their statutory duties. This limits their ability to engage proactively with governments and third parties about development opportunities on their land, or to develop ways of using their Native Title rights for the economic benefit of the Native Title group or larger community.

The particular focus of recent Native Title reports has been on promoting economic development through Native Title, and examining recent proposals for individual titling over Indigenous communal land.[71] From a human rights perspective, two factors must direct any reform of the Native Title and land rights systems.

Firstly, all decisions affecting Indigenous land must be taken with the free, prior and informed consent of Indigenous landholders. This requires the establishment of a process for the effective participation of Indigenous peoples as part of the broader reform process. Negotiation with Indigenous peoples must occur at all levels. Where the capacity of Indigenous peoples to participate is hampered, either through limited resources, limited skills or limited decision-making structures, provision must be made to address these deficiencies to enable genuine negotiation to take place.

Secondly, the benchmarks for reform must be the human rights of Indigenous peoples. A non-discriminatory approach to protecting Indigenous

70 When the court makes a determination that Native Title exists, Native Title holders are required by the Native Title Act 1993 to establish a body corporate to represent them as a group and manage their Native Title rights and interests. This body is called a 'prescribed body corporate' (PBC). A PBC is a Native Title corporation that may hold and/or manage Native Title for the whole group. See www.nntt.gov.au/publications/1021859460_4854.html.

71 Promoting economic development through Native Title has been a major focus of the following reports: see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2004,* 2005, Human Rights and Equal Opportunity Commission, Sydney, available online at www.hreoc.gov.au/social_justice/ntreport04/index.html; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003,* 2004, Human Rights and Equal Opportunity Commission, Sydney, available online at www.hreoc.gov.au/social_justice/ntreport03/index.htm.

peoples' inherent right to land must be adopted. This measures the extent to which the law permits Indigenous property rights to be enjoyed against the extent to which the law permits the enjoyment of other property rights by all Australians.

Part 3: Conclusion

Australia has taken some important steps towards a national reconciliation process since reconciliation was first recommended as a means of addressing Indigenous disadvantage in the early 1990s. However, we remain a considerable distance from the goal of 'a united Australia that respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all'.[72]

The government's commitment to addressing Indigenous disadvantage and fostering Indigenous economic development are critical elements of the national reconciliation process. However, the government's reconciliation agenda rests on an artificial division between measures that it regards as 'practical' as opposed to 'symbolic'. In reality, no such clear distinction exists. There are interdependencies between many of the dimensions of Indigenous disadvantage: particularly the extent to which social and historical factors continue to limit life opportunities for many Indigenous peoples even today. We need to move beyond the tunnel vision of 'practical reconciliation', and inject human rights standards into our efforts to address Indigenous disadvantage. Only in this way will Australia have the capacity to be a reconciled country that recognises and respects the rights of Indigenous peoples.

The process of reconciliation between Indigenous and non-Indigenous Australians is an unstoppable force that continues in local communities, at State and Territory government levels, and in the business world. It is not a process that is monopolised by governments, but one that belongs to all Australians and one that can still be achieved with the willing participation of the whole community.

72 CAR, *Australian Declaration Towards Reconciliation*, 2000, available online at www.austlii.edu.au/au/other/IndigLRes/car/2000/12/pg3.htm.

13 Conflict-handling mechanisms in Australian reconciliation*

Lester-Irabinna Rigney

Introduction

Legal and political strategies of reconciliation, at this moment in their evolution, are limited by the absence of clearly defined legal objectives and associated implementation strategies. Beyond 2006, what does it mean to take seriously the thought of sharing the legal, cultural and political spaces of Australia between Indigenous and non-Indigenous peoples? What conflict dispute resolution mechanisms exist in Australian reconciliation?

While much has been accomplished, ideological conflict and disagreement has ruptured the reconciliation process. Government agendas dispute and actively resist legal and political solutions proposed by reconciliation supporters. David Cooper, former National Director of Australians for Native Title and Reconciliation (ANTaR), claims that 'between 2001 and 2004, many local groups and state peak bodies "lost momentum" and downsized their reconciliation activities'.[1] The failure of reconciliation to make even the slightest change to Indigenous poverty, education and health statistics, suggest that conflict and disagreements far outweigh common ground.

Hizkias Assefa, distinguished Professor of Conflict Studies and Peace Building, suggests that 'compared to conflict handling mechanisms such as negotiation, mediation, adjudication, and arbitration, the approach called reconciliation is perhaps the least well understood'.[2] Although the works of the Council for Aboriginal Reconciliation (CAR) and its contemporary, Reconciliation Australia (RA), have advanced 'race' relations, an updated meaning and process to mitigate conflict differences toward reconciliation has not been clearly articulated.

* This chapter was written before the 2007 Australian election which has seeen the Federal Liberal Government under the leadership of Prime Minister Howard defeated by Kevin Rudd's Australian Labour Party. This context should be considered when reading this chapter.

1 S. Reys and D. Cooper, 'Sustaining the Reconciliation Process' (2006) *Journal of Indigenous Policy*, Issue 5, p 25.

2 H. Assefa, *The Meaning of Reconciliation. In People Building Peace: 35 Inspiring Stories around the World*, 1999, European Centre for Conflict Prevention, The Netherlands, p 37.

This chapter briefly examines reconciliatory conflict management approaches in Australia, and compares and contrasts them with other approaches used to mediate disagreements toward building coexistence. It draws upon Assefa's (1999) *Spectrum of Conflict Handling Mechanisms* as a lens through which to analyse reconciliation in Australia.[3]

Plotting Australian reconciliation on the 'spectrum of conflict handling mechanisms'

Professor Hizkias Assefa's 1999 publication, *The Meaning of Reconciliation*, constructed a spectrum listed opposite (Figure 13.1) that positions several major conflict resolution mechanisms from the use of force, to reconciliation. The level of mutual participation by the conflicting parties in search of solutions to the problems underlying the conflict is also plotted on the spectrum.[4] Plotting Australian reconciliation on Assefa's spectrum of conflict resolution is used here to examine mutual participation by conflicting parties and to analyse the Australian institutional apparatus used to resolve differences.

Force

Assefa suggests that, at the left end of the spectrum, are approaches where mutual participation by conflict parties is minimal, in contrast to high mutual participation further to the right.[5] The use of force by one of the parties to impose a solution would be an example of a mechanism at this end of the spectrum. While Assefa uses the term 'conflict' to include civil war within the spectrum, the contemporary Australian context does not involve State-sponsored military force against Indigenous peoples. The circumstance of conflict in Australia is one of passionate ideological, political and legal differences in sharing Australia. It is a conflict that is based on four indisputable facts: First Nations Australia was invaded by the British; no formal agreement or treaty was, or has been, signed; Indigenous sovereignty was not ceded; the social impact of colonisation continues through contemporary disadvantage and injustice. In essence, the Australian conflict between the Indigenous minority and the non-Indigenous majority is played out in political and social arenas to rectify the historical elimination and contemporary denial of Indigenous rights and freedoms.[6] It is this definition of Australian conflict that is used throughout this chapter.

3 Ibid, pp 37–45.
4 Ibid, p 37.
5 Ibid, p 37.
6 The contemporary political and social debates of sharing the Australian space can be sourced in the following text: G. Worby and L.-I. Rigney (eds) *Sharing Spaces: Indigenous and Non-Indigenous Responses to Story, Country and Rights*, 2006, API Network, Australian Research Institute, Curtin University of Technology. Western Australia.

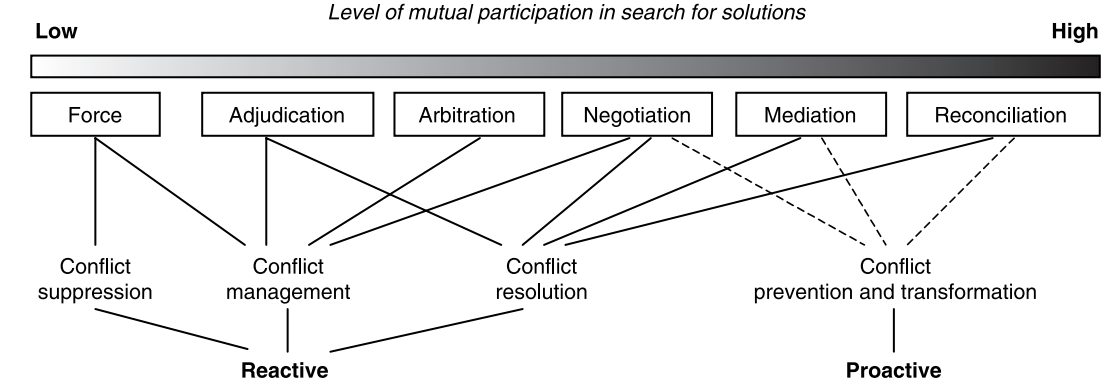

Figure 13.1 Spectrum of conflict-handling mechanisms.

Adjudication

Further to the right of the spectrum is adjudication. According to Assefa, this mechanism requires a third party to impose a solution to the conflict. Unlike the mechanism of force, the processes of adjudication 'at least allow the parties the opportunity to present their cases, to be heard, and submit their arguments for why their preferred solution should be the basis upon which the decision is made'.[7]

In Australia, adjudication mechanisms including the court system have been used extensively since the 1990s to settle disputes over land including Native Title, water rights and the validity of the Stolen Generations policy. But for Indigenous peoples, these have largely been unsuccessful. Indigenous lawyer Larissa Behrendt argues: 'Indigenous peoples have had disappointing results when seeking redress for rights violations from the High Court and have been directed towards negotiation with the legislature.'[8] For example, the failure of the Indigenous plaintiffs in the Stolen Generations case of *Kruger v Commonwealth*[9] highlighted the lack of rights protection via the adjudication mechanisms. Similarly, the 1992 *Mabo* High Court decision and the subsequent 1993 Native Title Act promoted the conflict dispute mechanisms of the High Court and the National Native Title Tribunal (NNTT) to determine the parameters of Indigenous property rights. For Indigenous peoples, failure in most cases that have come to the High Court has had a devastating impact. It has invariably meant the extinguishment of Native Title and losing the right to land, with the decision enforced by law. However, in rare cases in which favorable outcomes to both parties can be reached, adjudication can become a conflict resolution mechanism.

Arbitration

Further to the right of adjudication is arbitration. Assefa argues that 'this mechanism allows both parties to choose who is going to decide the issues under dispute, where as in *Adjudication* the decision-maker is already appointed by the state'.[10] Arbitration is more directed towards negotiation and mediation than adjudication. In this sense, mutual involvement of the parties at least provides the opportunity to select the arbitration umpire to settle the dispute. Here, both parties consent to be bound by the terms within the agreement. As Assefa rightly indicates, 'although mutual involvement

7 Assefa (1999), p 38.

8 L. Brehendt, *Achieving Social Justice: Indigenous Rights and Australia's Future*, 2003, Sydney: Federation Press, p 28.

9 *Kruger v Commonwealth* (1997) 190 CLR 1. For more information see Behrendt's analysis (2003).

10 Assefa (1999), p 38.

of the parties in the decision making process is much higher than *Adjudication*, the solution is still decided by an outsider and, depending on the type of arbitration, the outcome could be imposed by the power of the law'.[11]

An example of arbitration used in Australia is the NNTT, which acts as an arbitrator or umpire in some situations in which adversaries cannot reach agreement about proposed developments (future acts), such as mining.[12] The Tribunal also assists parties to negotiate other agreements including Indigenous land use agreements (ILUA). Consequently, the Tribunal engages in mediation, investigation and making decisions (called 'future act determinations') in arbitrating conflict disputes around land use and access.

In contrast, there are several aspects that make the popular method of arbitration an inappropriate alternative to the court system for Indigenous Australians. Behrendt argues that 'arbitration has too many characteristics of the litigation process; is bound by the rules of evidence; and fails to address the power imbalance'.[13] Authority and power advantage rests with the adversary that has the most political and economic resources. Such power inequity cannot be underestimated in any conflict-handling mechanism.

Negotiation

Assefa places negotiation further to the right on the spectrum, where mutual participation by both parties seeks solutions that are satisfactory to all in the conflict in absence of a facilitator. Assefa stresses that 'differences in the power relationship between adversaries need to be considered'.[14] For example, the highly resourced nation state has professional negotiators, while litigators for poorer Indigenous minorities are invariably volunteers or early-career negotiators who, in general, are outsiders to the community. Assefa and Behrendt are united in their opinion that those who hold power in agreement-making invariably stand to gain more from the negotiation.

An example of negotiation in Australia includes the development of shared responsibility agreements (SRA) and regional partnership agreements (RPA).[15] After the bi-partisan decision to close the Aboriginal and Torres Strait Islander Commission (ATSIC) in 2004–05, new Indigenous policy instruments of negotiation were developed by the federal Howard

11 Ibid, p 38.

12 See the National Native Title Tribunal, http://www.nntt.gov.au/about/index.html (accessed 11 May 2006).

13 L. Behrendt, *Aboriginal Dispute Resolution*, 1995, Federation Press, New South Wales, pp 55–56.

14 Assefa (1999), p 38.

15 See the Federal Government Website for SRA and RPA policy initiatives. Available online at http://www.oipc.gov.au/About_OIPC/downloads.asp (accessed 10 February 2006); http://www.indigenous.gov.au/sra/kit/what_are.pdf (accessed 10 February 2006).

Government. New Indigenous affairs mechanisms were established at the national level to facilitate negotiation including the National Office of Indigenous Policy Coordination (OIPC) and 30 regional Indigenous coordination centres (ICCs).

The target of these negotiation structure mechanisms involves mediating conflicting differences between Indigenous communities and governments in how to address Indigenous disadvantage at the local level. SRAs involve individual Indigenous communities and governments negotiating solutions, while RPAs involve agreements with a collective of Indigenous groups to bring solutions to a particular region. Negotiated SRAs and RPAs provide modest Indigenous services under the principle of 'mutual obligation'.[16] It is important to note that the negotiation of SRAs and RPAs do not include a neutral third party. All negotiations are conducted within the government corpus through OIPC and ICC, who directly bargain with Indigenous communities at the local level.[17] Although SRAs are voluntary, these agreements seek to discharge some government services and responsibility under a bargaining arrangement where Indigenous communities come to the negotiating table to cut a better deal on their health, education and welfare.

Mediation

Mediation according to Assefa is a special type of negotiation within which the conflicting adversaries use a 'third party to minimise obstacles to the negotiation process including those that emanate from power imbalance'.[18] He goes on to state that 'unlike *Adjudication*, it is the decision and agreement of the parties in conflict that determines how the conflict will be resolved'.[19] Behrendt argues that, because of the use of a neutral facilitator, meditation is better able to redress power imbalances than negotiation.[20]

The National Alternative Dispute Resolution Advisory Council (NADRAC) claims that, in recent years, there has been a push in Australia for ADR, particularly in Native Title.[21] Similarly, Marcia Langton and Lisa Palmer, in their 2003 paper titled *Modern Agreement Making in Australia*, claim that the amended 1993 Native Title Act 'emphasised agreement making as the preferred method of resolving a wide range of Native Title

16 J. Howard, 'Address at the National Reconciliation Planning Workshop' (2006) *Journal of Indigenous Policy*, Issue 5, p 97.

17 See OIPC information on SRAs and RPAs http://www.oipc.gov.au/About_OIPC/default.asp (accessed 18 May 2006).

18 Assefa (1999), p 38.

19 Ibid, p 38.

20 Behrendt (1995), pp 55–56.

21 For more information on mediation, see the NADRAC website, http://www.nadrac.gov.au/agd/WWW/disputeresolutionhome.nsf/Page/About_NADRAC (accessed 7 June 2006).

issues'.[22] Under the generic title of alternative dispute resolution (ADR), some agreement-making in Native Title is sought through non-adjudicative mechanisms such as mediation, facilitation and negotiation.

One example in the Native Title Act 1993 is the availability of the ILUA. An ILUA is a legally binding contract between Indigenous peoples and governments without the need for a court determination. Langton and Palmer's paper and the recent Agreements, Treaties and Negotiated Settlements (ATNS) project outline other examples of agreement-making in Australia, including environmental agreements, tourism agreements, sea/marine resource rights, joint ventures and small-scale land use agreements.[23]

Although these agreements are a step in the right direction toward mediating conflict resolution, Langton and Palmer argue that the 'right to negotiate a limited and prescribed statutory right' is an 'inferior substitute for the rights of Indigenous self-government' preserved in constitutions such as those 'found in Canada and United States'.[24] Nevertheless, they suggest that 'developments in agreement making are likely to contribute to efforts to improve the disadvantaged status of Aboriginal people'.[25] They also believe that agreement-making is an area of policy engagement that encompasses the hard, rather than soft, edges of a meaningful reconciliation process.[26]

Reconciliation

At the very far right of the spectrum is reconciliation. Assefa argues that 'this approach not only tries to find solutions to the issues underlying the conflict but also works to alter the adversaries' relationship from that of resentment and hostility to friendship and harmony'.[27] Moreover reconciliation

22 M. Langton and L. Palmer, *Modern Agreement-Making and Indigenous People in Australia: Issues and Trends*, 2003, available online at http://www.austlii.edu.au/au/journals/AILR/2003/1.html#Heading3 (accessed 18 May 2006). A comprehensive analysis of agreement making can also be found in the following text by the same authors: M. Langton, M. Tehan, L. Palmer, and K. Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People*, 2004, Carlton: University of Melbourne University Press.

23 For more information on Australian mediation and agreements, see The Agreements, Treaties and Negotiated Settlements (ATNS) project. This project is an ARC Linkage project examining treaty and agreement-making with Indigenous Australians and the nature of the cultural, social and legal rights encompassed by past, present and potential agreements and treaties. The project also examines the process of implementation and the wider factors that promote long-term sustainability of agreement outcomes. It has an excellent Agreement database as an online gateway with over 2,000 case studies: http://www.atns.net.au/index.php (accessed 7 June 2006).

24 M. Langton and L. Palmer (2003), (accessed 7 June 2006).

25 Ibid, Heading 586.

26 Ibid, Heading 586.

27 Assefa (1999), p 38.

mechanisms for conflict resolution seek to be proactive in anticipating and addressing substantive issues before they surface. Assefa claims that 'of course for this to happen, both parties must be equally invested and participate intensively in the resolution process'.[28]

The inspiring stories of South Africa, Northern Ireland and Guatemala reinforce the importance of mutual participation in building reconciliation measures at all levels of government as well as within civil society. Equally, the international experiences in reconciliation building with Indigenous peoples in New Zealand, Canada and the USA are examples where reconciliation makers engage in strategies to transform conflict patterns.

To a certain extent, the establishment of the Council for Aboriginal Reconciliation (CAR) as a statutory authority in September 1991 was seen as the cornerstone of federal government investment in reconciliation.[29] The CAR was the catalyst for symbolic reconciliation initiatives that sought to bring together Indigenous peoples, the public, governments and the corporate sector. A series of initiatives took place including national conventions, bridge walks, and reconciliation declarations by religious groups and governments. This momentum informed the development of organisations such as Australians for Native Title and Reconciliation (ANTaR). ANTaR continues to operate as an independent national body of mainly non-Indigenous organisations and individuals working in support of reconciliation and justice.[30]

While the CAR advocated for mutual participation by non-Indigenous governments and Indigenous peoples to resolve the conflict over Indigenous injustice, ANTaR embarked on prominent nationwide community education and awareness campaigns to improve 'race' relationships. Neither organisation has conflict-handling mechanisms that seek to be proactive in anticipating and addressing substantive issues before they arise. At the conclusion of its ten-year term in 2000, the CAR was replaced by Reconciliation Australia (RA) as the major non-government body to continue the momentum.

While the High Court adjudicated the 1992 Native Title *Mabo* decision, reconciliation bodies such as CAR, RA and ANTaR aspired to more modest symbolic solutions toward conflict prevention by improving 'race' relations. This was promoted through education and awareness initiatives to encourage greater tolerance. Consequently, reconciliation applied to legislative, legal and constitutional change was a rarer commodity than the pursuits for tolerance and cultural understanding.

ANTaR's reconciliation as the 'people's movement' was opposed to the government's agenda of 'practical reconciliation' when it became clear that

28 Ibid, p 38.

29 See the CAR website for further information on the eight goals: http://www.austlii.edu.au/au/other/IndigLRes/car/2000/16/text02.htm (accessed 14 May 2006).

30 See http://www.antar.org.au (accessed 14 May 2006).

the then Howard Government was steadfast in the belief that the current generations of Australians should not be held responsible for the events of the past. The government's shift away from a rights-based approach to a limited focus on Indigenous disadvantage became the basis for 'practical reconciliation'.

David Cooper, former National Director of ANTaR, claims that 'many documents from 1991–2000, the peak reconciliation period, that sought to bring structural change, appeared to be at best, put on hold, and at worst, put to pasture'.[31] The level of mutual participation in the search for reconciliatory solutions, especially from the then government side, rapidly deteriorated. 'Denying the past' has become the federal government orthodoxy and manifest in the government's actions in numerous ways including: legislative amendments to diminish the effect of Native Title since the 1992 *Mabo* judgment; a refusal to offer a national apology or compensation to the Stolen Generations;[32] the lack of legislative or political response to the CAR recommendations; the lack of response to calls for a negotiated treaty; and the closure of ATSIC. The lack of mutual participation and meaningful response to major reconciliation documents by the Howard Government galvanised the reconciliation movement predominantly around the social reconstruction of Australian consciousness for attitudinal change. Assefa would argue that while attitudinal change for reconciliation is needed, it is diminished without both parties who are in dispute mutually resolving the relational root causes of disadvantage that is the source of the conflict. In other words, a new order for coexistence cannot prevail if only one party is involved in the search for solutions.

Overview of Australian conflict-handling mechanisms

This brief examination of the conflict-handling mechanisms used in Australia reveals several insights into the complex politics of how opposing adversaries mitigate their differences. Assefa categorises them in three groups on the spectrum: 'conflict management', 'conflict resolution' and 'conflict prevention'.

Assefa states that conflict management/resolution approaches, mostly on the left-hand side of the spectrum, 'generally tend to focus more on mitigating or controlling the destructive consequences emanating from a given conflict than on finding solutions to underlying issues causing it'.[33] In Australia, the federal government has not sought to reconcile and resolve the issue of

31 S. Reys and D. Cooper, 'Sustaining the Reconciliation Process' (2006) *Journal of Indigenous Policy*, Issue 5, p 30.

32 HREOC, *Bringing Them Home: The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, 1997, Canberra: Australian Government Printers.

33 Assefa (1999), p 39.

Indigenous land title. Instead, it has simply used the courts as a system of management by which to contain the conflicting differences. For Indigenous peoples, the conflict mechanism of adjudication and arbitration have proven to be untrustworthy in upholding durable solutions to Indigenous aspirations for Native Title.

The further left we move on the Assefa spectrum, the more power is vested in the ruling majority. Equally, the further left we move, the more diminished is the role, authority and influential status of Indigenous Elders and community leaders. Adjudicative British law is enmeshed with the cultural values of non-Indigenous society. Negotiation and representation of Indigenous interests is usually done through a lawyer or negotiator trained in British law who invariably is an outsider to the community. Moreover, the court system fails to recognise Indigenous laws and Aboriginal communal mechanisms to solving disputes, which has the effect of trivialising Indigenous authority.

Adjudication via the court system legally assesses who wins and who loses. We know that the defeated only abide by the legally enforced solution until the next challenge. In this sense, conflict management approaches in Australia are unsatisfactory for permanent solutions to Native Title and especially reconciliation. The challenge that lies ahead for the victors in Native Title, in this case usually the Australian government, is that resentment and dissatisfaction of the defeated only fosters more conflict. On the other hand, if conflict management mechanisms 'provide an opportunity to work out major issues and negative relationships', they can become conflict resolution mechanisms.[34] In this sense, court outcomes that are legally binding for both parties and enforced by law can be advantageous to both adversaries.

In contrast to conflict management/resolution mechanisms, conflict prevention seeks to be proactive in anticipating and addressing substantive issues before they surface. In this sense, these mechanisms are understood to be more reconciliatory than adjudicative. However, Assefa claims that 'as we move from left to the right end of the spectrum, although the likelihood of effectiveness and durability of the solutions increases, our knowledge and understanding of the approaches to be utilized become sketchy, less developed and unsystematic'.[35] In Australia, reconciliation mechanisms as conflict prevention measures are imprecise and vague. Assefa argues that our knowledge of 'conflict management approaches such as *Force, Adjudication* or *Arbitration* are advanced, as these institutions of jurisprudence, military, prisons, and legal studies are well resourced and command high respect'.[36] In contrast, Assefa states that reconciliatory 'conflict prevention approaches such as *Problem-Solving Negotiation* and *Mediation* are less

34 Ibid, p 39.
35 Ibid, p 40.
36 Ibid, p 40.

developed institutions and have less resources devoted to training, advancement and practice'.[37]

With agreement-making in the 1993 Native Title Act the exception, Australian reconciliation dispute mechanisms, institutions, resources and procedures are even more limited. The provision of reconciliatory services remains with independent, volunteer-driven, non-government organisations that operate extensively without government support. Reconciliation solutions from CAR, RA and ANTaR are spasmodic and, to a certain extent, are tied to fundraising capacity and limited human resources. Compounding difficulties is the absence of a nationally recognised, updated and contemporary understanding of reconciliation that is shared across all interested parties. Just as there is no broad consensus on a modern reconciliation strategy, there is no agreed related set of interventions by which adversaries can negotiate conflict toward transformation.

Scope of action

This chapter argues that the conflict management mechanisms of adjudication and arbitration alone are inadequate approaches to resolving conflict differences toward Australian reconciliation. Arguably, the colonisation of another's land invariably necessitates conflict at any given time in history. Yet the lack of formal processes and State-sponsored institutional mechanisms to build peace and reconciliation characterises the Australian context. Even if Australian groups in conflict sought reconciliatory dialogue for solutions to substantive issues, the principle pillars of conflict management mechanism on the left of the Assefa spectrum are virtually the only mechanisms available. Strengthening local institutional capacities for conflict dispute resolution toward reconciliation building enables local parties to change and transform existing conflict patterns. These would complement court decisions, legal agreements and negotiated SRAs and RPAs rather than replace them.

It is necessary to reiterate how reconciliation mechanisms are distinguished from traditional forms of conflict management mechanisms. Assefa argues that 'most conflict handling mechanisms such as *Adjudication, Arbitration, Negotiation* and *Mediation* use a method where opponents defend their own position and deny their own guilt and responsibility'.[38] In other words, each party seeks before a judge or mediator to explain the faults and obligations of their adversary. In contrast, reconciliation methodology is the 'voluntary initiative of the conflict parties to acknowledge their responsibilities and guilt'.[39] Each opponent submits their arguments about the faults of their opponent and the effect of the conflict on each party, but each opponent is also required

37 Ibid, p 40.
38 Ibid, p 42.
39 Ibid, p 43.

to be self-critical and to acknowledge responsibility in order to construct a new relationships. According to Assefa, another key difference between reconciliation methodology and other conflict-handling mechanisms is that the 'forces for change of the former are internal and voluntary' while the latter is 'external and to a certain extent coerced'.[40]

In contrast with conflict-handling mechanisms to the left of the Assefa spectrum, Australia clearly lacks in institutional building for reconciliation at all levels. Some may argue that Australia already has such mechanisms in place and that 'mutual obligation' SRAs are voluntary forms of agreement making. Indeed, some authors have suggested SRAs are a form of government recognition of Indigenous Australians' collective right to self-determination.[41] Others have argued that SRAs have overtones of paternalism and imposition,[42] while the Aboriginal and Torres Strait Islander Social Justice Commissioner has concerns with the lack of 'transparent frameworks for government accountability, with an absence in many agreements of sufficient benchmarks or targets'.[43]

Current Australian SRAs cannot be considered as reconciliatory, according to the Assefa spectrum, because the process is not free from coercion or manipulation. For example, the 2004 SRA, better known as the 'Fuel for Hygiene' deal, struck between the then Howard government and the Mulan Aboriginal Community in the Kimberley region of Western Australia, was not free from exploitation.[44] In agreeing to supply a petrol browser to the community, the government required Mulan members to meet certain standards of personal and community hygiene including washing children's faces twice a day and families keeping homes free of waste and rubbish, as well as ensuring children turned up to school each day.[45] Other Australians are not required to enter into such agreements in return for government services.

The optimal reconciliation conflict resolution mechanisms, according to Assefa, are negotiation/mediation, which are based on free and full access to bargaining that upholds equality between all conflicting parties. Engaging some Indigenous communities, like Mulan, to bargain SRAs from what little

40 Ibid, p 43.

41 J. Field, 'The Next Steps in the Reconciliation Process' (2006) *Journal of Indigenous Policy*, Issue 5: p 125.

42 K. Collard, H. D'Antoine, D. Eggington, B. Henry, C. Martin, and G. Mooney, ' "Mutual" Obligation in Indigenous Health: Can Shared Responsibility Agreements be Truly Mutual?' (2005) *Medical Journal of Australia*, 182 (10), pp 502–504, available online at http://www.mja.com.au/public/issues (accessed 11 May, 2006).

43 HREOC, *The Aboriginal and Torres Strait Islander Social Justice Commissioner's Social Justice Report*, 2005, Canberra: HREOC, p 159.

44 M. Metherell and K. Gauntlett, 'Aborigines Strike Fuel For Hygiene Deal' (2004) *The Sydney Morning Herald*, 9 December, http://www.smh.com.au/news/National/Aborigines-strike-fuel-for-hygiene-deal/2004/12/08/1102182364537.html (accessed 20 April 2006).

45 Howard (2006), p 97.

they have to bring to the table as a solution to their own poverty seems to demonstrated that an imposed power is being operated by the 'state apparatus'[46] in a mechanism that is supposed to facilitate genuine negotiation. The Mulan case exposes flaws in the Australian conflict mechanisms of negotiation. The powerful are failing to acknowledge openly that a power imbalance exists between negotiating adversaries. In the absence of a third-party mediator as found in mediation mechanisms, under-resourced Indigenous remote communities are well and truly behind even before arriving at the negotiating table.

While some aspects of Aboriginal cultural values in the case of Mulan are tolerated and even upheld in some negotiations, legitimating the authority of the 'state apparatus' (dominant cultural values, beliefs and laws) remains fundamental to the agreement process. With no creation of a permanent institutional framework or body for negotiating SRAs outside the corpus of government apparatus, the current SRA process seems problematic.

However, these difficulties are not insurmountable. With goodwill, they can be fixed. Mediation on the Assefa spectrum suggests that a mediation body external to government could at least act to minimise the power imbalance between conflicting parties and would therefore promote the process as genuine and fair.

Issues in Australian reconciliation dispute mechanisms

As argued above, even though there is an absence of full-scale commitment and structures to action reconciliation in Australia, the high social statistics of Indigenous disadvantage suggest that we cannot afford to be without reconciliation strategies. What does reconciliation as a conflict-handling mechanism entail?

Assefa argues that 'where the parties are engaged earnestly in the search for solutions and are able to find resolutions that could satisfy the needs and interests of all involved, there could be no better guarantee for the durability of the settlements'.[47] While it may be too early to conclude that the merits of small-scale Australian SRAs are of little value, the processes of negotiation and or arbitration acceptable to both parties can significantly alter the future relationship between them.

No single mechanism of conflict resolution can comprehensively mitigate all the negative impacts on Indigenous inequality: all have their positive and negative aspects. However, recent work by Toni Bauman, in her paper entitled *Whose Benefits? Whose Rights? Negotiating Rights and Interests Amongst*

46 Here, I am using Foucault's concepts of 'Institutional Apparatus' and its 'technologies' (techniques) to expose the relationship between knowledge, power and discourse and its application to regulate social conduct in society: M. Foucault, *Power/Knowledge*, (1980) Brighton: Harvester, pp 194–196.

47 Assefa (1999), p 39.

Indigenous Native Title Parties, provides new insights into what possibly could be considered as reconciliation conflict resolution mechanisms.[48]

Examining Native Title mediation, Bauman argues that 'prior to any substantive negotiations taking place, it is necessary for Indigenous parties to negotiate a framework for Indigenous decision-making and conflict management processes in relation to particular local contexts and proposals'.[49] Bauman is critical of the orthodox Native Title dispute mechanisms. She is of the view that Indigenous peoples are not homogenous and that therefore a one-size-fits-all approach to mediation should be avoided. While alternative dispute mechanisms are needed to mediate Native Title negations with the Crown, there is also a need for mediation mechanisms to be developed within the community to resolve internal complexities that arise from the Native Title process. She argues:[50]

> In their subjection to Australian common law, Indigenous Native Title rights and interests are also located in fundamental inequalities between Australian law and Indigenous laws, which can give rise to conflicts amongst Indigenous peoples about their identities as they seek recognition of their collective rights and interests in the terms of imposed legislative definitions.

When Bauman's work is closely analysed, it shows that before and after the Crown Court hearing of Native Title, Lands Councils, Native Title representative bodies (NTRBs), Indigenous groups and communities are left to their own devices to sort out complexities including: individual rights and interests versus collective rights; boundaries of land; membership of the group (who is included and who is excluded); who has decision-making powers in the community; who can represent the group; devising transparent decision-making processes.[51]

Reconciling and mediating these issues alone requires considerable skill and resources. Bauman is unequivocal in her view that the 'assistance of independent third parties such as facilitators and mediators will be required, and Native Title holders will benefit from training in negotiation skills'.[52] This is what is being proposed by the recent 2005 Indigenous Facilitation and Mediation Project (IFaMP) by the Native Title Research Unit of the Australian Institute of Aboriginal and Torres Strait Islander Studies.[53]

48 T. Bauman, *Whose Benefits? Whose Rights? Negotiating Rights and Interests Amongst Indigenous Native Title Parties*, (2005) Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies. April/May, Issue paper No 2. Vol 3.

49 Ibid, p 1.

50 Ibid, p 2.

51 Ibid, pp 7–10.

52 Ibid, p 9.

53 http://www.aiatsis.gov.au/ifamp/ (accessed 2 August 2006).

Managed by Bauman, the outcomes of the IFaMP project have contributed to a major shift in mediation in Native Title. It calls for more training in mediation to promote good decision making and effective dispute management skills for Indigenous groups, communities and Native Title representative bodies (NTRBs).[54] Moreover, national accredited training will assist the employment and skilling of Indigenous communities by providing an academic qualification. Where conflict occurs at the local and regional level, local government authorities and community-based organsations could be equipped and trained in non-adjudicative dispute resolution methodologies for reconciling and transforming conflict patterns.

The IFaMP project has consulted widely with NTRBs, community mediation centres and Native Title mediation and facilitation practitioners, who have called for a national network of accredited Indigenous facilitators and mediators to work in Native Title toward responding to issues during and after the court process. The practical objective of the IFaMP project is that such a national network would complement other government activities, including the development of SRA and RPA. A major goal of the IFaMP project is to influence the development of national standards in mediation and alternative dispute resolution.[55]

With the need for such standards finally on the Australian radar, the IFaMP project provides advice to relevant agencies including OIPC, NADRAC and the National Native Title Tribunal. A final document detailing elements and issues involved in a national approach and an implementation strategy is expected to be completed in the near future. This project sets the pace in the development of high quality, economic and efficient ways of resolving disputes that mirror the Assefa criteria for reconciliatory conflict-handling mechanisms.

Sadly, conflict-handling mechanisms in Australian reconciliation are in their infancy. Reconciliation is not an abstract goal, but a process that must be actively built and managed. What is required is formal conflict-handling mechanisms that support reconciliation by a free and informed process based on mutual respect and genuineness.

Conflict expert Professor Paul Van Tongeren outlines several issues that are fundamental to building and managing conflict through reconciliation.[56] They are:

- strengthening local capacities for reconciliation;
- creating structures to enable conflicting parties to engage in dialogue;

54 http://www.aiatsis.gov.au/ifamp/ (accessed 2 August 2006).

55 http://ntru.aiatsis.gov.au/ifamp/practice/practice_frameset.html (accessed 2 August 2006).

56 P. Van Tongeren, 'Reflection on Peace Building' in *People Building Peace: 35 Inspiring Stories around the World*, 1999, European Centre for Conflict Prevention, The Netherlands, pp 124–129.

- access to innovative approaches from national and international examples;
- the exchange of experiences in conflict resolution for other groups;
- strengthening alliances between government, communities, and the corporate sector in reconciliation construction;
- creating new institutions for reconciliation building that facilitate reconciliation across all levels of society; and
- the development of early warning responses to lapses in conflict between groups.

We know from like-minded democracies similar to Australia that reconciliation with minorities is needed and achievable. The need for similar and new proactive approaches in Australia is paramount in reconciling conflicting differences.

Conclusion

This chapter argues that Australia lacks preventive reconciliation conflict resolution mechanisms that attempt to resolve issues before they occur. It plots Australian reconciliation on the Assefa spectrum of conflict-handling mechanisms. This chapter argues that the conflict management approaches of adjudication and arbitration are the major mechanisms used to resolve conflict between Indigenous and non-Indigenous peoples in Australia. It argues that conflict management approaches by the court system in Australia are unsatisfactory for permanent solutions to Native Title and especially reconciliation. The chapter argues that reconciliation building is not an abstract goal, but a process that must be actively built and managed. It calls for non-adjudicative reconciliatory dispute resolution methodologies to change and transform conflict patterns. The chapter concludes that, even though there is an absence of full-scale commitment and structures to action reconciliation in Australia, the high social statistics of Indigenous disadvantage suggest an immense need for it.

Acknowledgment

Peace from colonial-derived disadvantage is a goal inherent within the hearts and minds of my communities of the Narungga, Kaurna and Ngarrindjeri. Our Indigenous Elders, leaders and scholars will not rest until we have achieved this honourable task. I hope my writings here bring some gain toward achieving this vision. Thanks to Jo Kurraki, Tikari Kartarnya and Tarniwarra Kurlakurlana for your patience. Thanks to colleagues for reading previous drafts.

14 Self-determination and the demise of the Aboriginal and Torres Strait Islander Commission

Megan Davis

Indigenous Australia and the right to self-determination

Indigenous peoples globally have adopted international human rights standards as a framework for their relationship with the State. Therefore the right to self-determination has become established as the principle underpinning Indigenous advocacy globally.

The right to self-determination is used by Indigenous Australia to conceptualise for mainstream Australia the distinct cultural and structural claims that Aboriginal and Torres Strait Islander peoples are making of the Australian State. The purpose of articulating a framework based upon the right to self-determination is to recognise the distinctiveness of Aboriginal and Torres Strait Islander culture in Australia and is aimed at facilitating the achievement of full and effective participation of Aboriginal and Torres Strait Islander peoples in the decisions that affect them.

Problems with the language of self-determination

National debates in Australia about Indigenous issues frequently result in confused public debates about the meaning of the right to self-determination. When the Federal government in Australia abolished ATSIC in 2005, it declared that self-determination had failed. Yet ATSIC was not a full expression of self-determination and the government had misconstrued the meaning of the right to self-determination because it is a right that cannot be granted or taken away, rather it is an inherent right that all peoples have by virtue of being human. However, the structural form it takes within the State is contentious because of concerns that it is destabilising and could potentially threaten the territorial integrity of the State. For these reasons, self-determination as it relates to indigenous peoples is controversial, even though the genesis of Indigenous peoples' inherent right to self-determination pre-dates the modern State.

Nevertheless these fears are misguided, because the claims made by contemporary Indigenous peoples within States, such as Indigenous Australians, including those claims articulated to the United Nations working groups, do

not entail secession or separatism. According to the Council for Aboriginal Reconciliation:

> . . . such references are unfairly inflammatory and do not reflect Aboriginal and Torres Strait Islander aspirations. Self-determination is much more about the process of decision-making. It reflects the need for Aboriginal and Torres Strait Islander peoples to negotiate a relationship with the Australian government, which may lead to many outcomes that have the potential to enhance rather then undermine our sense of national unity. It also reflects the kind of autonomy and decision-making that is already being exercised by communities who take responsibility for the delivery of services or programmes. That is, self-determination is reflected in the recognition by governments of Aboriginal and Torres Strait Islander peoples' right to exercise a sphere of authority and responsibility and the communities' exercise of that right.[1]

Another issue raised in relation to the use of the term 'self-determination' in these claims is that such a term is void of any reference to Indigenous women's specific issues. This may be because they are aspirational statements of Indigenous self-determination couched in neutral language. This does not necessarily mean that Indigenous women do not agree with or benefit from those broad claims. Even so, an amorphous Indigenous claim to self-determination can often shield from greater inquiry the very real differences between the socio-economic status of Indigenous men and women within the state, and makes ill-conceived assumptions about the neutrality of legal and political systems within liberal democratic States. The assumption of homogeneity in the word 'Indigenous' masks gendered differences in terms of opportunity and access to legal and political systems within the States, and, for this reason, any extensive examination of the meaning of self-determination must include a consideration of Indigenous women's specific issues and concerns.

What is self-determination to Indigenous Australia?

The interests and claims of Indigenous Australians are as diverse as the nation itself. Aboriginal and Torres Strait Islander communities in far North Queensland have very different challenges to urban Indigenous communities in South East Queensland, Perth or Sydney. Indeed the concerns of rural and remote Indigenous communities are vastly different to the concerns of

1 'Self-determination and Political Participation', Council for Aboriginal Reconciliation, Recognising Aboriginal and Torres Strait Islander Rights Ways to Implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights, one of four National Strategies in the Roadmap for Reconciliation, 2005, Reconciliation Australia.

urban Indigenous Australia. Nevertheless it is possible to generalise about what constitutes self-determination for Aboriginal and Torres Strait Islander peoples.

The view that self-determination is fundamental to Indigenous Australian aspirations is reflected in a number of key national Indigenous documents such as the 1998 Barunga statement and the 1993 Eva Valley statement.[2] The Barunga statement was presented to Prime Minister Bob Hawke in 1998 and included the following principles:

- a national Aboriginal and Torres Strait Islander representative body;
- recognition of Aboriginal customary law;
- control of ancestral lands;
- protection of sacred sites and artefacts and Indigenous knowledge;
- compensation for the loss of lands;
- repatriation of human remains;
- recognition of fundamental international human rights including economic, social and cultural rights.

The Eva Valley statement was intended to serve as a framework for the Commonwealth in response to the High Court decision in *Mabo*.[3] It highlighted the following as crucial for self-determination:

- improved legislative entrenchment and recognition of international human rights law;
- a treaty process to negotiate a settlement with Aboriginal and Torres Strait Islander peoples.

The right to self-determination has also been identified as crucial in a number of major national inquiries into the concerns of Indigenous Australia.[4] In 2000, the Council for Aboriginal Reconciliation's Australian Declaration towards Reconciliation proclaimed that, 'we pledge ourselves to stop injustice,

2 'Barunga Statement' in Commonwealth, Council for Aboriginal Reconciliation, Documents of Reconciliation, 1998, Canberra: Council for Aboriginal Reconciliation, available online at http://www.austlii.edu.au/au/orgs/car/docrec/policy/brief/attach.htm; 'Eva Valley Statement' in Agreements, Treaties and Negotiated Settlements Project, Agreements Database, 2004, Melbourne: Indigenous Studies Program, University of Melbourne, http://www.atns.net.au/biogs/ A001286b.htm.

3 (1992) 175 CLR 1.

4 Commonwealth, Human Rights and Equal Opportunity Commission (HREOC), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, Australian Government Publishing Service http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, National Report, 1991, Canberra: Australian Government Publishing Service; Commonwealth, Senate Legal and

overcome disadvantage and respect that Aboriginal and Torres Strait Islander peoples have the right to self-determination within the life of the nation'.[5]

Self-determination was identified in the Final Report of the Royal Commission into Aboriginal Deaths in Custody as fundamental to addressing the underlying causes of Indigenous Australians' interaction with, and over-representation in, the criminal justice system.[6] The Commission stated that self-determination must be the guiding principle in developing and implementing solutions to the criminal justice crisis, and to achieve this serious consideration needed to be given to determining the tenets of self-determination.

The enhancement and development of opportunities for increased Aboriginal self-determination is crucial to the improvement of all aspects of Aboriginal life. As noted above, little agreement exists as to the definition of self-determination and the processes available to implement a policy of enhanced levels of self-determination. It is critical that these questions should be settled and, until this is done, there are a wide range of agencies and organisations in a position to usurp or deny the decision-making role that Aboriginal people should have. Some of these organisations have little Aboriginal involvement at any level in their processes.[7]

Self-determination was also highlighted in the Australian Law Reform Commission's Report into the Recognition of Aboriginal Customary Laws. It was viewed as being integral to addressing the piecemeal and haphazard recognition of Aboriginal customary law in the Australian legal system.[8] To counter the misuse of Aboriginal customary law that may occur in an adversarial legal contest, the ALRC and HREOC have argued that participation by Aboriginal and Torres Strait Islander communities in the process can assist in working out solutions and in determining what is legitimate customary law. The most recent Law Reform Commission of Western Australia inquiry into Aboriginal customary laws highlighted self-determination in its

Constitutional Department References Committee, *Reconciliation: Off Track*, 2002, Canberra: of the Senate, available online at http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002–04/.reconciliation/report/report.pdf; Commonwealth, Aboriginal and Torres Strait Islander Social Justice Commissioner of the Human Rights and Equal Opportunity Commissioner (HREOC), *Submission to the Northern Territory Law Reform Commission Inquiry into Aboriginal customary law in the Northern Territory*, 2003, Sydney: Human Rights and Equal Opportunity Commission, available online at http://www.hreoc.gov.au/social_justice/customary_law/nt_lawreform.html.

5 Council for Aboriginal Reconciliation, Final Recommendations, Final Report.

6 Royal Commission into Aboriginal Deaths in Custody (RCIADIC), National Report 1991, Australian Government Publishing Service.

7 Ibid, RCIADIC Recommendation 188.

8 Australian Law Reform Commission, *Report into the Recognition of Aboriginal Customary Laws*, Report No 31,1986, Australian Government Publishing Service.

Final Report as being key to improving Indigenous peoples health, well-being and relationship with the State.

> It is the Commission's opinion that in order for Western Australia to effectively engage with Aboriginal people in pursuing these aspirations it is necessary to consider ways of giving Aboriginal people greater control over, and substantive power within, the decision-making processes that affect their lives.[9]

The final report of the 'Bringing them Home' inquiry also had as one of its recommendations the recognition of the right to self-determination for Aboriginal and Torres Strait Islander peoples.[10] This inquiry highlighted the importance of Indigenous control over decisions made by authorities about the control and care of Indigenous children. In this regard, self-determination was reflected in the recommendations, which advocated more Indigenous youth and welfare workers, community involvement in the development and implementation of child welfare policies and, most importantly, taking into account Indigenous culture when making decisions about Indigenous children.

The right of self-determination in international law

The right to self-determination is the right of peoples to determine their own economic, social and cultural destiny. It is a right that has its genesis in political theory, in particular that of the Enlightenment period, influencing both the French and American Revolutions. It developed against a political landscape that saw the concentration of power in institutions such as the Monarch, the Church and the ruling elites who were all unaccountable to the citizens. As such, the right to self-determination developed as a right of all peoples to participate in the internal governance of the State and for the State to be accountable to its citizenry, free from external interference.

Today, the right to self-determination is a fundamental right that is enshrined in common Article 1 of the International Covenant on Civil and Political Rights (hereafter ICCPR) and the International Covenant on Economic and Social, Cultural Rights (hereafter ICESCR)[11]: All peoples have

9 Aboriginal Community Governance in Western Australia, ch 10, p 351, Final Report into Aboriginal Customary Laws, Law Reform Commission of Western Australia.

10 Commonwealth, Human Rights and Equal Opportunity Commission (HREOC), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, Australian Government Publishing Service, available online at http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/.

11 International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976, available online at http://www1.umn.edu/humanrts/instree/b3ccpr.htm; International

the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

For a long time, the right to self-determination was viewed as only applying to colonial peoples and territories in the context of the decolonisation period following the Second World War. As a result, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations ('Friendly Relations Declaration')[12] came as a significant development in terms of the evolution of the international political and legal understanding of the right to self-determination beyond the decolonisation context. This declaration went further than any other international instrument in making clearer to States the elements of the right to self-determination.

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status, and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.[13]

More importantly, it contained a disclaimer against any action that would compromise the territorial integrity of the State and, in doing so, it linked this disclaimer to an understanding of the internal aspect of self-determination. This gave the meaning of self-determination as government representing the whole people belonging to the Territory, without distinction as to race, creed and colour:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole

Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976, available online at http://www1.umn.edu/humanrts/instree/b2esc.htm.

12 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA res 2625, Annex, 25 UN GAOR, Supp (No 28), UN Doc A/5217 at 121 (1970), available online at http://www1.umn.edu/humanrts/instree/principles1970.html.

13 Charter of the United Nations, 26 June 1945, 59 Stat 1031, TS 993, 3 Bevans 1153, entered into force 24 October 1945, available online at http://www1.umn.edu/humanrts/instree/aunchart.htm.

> people belonging to the territory without distinction as to race, creed or colour.[14]

This is important, because States continue to deny the application of the right to self-determination to Indigenous peoples in international law despite these safeguards. It is also important to emphasise the developments in understanding the right to self-determination from a predominantly external context to an emphasis on internal self-determination, in particular democratic governance, because it allows people to participate in decision making within a State.

This argument has become increasingly important since the end of the Cold War. The norm of democratic governance is said to derive from the right to political participation as established in the United Nations Charter, Article 21 of the Universal Declaration of Human Rights (UDHR) and Article 25 of the International Covenant on Civil and Political Rights (ICCPR). The United Nations Special Rapporteur on Indigenous Issues has argued in relation to Indigenous peoples that:

> the denial of self-determination is essentially incompatible with true democracy. Only if the peoples right to self-determination is respected can a democratic society flourish.[15]

Currently, a United Nations Working Group of the Commission on Human Rights is attempting to seek agreement on a draft of the Declaration on the Rights of Indigenous Peoples, so as to enshrine in international law the distinct nature of Indigenous peoples and their associated rights as peoples. The right to self-determination is the key principle underpinning Indigenous peoples' advocacy in international law and therefore it is the cornerstone upon which the entire United Nations Draft Declaration on the Rights of Indigenous Peoples (DDRIP) is based. According to the United Nations Indigenous caucus: 'The right of self-determination is the heart and soul of the declaration. We will not consent to any language which limits or curtails the right of self-determination.'[16]

14 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV), 25 UN GAOR, Supp (No 28) 121, UN Doc A/8028 (1971).

15 R. Stavenhagen, 'Self-determination: Right or Demon?' in D. Clark and R. Williamson (eds), *Self-Determination: International Perspectives* (1996) pp 1, 8.

16 It was in the United Nations Working Group on Indigenous Peoples (WGIP) that an Indigenous caucus developed and eventually took charge in formulating Indigenous representatives responses to government interventions and crafting caucus positions that would be made on the floor. The working method was that caucus positions would be collective reflecting decisions taken on matters related to the Draft Declaration or the PFII. The caucus always had a Spanish-speaking leader and an English-speaking leader. For both the WGIP and the WGDD, it was the World Council of Churches that would annually host Indigenous caucus meetings providing translation, along with Swiss-based Indigenous Peoples' Center for

The right to self-determination is protected in Article 3 of the DDRIP: Indigenous peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. Furthermore in Article 31, the right to self-determination is explained in practical terms:

> Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

The recognition of self-determination as an integral element of Indigenous Australia in national inquiries and reports is bolstered by its importance in international law. Indigenous Australians have built upon the significance of self-determination in international law. There is extensive United Nations human rights jurisprudence acknowledging Indigenous peoples' right to self-determination[17] and it is important that the right of self-determination has evolved to become linked with a right of all peoples to democratic governance. This is particularly relevant to all Indigenous peoples living in liberal democracies.

National translation of the right to self-determination

Indigenous peoples' right to self-determination has been accommodated domestically in various ways. For those colonies settled by England, the Crown generally enacted treaties with Indigenous peoples, although many of these treaties have been partially or wholly dishonoured. In other cases, the content of the treaty is continually changing through judicial interpretation as in the New Zealand Te Tiriti o Waitangi (or Treaty of Waitangi), and Te

Documentation, Research and Information (DOCIP) for Indigenous caucus strategy meetings. See generally, S. Pritchard *Setting International Standards: An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, 2001, Canberra: Aboriginal and Torres Strait Islander Commission.

17 General recommendation XXI on the right to self-determination (1996), paras 1–4 and 6; Australia, 24 July 2000, A/55/40, para 506; Mexico, 7 July 1999, CCPR/C/79Add.109, para 19; Canada, 7 April 1999, CCPR/C/79/Add.105, para 8; New Zealand, 3 October 1995, A/50/40, para 175; Colombia, 25 September 1992, A/47/40, para 391; *Mikmaq Tribal Society v Canada*, CCPR/C/39/D/205/1986 (1991), para 3.2; *Ominayak and the Lake Lubicon Band v Canada*, CCPR/C/38/D/167/1984 (1990), paras 13.3, 32.1; The rights of minorities (Article 27): 8 April 1994. CCPR General comment 23, 3.1; General comment No 12: Article 1 (Right to self-determination), paras 1, 5, 6; Russian Federation, 12 December 2003, E/C.12/1/Add.94, paras 11, 39.

Rōpū Whakamana I Te Tiriti o Waitangi (the Waitangi Tribunal). Some States, such as Canada, are also engaged in post-colonial treaty-making for those Indigenous groups who did not enter into a treaty at first contact – British Columbia and the Nisga'a Final Agreement, which came into effect in 2000, are examples of this. Indeed perhaps the most significant accommodation of Indigenous peoples within states has been the creation of the territory of Nunavut in Canada in 1999. Eighty-five per cent of the population of Nunavut are Inuit.

Australia remains the only common law country that has not entered into a treaty agreement with its Indigenous peoples, nor engaged in any belated State-building exercise. Some States have altered their constitutions to include recognition of Indigenous peoples' rights. For example, Latin American countries known as 'third-wave democracies' are notable for the extensive reforms of constitutions in the region, and a belated recognition of Indigenous peoples' rights and cultural pluralism. Those States with constitutional recognition of Indigenous peoples' rights include Paraguay, Peru, Argentina, Bolivia, Columbia, Ecuador, Nicaragua, Guatemala, Brazil and Venezuela. Canada has also included a recognition of Indigenous peoples in its Constitution (s 35).

There are many ways of implementing the right to self-determination within governance structures. The way in which self-determination is configured can be diverse and there are many examples of international practice. These can include:

- treaty or other constructive agreement;
- constitutional recognition:
- Parliament or representative body:
- designated or identified Indigenous parliamentary seats;
- Indigenous electoral roll.[18]

These are a few examples of the way in which the right to self-determination can be formalised within the existing structures of the settler State. It is often referred to as nation-building or belated State-building, and is a way in which Indigenous peoples can be accommodated as part of the State and experience a sense of ownership over the structures created for them and a sense of belonging. The United Nations has viewed it in the following manner:

> The right of self-determination of Indigenous peoples should ordinarily be interpreted as their right to negotiate freely their status and representation in the State in which they live. This might best be described as a kind of 'belated State-building', through which Indigenous peoples are

18 For example, the Māori electoral role in New Zealand. See Nga take kōwhiri Māori (Māori electoral matters), NZ Electoral Commission, available online at http://www.elections.org.nz/maori-category.html.

> able to join with all the other peoples that make up the State on mutually-agreed and just terms, after many years of isolation and exclusion. This does not mean the assimilation of Indigenous individuals as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State on agreed terms.[19]

The Aboriginal and Torres Strait Islander Commission

The Aboriginal and Torres Strait Islander Commission (ATSIC) was an independent statutory body empowered by the Aboriginal and Torres Strait Islander Commission Act 1989 (Cth), introduced by the Hawke Labour Government in 1990 and widely regarded as an expression of self-determination. ATSIC commenced operations on 5 March 1990. ATSIC's key role was in policymaking and advocacy for Indigenous people. It had, therefore, representative and administrative roles. In having an elected arm and an administrative arm, ATSIC operated in a complex political environment, because, despite its representative role, it was a government agency that was expected to develop policy and deliver programmes.

ATSIC's structure consisted of a national Board of Commissioners that was headed by an elected Chairperson. The administrative arm was led by a Chief Executive Officer. ATSIC was also constituted by an elected representative arm of Aboriginal and Torres Strait Islander representatives from 35 regional councils. The regional councils acted as independent bodies and were empowered to consult with local communities and represent the interests of Aboriginal and Torres Strait Islander people in their region.

ATSIC's budget was primarily directed toward housing programmes, such as the Community Housing and Infrastructure programme (CHIP), and the employment programme, Community Development Employment Projects (CDEP). The balance of the budget was spent on a range of important projects and programmes for Indigenous Australians that included domestic advocacy such as the treaty campaign, Indigenous culture and heritage, sporting programmes and international human rights advocacy, which focused upon the United Nations.

The objects of the ATSIC Act were: to ensure maximum participation of Aboriginal and Torres Strait Islander peoples in the formulation and implementation of government policies; to promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders; to further the economic, social and cultural development of Aboriginal persons and Torres Strait Islanders; and to ensure coordination in the formulation and implementation of Indigenous policies between the Commonwealth, State, Territory and local governments.[20] The functions of

19 E.-I. A. Daes, Chairperson of the Working Group on Indigenous Populations, Explanatory note concerning the draft declaration on the rights of indigenous peoples, E/CN.4/Sub.2/1993/26/Add.1 (19 July 1993).

20 Aboriginal and Torres Strait Islander Commission Act 1989, s 3.

the ATSIC Act meant that ATSIC was charged with the formulation of policies and programmes: to assist the Minister in all matters, to provide advice and to protect cultural material and information.[21] The objects and functions combined to establish a broad ATSIC representative, administrative and policy framework that indicated it was the peak government body in relation Aboriginal and Torres Strait Islander peoples.

What went wrong?

ATSIC's dual role led to extensive criticism because it was accountable to Indigenous peoples as well as to State and federal governments. Moreover there was a public perception, fuelled by State and federal governments, that ATSIC had responsibility for all government-funded Indigenous programmes even though this was not the case. To this extent, State and federal governments were able to blame ATSIC for policy failures in areas of Indigenous affairs that were not even the province of ATSIC. One example, frequently used by critics of ATSIC, was that Aboriginal and Torres Strait Islander health had not improved even though health was not a responsibility administered by ATSIC.

Moreover, with the election of a federal Coalition government led by John Howard, there had been a notable shift in the way in which small minority groups in Australian democracy were viewed. After his election, John Howard outlined in a speech his approach to this. He argued that there was:

> [a] frustrated mainstream in Australia today which sees government decisions increasingly driven by the noisy, self-interested clamour of powerful vested interests with scant regard for the national interest. Many Australians in the mainstream feel utterly powerless to compete with such groups, who seem to have the ear completely of the government on major issues.[22]

The rhetoric of formal equality and the principle that everyone is equal and should be treated accordingly were employed to neutralise former policies of substantive equality and the principle, recognised in international law and in the Racial Discrimination Act (1975), that in reality everyone is not equal and that some groups or individuals in society need additional assistance and funding to make them equal with others in society. The rhetoric, therefore, marginalised Indigenous Australians who, as a consequence of historical oppression and discrimination, are a disadvantaged group that is not able to participate on an equal footing in Australian society.

21 Ibid, s 7.

22 J. Howard, 'The Liberal Tradition: The Beliefs and Values which Guide the Federal Government', 1996, Sir Robert Menzies Lecture, 18 November.

ATSIC review

In November 2002, the federal government announced an external review of ATSIC. John Hannaford, Jackie Huggins and Bob Collins were appointed to conduct the review. The review was called a reassessment of the Commission's role, particularly as it relates to advocacy and representation of Aboriginal and Torres Strait Islander people, programmes and services to Aboriginal and Torres Strait Islanders and advice on the implementation of legislation. The terms of reference were amended later for the review also to consider the structure of the relationship between ATSIC and the government and the merits of a possible Ministerial veto over ATSIC decisions.

The review of ATSIC included extensive consultation with Indigenous people. The report entitled *In the Hands of the Regions: A New ATSIC* determined that ATSIC required structural reform in particular giving greater control to regional levels. Further, it noted that there was widespread support for ATSIC's existence and its continuing evolution as the peak national Indigenous representative body. The report also concluded that mainstream Commonwealth, State and Territory government agencies had used ATSIC to avoid or minimise blame for their own failure of responsibilities in addressing Aboriginal and Torres Strait Islander peoples.

Despite the findings of the review, the federal government announced its intentions to abolish ATSIC, stating that it had failed as an 'experiment in separate representation'. It also announced the transfer of funding and responsibility for Indigenous programmes to mainstream government departments. While ATSIC was originally responsible for all of its programmes and funding decisions in 2003, its functions were transferred to a new Executive Agency called the Aboriginal and Torres Strait Islander Services (ATSIS). On 15 April 2004, the federal government announced that it would abolish ATSIC and the Aboriginal and Torres Strait Islander Services and implement 'new arrangements'. ATSIC was subsequently abolished by the Howard Government in 2005.

New arrangements in Indigenous affairs

The new arrangements constituted the transfer of ATSIC–ATSIS programmes and services to mainstream federal government agencies.[23] Those agencies would work with State and Territories governments to better coordinate Indigenous programmes and services and service delivery in a whole-of-government manner, within the ambit of the Council of Australian Governments (COAG). A National Indigenous Council would be established

23 ATSIC was responsible for all of its programmes and funding decisions until 2003, when the function was transferred to a new Executive Agency called the Aboriginal and Torres Strait Islander Services (ATSIS). Ultimately, both were abolished and all programmes and services for Aboriginal and Torres Strait Islander were delivered to mainstream.

as an expert body providing advice to the federal government's Ministerial Taskforce on Indigenous affairs.

The Office of Indigenous Policy Coordination (OIPC) was created within the Department of Immigration and Multicultural and Indigenous Affairs. Moreover, the creation of regional partnership and shared responsibility agreements (RPAs and SRAs) with Indigenous peoples at a community level were to become the centrepiece of the new arrangements. SRAs involved the federal government providing basic infrastructure and services in exchange for commitments by communities to behavioural change. For example, some communities signed up to SRAs for petrol bowsers or for swimming pools. SRAs would be underpinned by the principle of mutual obligation.

The Aboriginal and Torres Strait Islander Amendment Bill 2004 was introduced into Parliament on 27 May 2004. The Bill was referred by the Senate to a Select Committee on the Administration of Indigenous Affairs on 16 June 2004. Not only did this Committee examine the ATSIC Amendment Bill but, pursuant to its terms of reference, it also examined the proposed new arrangements that would replace ATSIC, as well as the prospect of the administration of Indigenous programmes and services by mainstream departments and agencies. The Senate Select Committee produced a report titled *After ATSIC? Life in the Mainstream*.[24] According to the report, there was no support for maintaining ATSIC, but it also expressed concern about the mainstreaming of Indigenous programmes and services.

The original ATSIC Act Amendment Bill lapsed, but it was reintroduced into Parliament in December 2004. On 16 March 2005, the Commonwealth Parliament passed the ATSIC Amendment Bill repealing provisions of the ATSIC Act abolishing ATSIC. The legislation received Royal Assent and was proclaimed with effect from 24 March 2005, although the legislation provided that regional councils would cease on 30 June 2005.

The demise of self-determination

The ATSIC was not an exercise in self-determination, but was supposed to be an incremental step toward the realisation of self-determination. Yet the demise of ATSIC has contributed to widespread confusion about what self-determination means. According to Mick Dodson, former HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner, self-determination remains the key to improved Indigenous inequality:

> . . . the government feeds the inequality experienced by Indigenous Australians through paying for poor health, education, housing, employment status it does nothing more than manage the inequality that we

24 Select Committee on the Administration of Indigenous Affairs, 2005, Senate Printing Unit, Parliament House Canberra.

> experience as peoples. Clearly what is needed is an approach based in partnership and mutual respect, which seeks to facilitate Indigenous participation on an equal basis. Nothing less than the recognition of our right to self-determination is needed to begin to remedy our current situation.[25]

The demise of ATSIC has severely hampered the capacity of Indigenous Australians to participate in State and national policy debates in Australia. It has also severely hampered indigenous Australians' participation in United Nations human rights advocacy.

Nevertheless, despite the absence of a formal Indigenous representative body situated within a public institution of the State or even constituting a public institution of the State, there are many examples of the continuing importance and exercise of self-determination in Australia. Indigenous participation in sentencing procedures has been occurring informally in remote communities for some time. During the late 1990s, formalisation of this practice began in urban areas with the advent of Indigenous sentencing and circle courts known as 'circle sentencing'. Circle sentencing has been extremely successful in those areas in which it has been trialled, most notably Nowra in New South Wales, as well as the Nunga courts in South Australia, Murri courts in Queensland and Koori courts in Victoria.[26] These initiatives are referred to as 'restorative justice' and they involve processes aimed at restoring relations between victims, offenders and communities. The process is a formal sentencing hearing and the magistrate or judge has the final decision; the process is not dominated by lawyers and legal jargon is avoided. Members of the Indigenous community attend the proceedings and participate in determining appropriate sentencing outcomes, and have a responsibility in ensuring that the offender's punishment is implemented. It enables the court to receive information about the issues and challenges of the broader Indigenous community, and it enables the victim of an offence to communicate with the offender and impress upon the offender the impact of his or her crime. Initiatives like these create an 'ownership' by Indigenous peoples of Australian public institutions and deliver a sense of belonging, particularly because they have been involved in the solution to the problem. This is what the right to self-determination is about in practice.

The current HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma has also highlighted a number of important and successful community justice mechanisms, such the as Ali-Curung, Lajamanu

25 'Self-determination and Effective Participation "Within the Life of the Nation"? An Australian Perspective on Self-determination', available online at http://www.hreoc.gov.au/Social_Justice/international _docs/self_determination.htm.

26 Aboriginal Justice Advisory Council, *Circle Sentencing: Involving Aboriginal Communities in the Sentencing Process*, Discussion Paper, 2000, Sydney: AJAC.

and Yuendumu law and justice committees.[27] These dispute resolution processes are contributing to the empowerment of Aboriginal communities and give form to claims of self-determination. There are also community night patrol programmes, such as that by the Julalikari Aboriginal Council in Tennant Creek and the Tangentyere Remote Area Night Patrol (RANP).[28] Community night patrols involve community volunteers patrolling the camps and towns at night. Their role may involve dispute resolution, as well as participating in meetings and developing frameworks, to improve communication within the community and between police and the community. Moreover there are also community programmes that target truancy, drug and alcohol abuse, antisocial behaviour of at-risk youth and cultural programmes that provide cultural instruction of Aboriginal and Torres Strait Islander youth.[29]

These are examples of successful programmes achieved through Indigenous Australians working together with authorities to identify and implement appropriate and improved outcomes for Indigenous peoples and youth with police and the criminal justice system. It is evident that giving Indigenous peoples the capacity and space to develop and participate in processes and decisions that affect them, improves the well-being of Aboriginal and Torres Strait Islander communities in Australia. This is a far cry from the creation of a separate State, but rather an illustration of the success of enabling peoples to determine their own economic, social and cultural destiny.

In 2007, Howard's new arrangements began to unravel. A recent report by Bill Gray regarding the COAG trials shows that there is too much 'red tape' or administration in Indigenous communities.[30] Shared responsibility agreements are beginning to be wound back and there has been no visible

27 Bill Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Community Justice, Law and Governance: A Rights Perspective* (paper delivered at the Indigenous Governance Conference, Canberra, 3–5 April 2002), available online at http://www.hreoc.gov.au/speeches/social _justice/community_justice.html; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission of Australia, *Submission to the Expert Seminar on Indigenous Peoples and the Administration of Justice*, Madrid, Spain, 12–14 November 2003, available online at http://www.humanrights.gov.au/social_justice/madrid/issue3.htm.

28 H. Blagg, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia*, Law Reform, Commission of Western Australia (LRCWA), Project No 94, Background Paper No 8, 2005, p 3; H. Blagg and G. Valuri, 'Self-Policing and Community Safety: The Work of Aboriginal Community Patrols in Australia' (2004) 15 *Current Issues in Criminal Justice* 205, 212–13; H. Blagg and G. Valuri, *An Overview of Night Patrol Services in Australia*, 2003, Canberra: Commonwealth Attorney-General's Department, 27.

29 N. Morgan and J. Motteram, *Aboriginal People and Justice Services: Plans, Programs and Delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004).

30 Bill Gray report, 'Views from the top of the Quiet Revolution: Secretarial Perspectives on the New Arrangements in Indigenous Affairs', W. Gray and W. G. Saunders, Discussion Paper No 282/2006 ANU Centre for Aboriginal Economic Policy Research.

evidence of an improvement in the socio-economic situation of Indigenous peoples.

Noel Pearson was quoted as saying that the Prime Minister's mainstreaming approach was taking Indigenous affairs back to a former era: 'This is complete folly, ATSIC was started up in 1990, the 20 years prior to that mainstreaming was the way in which services were delivered to Indigenous people and that produced failure.'[31] This is true, that mainstreaming did not work before ATSIC. It is arguable that ATSIC was prematurely abolished without allowing it the time to evolve like all public institutions. ATSIC was flawed in many ways. For example, it was expected to be all things to all people, voting was non-compulsory and there was minimal transparency of Board decisions and minimal Aboriginal and Torres Strait Islander peoples' participation beyond the ballot box.

The reality is that it has been abolished. So too, mainstreaming has failed to improve the situation of Indigenous peoples. It must be considered that it is the 'unfinished business' of the Australian State that remains the key to improving the situation and human rights of Indigenous peoples in Australia. Unfinished business means revisiting public institutions to ensure that they recognise and accommodate Australia's first peoples structurally in our democracy. This would create a greater sense of inclusion and of ownership over the processes and structures that constitute the Australian state. Until this is achieved, Indigenous Australia will remain dislocated and disengaged with mainstream Australia and until this is achieved the culture of disrespect and institutional racism displayed by Australian public institutions will continue. In 2008, Australia has a new Labor government that had signalled in its pre-election campaign that it would take a more consultative approach to Indigenous affairs. It is hoped that with the Apology to the Stolen Generations and the establishment of a new representative structure, the federal government will go some way to finally addressing some of the unfinished business that still exists in Australia today and implementing the right of Indigenous Australians to self-determination.

31 Noel Pearson, quoted in 'Indigenous Leaders Condemn ATSIC Decision', 15 April 2004, ABC Online, http://www.abc.net.au/message/news/stories/ms_news_1088120.htm.

15 Recognition of the Indigenous people of Australia and their rights

Professor Michael Dodson and Robin McNamee

Introduction

Australian Indigenous people have suffered many injustices over the past 220 years and at present seem to be regressing back to past policies and practices. This chapter will concentrate on Indigenous Australians and human rights approaches that have been applied up until now by various government bureaucracies. It has become the main aim of social justice initiatives to reverse the historical systematic abuse of Indigenous rights by past Australian governments. Issues such as the Stolen Generations and Native Title have received widespread coverage but, to date, have not been very successful in implementing policies, procedures and laws that protect Indigenous Australians.[1]

After the first fleet arrived at Sydney Cove in 1788, interaction between the settlers and the Indigenous peoples for the first three years was virtually non-existent. It seems that, in those very early days, the colonial settlers and the Indigenous peoples were able to lead quite separate and distinct lives free from interference with each other. The Indigenous people were adept at appearing and disappearing at will. The settlers had virtually no contact with Indigenous people outside the Port Jackson area. Aboriginal people clearly had their own autonomous way of life, with its unique and distinct social and cultural practices that, quite understandably, were not understood by the new settlers. However, over time and as expansion grew and more and more settlers were brought to Australia in varying circumstances, interaction increased, and contact became much more aggressive and violent as more and more land was taken to accommodate the new arrivals. This set the tone for government responses to the human rights of Indigenous Australians in modern times and, over the years, for governments to implement different strategies and laws to address the question. In this chapter, we will explain the different

1 Aboriginal and Torres Strait Islander Social Justice Commissioner, Indigenous Social Justice Strategies and Recommendations, p 2, available online at http://www.austlii.edu.au/au/other/IndigLRes/1995/4/index.html.

mechanisms that have bought Australia to its current position and how human rights of Indigenous peoples have been affected in different ways.[2]

The historical perspective

For much of the first sixty or so years of the British settlement of Australia, there had been little or no recognition of the customs, practices and laws of Aboriginal people. However, in 1837, a Select Committee of the House of Commons, in examining the position of Aborigines in British settlements, affirmed the view that Aborigines should be subject to British law. In 1840, a dispatch to all governors in Australia and New Zealand expressed the view that English law should entirely supersede Aboriginal customary law.[3]

Inherent Aboriginal sovereignty has yet to be recognised in Australian law

It appears clear that, in order to recognise Aboriginal sovereignty in Australian law, there would have to be an acknowledgment of that sovereignty prior to the assertion and acquisition by Britain of sovereignty over Australia. Furthermore, in the act of British acquisition, some aspects of that original Aboriginal sovereignty were retained; in other words, it is now recognised that not all aspects of that sovereignty have been extinguished. Inherent Aboriginal sovereignty has been recognised in other former British colonies, in particular the USA and Canada. In those countries, recognition is based on the view that the Indigenous North Americans were organised into independent, self-governing communities, with which France and Great Britain dealt as sovereign nations. Upon European settlement, those nations came under the protection of a more powerful nation, thereby acquiring the status of 'domestic dependent nations', but their original, natural rights were not extinguished. Until *Mabo v Queensland*,[4] most of the authorities had relied on the classification of Australia as a settled colony, as distinct from ceded or conquered. The distinction was regarded as critical to the position of English law in a new British colony.[5]

The sovereignty of Aboriginal peoples prior to the acquisition of British sovereignty over Australia has been acknowledged by only one stream

2 N. Peterson and W. Saunders, *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities*, 1998, Cambridge University Press, Cambridge, p 4.

3 The Laws of Australia: Aboriginal Customary Law; Recognition of Aboriginal Customary Law; UK, Parliament, *Report of the House of Commons Select Committee on Aborigines (British Settlements)*, Parl Paper No 425 (1837). Australia, Parliament, Library Committee, Historical Records of Australia, Series 1, *Governors' Despatches to and from England* (1924), Vol 21 p 35.

4 *[No 2]* (1992) 175 CLR 1; 66 ALJR 408; 107 ALR 1.

5 Ibid, p 35.

of authority in Australian jurisprudence. The human rights of Australia's Indigenous peoples have undergone many different and varying changes over the last 220 years. These changes have been the result of different Australian governments implementing differing policies and laws. At first, government policies were designed to segregate Indigenous people from the rest of mainstream Australian society. Then government policies attempted to assimilate Indigenous Australians into mainstream society, but at the very bottom of the Australian social structure. The Stolen Generations are an example of where Australian governments have tried to assimilate Aboriginal people into mainstream society. Over time, Indigenous Australians have been subjected to an ever-present stream of government legislative and political methods to try to improve the social, economical and legal status of Indigenous Australians.

In more recent times, there have been measures put in place to try to improve the situation of Indigenous Australians. In spite of these efforts, there is little improvement of the situation evident. There are still Indigenous deaths in custody occurring too regularly and high mortality rates of Indigenous men, women and children persist, especially in remote regions of Australia where the basic infrastructure enjoyed by the rest of Australia is not in place. Within Indigenous society, there are still massive problems of alcohol and substance abuse, including petrol sniffing, especially among the young Indigenous population.

Some of these problems are exacerbated by the geographic and demographic peculiarities of the country. Australia is an extremely large land mass that has a particularly small population and much of the land has few inhabitants. Our total population at present is a little over 20 million people, of which 85 per cent of the population live within 50 kilometres of the coast where most of the major cities and urban centres are located. Since the end of the Second World War, Australia has fast become a multicultural society. Approximately 2.2 per cent of Australians identify themselves as being Indigenous Australians. Indigenous Australians represent a far greater proportion of the population who live in remote areas of the country. Australia is a signatory to numerous international conventions, some of which have been incorporated into national domestic legislation.[6]

The recognition and protection of Australian Indigenous rights

Australia's history helps to explain the deep sense of injustice felt by many Aboriginal people, their disadvantaged status today and their current attitudes toward non-Aboriginal people and society. The Indigenous Australian

6 G. Neate, President, National Native Title Tribunal, 'The Tidal Wave of Justice and the Tide of History: Ebbs and Flows in Indigenous Land Rights in Australia', Paper delivered at the 5th World Summit of Nobel Peace Laureates, Rome, Italy, 10 November 2004, p 2.

colonial experience is one of the most important underlying issues that assist in the understanding of the disproportionate detention rates of Aboriginal people. The sense of exclusion is seemingly ingrained in the Indigenous psyche. Until the 1970s, the history taught in Australian schools portrayed Aboriginal people as a doomed and primitive race who were not part of Australian society except as recipients of non-Aboriginal charity and largesse. In fact, there were considerable attempts by Aboriginal people both to negotiate and accommodate those who colonised Australia. Aboriginal society before the arrival of the British varied throughout Australia, but was based on a relatively egalitarian social structure in which economic, social and religious life were inextricably intertwined.[7]

Aboriginal people had contact with others before the British arrived and had enjoyed relatively harmonious relations with them. However, with the coming of the British, large numbers of people settled along Australia's eastern coast. On the basis of Cook's and Banks's observations that there were few inhabitants along the coast of Australia, and on the basis of their assumptions that these people had no property rights, possession of Australia was taken by the colonial power on the basis that the land was *terra nullius*, or wasteland.

Early official policies were directed at the protection of Aboriginal people. Most of them were ignored by the colonial government. The expansion of the colonial frontier into the interior of the country involved much violence toward Aboriginal people, who resisted the dispossession from their land. The frontier period set the tone for the type of 'law and order' first imposed on Aboriginal people and explains the deep suspicions of foul play or murder by police officers or prison officers that many Aboriginal people hold about deaths that occurred in custody. In a number of areas, violence toward Aboriginal people by settlers and police continued until the early part of the twentieth century. The effects of this violence were compounded by the effects of diseases, which took their toll on Aboriginal groups, particularly in New South Wales and Victoria, who had little or no resistance to introduced diseases such as smallpox and malaria. This, however, is only one area of colonisation that had a devastating affect on Indigenous people.[8]

Relations with police

Historically, the police have acted as the most consistent point of Aboriginal contact with the colonising power. Police were responsible for implementing

7 Final Report Of The Royal Commission Into Aboriginal Deaths In Custody – Summary: Part C – The Underlying Issues which explain the Disproportionate Number of Aboriginal People in Custody, Indigenous Law Resources, Reconciliation and Social Justice Library, available online at http://www.austlii.edu.au/au/other/IndigLRes/rciadic/rciadic_summary/fn0#fn0.

8 Ibid.

successive colonial, then State and Territory government, policies of protection and control. Police surveillance of Aboriginal communities has, in turn, shaped their own perceptions of Aboriginal people as 'recalcitrant' or 'degenerate'.

The Aboriginal system of law prior to colonisation was based more on the maintenance of community harmony than on abstract principles of justice. As Aboriginal social control structures were weakened, Aboriginal communities increasingly came to use police as an outside authority structure for internal policing purposes. Historically, Aboriginal experience of the criminal justice system has been one of discrimination and repression. That historical experience remains very much the perception of the criminal justice system as held by many Aboriginal people today.[9]

Although it should be remembered that police are agents of the wider community and as such reflect the community's views, the question of relations between Aboriginal people and police has been a particularly important one. Police represent the front line, the first point of contact between Aboriginal people and the criminal justice system. Too much police intervention in the lives of Aboriginal people throughout Australia has been arbitrary, discriminatory, racist and violent. Further, many of the laws that police officers have been directed to enforce have been based on unfair and racist assumptions about Aboriginal people. A major reason for the incarceration of Aboriginal people is their social behaviour, often associated with alcohol, in public spaces. Non-Aboriginal society has not been able to accommodate the essentially public nature of Aboriginal life, nor the ways in which this renders much behaviour visible. While there have been many efforts to improve relationships between police and Aboriginal people, both Aboriginal people and police have great difficulty in overcoming past distrust. That difficulty is compounded by the internal pressures of a police culture that reinforces stereotypical attitudes toward Aboriginal people.[10]

> Police are also subject to external pressures of local politicians and interest groups who perceive police as responsible for enforcing their social and political interests. These pressures sometimes lead to the adoption of policing strategies which are not conducive to good relations. Complaints by Aboriginal people about police conduct include physical and verbal harassment, the use of offensive language, oppressive scrutiny, and the treatment of Aboriginal women. Police services should endeavour to eliminate such conduct. The subject of police and Aboriginal relations is particularly complex. While the complaints continue, there is also evidence of substantial willingness on the part of police administrations

9 Ibid.
10 Ibid.

and on the part of particular police officers to bring about changes in this situation.[11]

Western Australia has identified that there remains considerable room for improvement in the conduct of officers and in the attitude of administrators to Aboriginal police relations.[12] One of the most positive outcomes of the Royal Commission into Aboriginal Deaths in Custody must be the identification of moves to improve relations between police and Aboriginal people in the Northern Territory, based on the presence and growing strength of Aboriginal organisations and the willingness of senior police administrators to address the problems that exist. Establishment of protocols between police and Aboriginal groups and police support for Aboriginal policing programmes in communities are particularly important developments. Aboriginal organisations also are making considerable efforts to address social control issues in a constructive and cooperative manner. These initiatives demonstrate that relations are not intractable, and that the positive advances called for by both Aboriginal people and police can be achieved.[13]

Self-determination: two systems

Within the Indigenous social organisation, there are social systems that have to be adhered to. Further, Aboriginal and Torres Strait Islander cultural heritage is governed by two sets of laws. First, there is the unwritten or customary Aboriginal law, a system that is generally unrecognised by the dominant culture, 'except to the extent that the Aboriginal laws happen to fit into the framework of the Anglo-Australian legal system'. Second, there is Anglo-Australian judge-made common law and Parliament-made statute law, or legislation.

From the point of view of many Aboriginal people, these two laws exist side by side. For some Aboriginal people, the Anglo-Australian system may well be regarded as irrelevant to the custodianship of their culture. Most non-Aboriginal people know little of the Aboriginal law, and many remain uninformed about Indigenous culture in its many manifestations around Australia and its islands. On the one hand, they may enshrine European archaeological and scientific values and protect Aboriginal sites and artefacts, and yet, on the other, fail or refuse to recognise the right of Aboriginal people to protect and control their own culture. The distinction is clearest in relation to property rights over land and objects with Aboriginal significance, and in relation to archaeological sites and collections. Legislation to protect

11 Ibid.

12 Final Report of the Royal Commission into Aboriginal Deaths in Custody – Final Report (ch 29).

13 Ibid.

Aboriginal sites has expanded considerably in recent years. It has been argued that 'all current Aboriginal heritage legislation, from an Aboriginal viewpoint, is defective in serious ways' when measured against the rights of Aboriginal people to be the owners and managers of their own cultural heritage.[14]

In some circumstances, Anglo-Australian law has served to protect living Aboriginal heritage and to promote Aboriginal control over it. The law has come to recognise and influence aspects of Aboriginal cultural heritage such as artwork, design, music, dance, ceremony, song and language, but, at the same time, there are absolutely no legislative mechanisms in place to protect Indigenous traditional medicines and foods from being patented by pharmaceutical companies. However, the interaction between Aboriginal customary law and Anglo-Australian law may result in arbitrary codification, with the possibility of uniformity being imposed on Aboriginal societies where none has previously existed, and of Aboriginal customs and practices, which continue to evolve, being frozen at a particular date.[15]

> The position of Aboriginal cultural heritage under Anglo-Australian law provokes comparison with the ways in which the law regards living cultural and religious heritage in general. Freedom of religion is protected in Australia, one of the few express guarantees of civil and cultural rights provided by the Australian Constitution. The meaning of 'religion' and its freedom have been defined by the High Court in terms clearly expansive enough to take in Indigenous religious beliefs. In *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 [17 ALJ 134], Latham CJ said that this constitutional protection must be regarded as operating in relation to all aspects of religion, irrespective of varying opinions in the community as to the truth of particular religious doctrines, as to the goodness of conduct prescribed by a particular religion, or as to the propriety of any particular religious observance. What is religion to one is superstition to another.'[16]

The crucial importance of self-determination to Aboriginal and Torres Strait Islander peoples is little appreciated by non-Indigenous Australians. The issues that have been a major and central focus on the historical and present status, treatment and aspirations of Aboriginal and Torres Strait

14 H. McRae, G. Nettheim and L. Beacroft, *Aboriginal Legal Issues: Commentary and Materials*, 1991, Sydney: LBC, p 44; see also Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report 31, 1986, Canberra: AGPS, vol 1, paras 69–85; 'Aboriginal Customary Law'. See N. M. Williams, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community*, 1987, Canberra: Australian Institute of Aboriginal Studies, esp ch 6, http://subscriber.lawbookco.com.au/lbcbin/lpext.dll?f=templates$fn=main-hit-j.htm$GLOBAL=G_$G_HAS_QUERY=true.

15 Ibid.

16 Ibid.

Islander peoples have been basically identified within the concept of self-determination.[17] Self-determination for Australia's Indigenous peoples has been government policy since the early 1970s. The Final Report of the Royal Commission into Aboriginal Deaths in Custody recommended that the self-determination principle be applied in the design and implementation of policies and programmes particularly affecting Aboriginal people. Senator John Herron, former Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs, outlined the broad aims of the Federal Coalition Government's policy in relation to Indigenous Affairs in 1996. The policy was based on the principle of self-empowerment through economic independence. Senator Herron stated:

> We must accept the diversity of Indigenous people and allow people greater control over their own lives and own communities. Furthermore, self-empowerment enables Aborigines and Torres Strait Islanders to have a real ownership of [their] programmes thereby engendering a greater sense of responsibility and independence . . . In this sense; self-empowerment varies from self-determination in that it is a means to an end – ultimately social and economic equality – rather than merely an end in itself'.[18]

Therefore the question of self-determination remains an extremely sensitive subject, one that cannot it seems be addressed lightly. The utmost care, diligence and extreme consideration needs to be taken when finding the right solution to answer this question, and one day that will hopefully be accomplished. This leads onto the next area of discussion: whether there is a need for a treaty with the Indigenous peoples of Australia as there is with other Indigenous peoples throughout the world.

The need for a treaty

A consequence of the doctrine of the settlement of Australia was that Australia was considered to be previously uninhabited by people with recognisable institutions, customs or laws. As a result, the Indigenous inhabitants were treated as British subjects, both protected by and subject to British law, while their own laws and customs were denied recognition. This policy included the refusal to recognise Aboriginal traditional laws as a defence to crimes defined by British law, the denial of land rights and the non-recognition of traditional marriages, among many other things. In 1989, the dispossession and

17 'The Right of Indigenous Peoples to Self-Determination', available online at http://subscriber.lawbookco.com.au/lbcbin/lpext.dll?f=templates$fn=main-hit-j.htm$GLOBAL=G_$G_HAS_ QUERY=true.

18 Ibid.

dispersal of the Aboriginal and Torres Strait Islander peoples and their present disadvantaged position in Australian society was recognised in the objects clause of the Aboriginal and Torres Strait Islander Commission Act 1989 (Cth). (The Aboriginal and Torres Strait Islander Commission has now been abolished.)

There have also been various Preambles to Acts and parliamentary resolutions to similar effect. The Council for Aboriginal Reconciliation was established by Commonwealth legislation in 1991. The Preamble to the Council for Aboriginal Reconciliation Act 1991 (Cth) recognised the prior Aboriginal occupation of Australia, the dispossession and dispersal of the Aboriginal people, and the need for a formal process of reconciliation. It stated that the Council existed to promote a process of reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community, based on an appreciation by the Australian community as a whole of the Aboriginal and Torres Strait Islander cultures, including the achievements and the unique position of Aborigines and Torres Strait Islanders as the Indigenous peoples of Australia. The Council's functions included a requirement that it consult on whether reconciliation would be advanced by a formal document or documents of reconciliation and thereafter to report to the responsible Minister accordingly. At the end of its first three-year term, the Council had identified the topic 'Agreeing on a Document' as one of its eight 'key issues', and reported progress on the issue.[19]

The Council developed the *Australian Declaration Towards Reconciliation* in its last three-year term. It was presented to leaders of Australian governments at 'Corroboree 2000', which was held in Sydney on 27 May 2000. It was accompanied by another document, *Roadmap for Reconciliation*. The final report of the Council, *Reconciliation: Australia's Challenge*, was presented to the Prime Minister by the then Council Chairperson, Dr Evelyn Scott, on 4 December 2000. This particular report included the two documents of reconciliation, the *Australian Declaration Towards Reconciliation* and the *Roadmap for Reconciliation*, as well as a series of recommendations in relation to giving effect to the terms of those documents. This discharged the Council's statutory functions under s 6(1)(h) of the Council for Aboriginal Reconciliation Act – to make recommendations to the Minister in relation to the 'nature and content' of documents of reconciliation and to the 'manner of giving effect' to such documents. The recommendations made by the Council included:

(1) The implementation of a national framework for addressing Indigenous disadvantage by the Council of Australian Governments (COAG);

19 I. C. Barnsley, G. Nettheim, R. Bartlett and A.J. Brown, *Proposals for a Treaty or Compact*, ch 3 'The Laws of Australia' available online at http://subscriber.lawbookco.com.au/lbcbin/lpext.dll?f=templates$fn=main-hit-j.htm$GLOBAL=G_$G_HAS_QUERY=true.

(2) The passing of formal motions of support by Australian parliaments and local councils for the two reconciliation documents;
(3) The holding of a Commonwealth referendum on a Constitutional Preamble which would recognise Aboriginal and Torres Strait Islanders as the first peoples of Australia; and
(4) The enactment of Commonwealth legislation to establish a process for developing a treaty or agreement on reconciliation. On 26 August 1999, the Australian Parliament passed a Motion of Reconciliation, in which it expressed its 'sincere regret that Indigenous Australians suffered injustices under the practices of past generations, and for the hurt and trauma that many Indigenous Australians continue to feel as a result'.[20]

At a meeting in November 2000, COAG issued a Communiqué in Respect of Reconciliation to act as a framework for cooperative efforts to address the delivery of services to Indigenous Australians. In December 2000, the federal government supported the establishment of Reconciliation Australia Limited as an independent body to take over the role of the Council for Aboriginal Reconciliation. There was also the construction of a memorial commemorating reconciliation in Canberra called Reconciliation Place. Apart from these matters, to date there has been no adequate response from government to the bulk of the findings and suggestions made in *Reconciliation: Australia's Challenge*.[21]

The idea of a treaty is an excellent way of addressing and advancing the human rights of Australia's Indigenous peoples, and it will also place Australia with much of the rest of world. The establishment of a treaty provides the potential for the legal, social, economic and human rights of Australia's Indigenous population to be recognised and protected in a manner that would allow the whole nation to move forward in a cohesive and coherent way. The focus of a treaty could assist in resolving many legal, social and economic issues confronting Indigenous Australians, as well as contribute to the recognition and protection of the aforementioned human rights of Indigenous Australians. However, the central focus of a treaty and the vision that it offers should concentrate upon how Indigenous Australians are to be included in Australian society and how and where they see themselves in the future of the country.[22]

Indigenous Australians have come to look at the idea of a treaty as an all-encompassing way to address the contradictions within and their exclusion from Australian society. The Prime Minister, John Howard, is opposed to the

20 Ibid.
21 Ibid.
22 M. Mansell, 'Citizenship, Assimilation and a Treaty', p 6 in *Treaty: Let's Get It Right!* (2003) ATSIC & AIATSIS.

idea, and argues that the legal implications that attach to the word 'treaty' suggest as a matter of law that all parties are sovereign in their own right and therefore can legally be termed as 'sovereign' peoples. This approach is to mistake the intentions of Indigenous Australians who call for a treaty. The reason for a treaty arises from the desired recognition of prior Indigenous sovereignty. Consequently, for a treaty to occur, there has to be recognition of prior Indigenous sovereignty; however, the terms of the treaty would outline, by agreement (because that is what a treaty is), the extent to which that sovereignty can now be exercised. This is a huge threshold issue that must be addressed not only with the utmost care and diligence, but also in good faith.

There is no escaping that this is a difficult issue, but this is absolutely no reason to abandon a treaty. A treaty provides an opportunity to put in place a mechanism that could see the advancement of all Indigenous Australians and would also place Australia in conformity in this regard with what has occurred in other parts of the world and in international law.[23] The international legal meaning of a treaty is stated by the Australian government as:

> The international legal meaning of treaties is used by the present Australian Government to unequivocally reject calls for a treaty. It is obvious that in light of such entrenched attitudes the term treaty must be viewed in the broadest possible sense and efforts made to build confidence on all sides in the process and its ultimate objectives. As Martinez said in his treaty study, one should avoid making oneself a prisoner of existing terminology. What really is required is innovative thinking.[24]

Many Indigenous Australians see a treaty as the only way of ever resolving the outstanding issues that they currently face, such as high incarceration rates, alcohol and substance abuse, and the lack of employment opportunities especially in remote communities throughout Australia.[25] The term 'Indigenous Australians' refers to many diverse groups all across Australia and therefore the concept of a treaty to encompass all of this diversity assumes the proportions of a monumental task.

Further, Indigenous communities have their own leaders whom they acknowledge and on whom they rely. A broad-based treaty would have to acknowledge this diversity and include mechanisms that accommodate its requirements. There are any number of possible options: two are relevant here – one could be to have individual treaties with different groups, underpinned by a national treaty framework that would guide local treaty making; the other

23 H. McRae, G. Nettheim, L. Beacroft, L. McNamara and S. Wright, *Indigenous Legal Issues: Commentary and Materials*, Lawbook Company 2003, ch 12, p 659

24 Ibid.

25 Ibid.

would be a single broad-based treaty approach that would have terms that would allow it to accommodate future changing environments of Indigenous populations.[26]

Conclusion

If for no other good reason than the practical requirements of overcoming the enormous disadvantages confronting Indigenous Australians and putting the relationship with mainstream society on a proper footing, a treaty is necessary. For this to occur, it requires mainstream society to obtain a deeper understanding of the background and history of Aboriginal and Torres Strait Islander society. Many of the issues discussed in this chapter require legislative and constitutional intervention and adjustment. Others would require the acknowledgment by, and a substantial adjustment of, the attitudes of non-Indigenous Australians. What is required for all is strong and committed leadership from all sides. The unwillingness of non-Indigenous Australians and particularly the federal government to address all aspects of the reconciliation process at present evidences a lack of this commitment.

It has to be recognised that there is a large reservoir of distrust, enmity and anger amongst Aboriginal people, and a lack of understanding amongst non-Aboriginal people. In some cases, there is a resistance to understanding, sometimes associated with racist ideas or simply self-interest. These and other factors point to the high desirability to take steps to help along the process of improving the relationship between Indigenous and other Australians – a process that may not proceed at all unless nurtured. This is what we call 'reconciliation'.

The process has been recognised as necessary by many throughout the Australian community. It could be said that the first step in the process of reconciliation was the clear endorsement by the Australian people of the referendum in 1967, which demonstrated overwhelming acceptance of the view that Aboriginal people should be part of the national polity. It can be said that, since 1967, there has been an evolution of thought on the part of non-Aboriginal Australian people, which has been reflected in the actions of successive Commonwealth governments that have not always been for the benefit of Indigenous people and which, indeed, in some instances have been positively detrimental. What is needed now is a change in direction, a change that will deliver political bi-partisan support. The principle of self-determination must be applied at all stages of the reconciliation process if it is to succeed.

It is also important to encourage support from the general public, because the process of reconciliation ultimately will succeed, or not, according to the extent to which the ordinary citizen feels himself or herself to be part of

26 Ibid, p 661.

the process. While there is a need now for political leadership to encourage that support from the public, it must be the public that drives the process forward. While reconciliation is fundamental, it is also apparent that improvements in these areas cannot wait until after the process has concluded.

There will obviously be a wide range of opinions and attitudes that will emerge during the negotiating process. Among non-Aboriginal people, diversity of opinion is a feature of public life and this is equally true within the Aboriginal community. Past attempts to gain a national Aboriginal viewpoint have often failed because adequate structures and processes have not been in place. It will be for Aboriginal people to determine the processes that should be adopted to ensure that the spectrum of Aboriginal opinion will be heard and to reach agreement, and to decide who will play a part in the negotiation process. These early and essential steps will take time, and it is essential that governments provide financial and administrative support.[27]

27 Reconciliation and Social Justice Library, Indigenous Law Resources, available online at http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/4.html#Heading4.

16 Aboriginal representation in government

Chris Kourakis QC and Stephen McDonald

Introduction

In *Mabo*,[1] the High Court adopted with approval the fundamental constitutional proposition stated by Gibbs J in *Seas and Submerged Lands*[2] that the courts cannot challenge or interfere with acts of State such as the 'acquisition of Territory by a sovereign state'.

The denial of Aboriginal sovereignty and rights of self-determination that this proposition entails was spelt out by three members of the High Court in *Yorta Yorta*:[3]

> Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence *only* to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.

It was only by an exercise of the Commonwealth's sovereign legislative power two centuries after European settlement that Aboriginal people were allowed a small measure of influence over the administration of their affairs. The Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) (the ATSIC Act) established the Aboriginal and Torres Strait Islander Commission (ATSIC)[4] and regional councils that were elected by, and accountable to, Aboriginal people. The Preamble to the ATSIC Act read in part:

1 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 31 *per* Brennan J (Mason CJ and McHugh J concurring).

2 *New South Wales v The Commonwealth ('Seas and Submerged Lands')* (1975) 135 CLR 337 at 388.

3 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 443 [43] *per* Gleeson CJ, Gummow and Hayne JJ.

4 ATSIC Act, s 6.

> . . . it is also appropriate to establish structures to represent Aboriginal persons and Torres Strait Islanders to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of programs and to provide them with an effective voice within the Australian government.

ATSIC advised the government on Aboriginal affairs and formulated and implemented government programmes for the delivery of Indigenous services. However, just 15 years later, on 1 July 2004, ATSIC was abolished, even though the statutory opinion expressed in the Preamble to the ATSIC Act remains as sound now as it has always been.

In this chapter, we examine the legislative framework under which ATSIC operated. We consider several alternative models that would allow Aboriginal people some control over governmental regulation of their social and economic circumstances. Some aspects of the constitutional rights of Indigenous people in Canada and New Zealand are discussed. We conclude that the New Zealand constitutional arrangements, under which the representatives of Māori-constituted electorates hold seats in Parliament, are not practically or politically feasible in Australia. Given the very different Australian constitutional and socio-economic context, the adoption of a Canadian territorial-based self-government model is problematic.

Ultimately, we propose a model that places the administration of Aboriginal affairs in institutions that are both accountable to Aboriginal people and to the Australian public as a whole through Parliament. Our proposal generally follows the ATSIC model, but integrates it with the legislative and executive arms of government in a way that results in both stricter accountability and a more effective voice for Aboriginal people. It does so by allowing the presiding officer of an Indigenous representative council to participate, but not to vote, in Parliament. The presiding officer would be required to account for the performance of the council and could be removed by Parliament with or without cause. He or she would have the right to speak in the lower house of Parliament on legislation that affects Aboriginal people and the right to question Ministers on the administration of those parts of their portfolios that concern Aboriginal people. The model could be implemented with some variation at State, Territory and Commonwealth levels.

The establishment and dissolution of ATSIC

Members of ATSIC were appointed by the Minister for Aboriginal and Torres Strait Islander Affairs (the Minister)[5] from those persons elected by regional councils formed within prescribed zones.[6] ATSIC acted as an

5 Ibid, s 27.
6 Ibid, s 131.

advisory board for the Minister and was responsible for the formulation, implementation and monitoring of programmes for Aboriginal persons, at the national, State/Territory and regional levels.[7]

ATSIC was subject to the general directions of the Minister.[8] The Minister was empowered, subject to any contrary parliamentary resolution, to suspend a Commissioner for misbehaviour.[9] The office of a Commissioner could also be terminated if a valid petition calling for the termination of the Commissioner's appointment was received.[10] The Commission was funded by appropriations made by Parliament.[11]

The ATSIC Act also created 35 regional councils.[12] They formulated regional plans for improving the economic, social and cultural status of their Aboriginal residents. ATSIC could also delegate its functions to the regional councils. Detailed provision was made for elections. ATSIC could suspend and remove regional councillors for cause.[13]

The abolition of the representative bodies established by the ATSIC Act was the culmination of several years of controversy. In November 2002, the federal government announced a review of the role and functions of ATSIC. The review coincided with a period of deep tension between the government and the ATSIC Board over corporate governance structures and an alleged lack of accountability. On 17 April 2003, the government announced the establishment of the Aboriginal and Torres Strait Islander Service (ATSIS) agency to manage ATSIC programmes.[14]

The persons commissioned to review ATSIC reported in November 2003. They recommended that 'ATSIC should be the primary vehicle to represent Aboriginal and Torres Strait Islander peoples' views to all levels of government'. On the other hand, they recognised that ATSIC was in urgent need of structural change and improved governance.[15]

7 Ibid, s 7. The Commission was empowered to make grants of money, interests in land and property and to make loans: s 14.

8 Ibid, s 12. All directions were required to be laid before each House of Parliament. Directions could not control the content of advice information or recommendations made to government.

9 Ibid, s 40. Each House could, within 15 sitting days, declare that the Commissioner ought to be restored to office and, if each House passed such a resolution, the Minister was required to terminate the suspension. Subject to such a resolution passed by Parliament, the Minister could proceed to terminate the Commissioner's appointment: s 40(5).

10 A valid petition was one signed by 66 per cent of persons eligible to vote at an election for members of the Regional Council.

11 ATSIC Act, s 57. However, the Minister controlled the timing of the payments so appropriated: s 57(21).

12 Ibid, ss 91 and 92.

13 Ibid, s 122A.

14 ATSIS commenced work on 1 July 2003.

15 J. Hannaford, J. Higgins and B. Collins, *In the Hands of the Regions – Report of the Review of the Aboriginal and Torres Strait Islander Commission*, 2003, pp 24, 30 and 32.

The ATSIC Review recommended the retention of ATSIC's 35 regional councils, but the replacement of the ATSIC Board with two new structures. The first was to be a new national body elected by regional councils, which would act as the governing body that determined ATSIC policy through a national plan. That body would meet at least twice every four years. The second would be a national Executive to which the national body would delegate the role of leading and advocating on behalf of ATSIC on a day-to-day basis.

In his response to the government review of ATSIC, the Social Justice Commissioner suggested that ATSIC's role could be enhanced by empowering it to set objectives and guiding principles for service delivery that would be tabled in Parliament and have the status of a legislative instrument. He recommended that all government departments should be required to include in annual reports to Parliament information as to how they implemented ATSIC objectives and that ATSIC should report to Parliament on departmental compliance with its objectives.

The government rejected the recommendation it had received. Instead, the ATSIC Commissioners were removed on 30 June 2004. The government put in place new arrangements for the administration of Aboriginal affairs. Indigenous-specific programmes with budgets totalling $1 billion and involving 1,300 staff were transferred to mainstream government departments and agencies. A Ministerial Task Force and Secretary's Group on Indigenous Affairs were established. Indigenous Australians selected by the government were appointed to a National Indigenous Council that was to advise the Ministerial Task Force. Regional Indigenous coordination centres were established and agreements negotiated with Indigenous people at regional and community levels.[16]

On 22 March 2005, the Aboriginal and Torres Strait Islander Commission Amendment Act 2005 (Cth) was assented to. It abolished the Aboriginal and Torres Strait Islander Commission and Regional Councils with effect from 1 July 2005.[17]

The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Tom Calma, in his *Social Justice Report* for 2004, accepted that the new arrangements compelled 'engagement on Indigenous issues at the most senior levels of the government and public service'. On the other hand, Mr Calma was concerned that the engagement of Indigenous people at the local level was not linked to a process that would allow them to influence policy at a national level. He suggested that that linkage might be provided by the

16 Aboriginal and Torres Strait Islander Commissioner's *Social Justice Report* 2004 at 79–80.

17 Schedules 1 and 2 commenced operation on 24 March 2005. Schedule 3 came into operation on 1 July 2005. Schedule 1 abolished the Aboriginal and Torres Strait Islander Commission. Schedule 2 made transitional and saving arrangements relating to the office of evaluation and audit. Schedule 3 abolished regional councils.

convening of a National Congress of Indigenous Representatives, an annual conference on service delivery to Indigenous communities and the establishment of a national Indigenous, non-government peak body.

In mid 2006, a breakdown of basic policing and law enforcement received prominent attention nationally. It prompted a commitment from State, Territory and Commonwealth governments to provide urgently greater financial resources to remote Aboriginal communities. The ensuing public debate emphasised the importance of autonomy, responsibility, transparency and accountability in the public administration of Aboriginal affairs.

International standards

By a resolution made on 3 March 1995, the United Nations Commission on Human Rights established an open-ended intersessional working group for the purpose of elaborating a draft of a proposed United Nations declaration on the rights of Indigenous peoples. The working group considered a draft declaration in sessions held between December 2005 and February 2006.[18] Its recommendations were adopted in the first session held in June 2006 of the Human Rights Council, the newly created United Nations agency that had succeeded the Human Rights Commission. The Council recommended that the General Assembly of the United Nations adopt a Declaration on the Rights of Indigenous People containing, inter alia, the following articles:[19]

> *Article 3*
> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> *Article 4*
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
>
> *Article 5*
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while

18 The report of the Working Group is No E/CN.4/2006/79. However, the General Assembly of the United Nations recently resolved to replace the Human Rights Commission with a Human Rights Council from 16 June 2006. The Human Rights Council was established by the General Assembly in a resolution of 15 March 2006.

19 Resolution 1/2 of the first session of the Human Rights Council, June 2006, available online at http://ap.ohchr.org/documents/E/HRC/resolutions/A-HRC-RES-1–2.doc.

> retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

The proposed Declaration further declares that Indigenous peoples have a right to control their educational systems[20] and the development of health, housing and other economic and social programmes.[21] Article 20 declares that Indigenous peoples have the right to maintain and develop their own Indigenous decision-making institutions.

The General Assembly adjourned its consideration of the proposal in December 1996.[22]

The New Zealand System of Māori electorates

The New Zealand Parliament was established in 1852 as a bicameral legislature with an elected lower house (the House of Representatives) and an appointed upper house (the Legislative Council). The Council was abolished in 1951.

The passage of the Māori Representation Act in 1867 saw the introduction of four Māori seats in the New Zealand House of Representatives. At that time, Members of the House were elected only by men who owned property.[23] Because most Māori property was owned collectively, all Māori men who were at least 21 years old were permitted to vote in the Māori seats. Those Māori who owned property individually were allowed to vote in both a Māori electorate and a general electorate, a state of affairs that continued until 1893. At the time, it was widely thought that Māori would soon come to own property individually and the Māori seats were introduced as an interim measure. They were established permanently in 1876.[24]

Full-blood Māori were not allowed to vote in the 'European' electorates until 1975, at which time the name was changed from 'European' to 'General'.[25] Those of mixed Māori and other descent were allowed to choose whether they voted in Māori or general electorates.

Historically, the separate representation of Māori has delivered them disadvantages as well as advantages. Were it not for the system of Māori seats, it is likely that there would have been few, if any, Māori elected to Parliament

20 Article 14, proposed United Nations Declaration on the Rights of Indigenous People.

21 Article 21, ibid.

22 Press statement by UN Special Rapporteur on the Rights of Indigenous People, 4 December 2006, available online at http://www.unhchr.ch/huricane/huricane.nsf/view01/B5094B0D3E5B022DC125723B.

23 The property qualification was abolished by the Qualification of Voters Act 1879.

24 A. Geddis, 'A Dual Track Democracy? The Symbolic Role of the Māori Seats in New Zealand's Electoral System' (2006) *5 Election Law Journal*, 347 at 352–353.

25 The name 'European' was never strictly accurate, because all eligible voters not of Māori descent were permitted to vote in those electorates.

for much of New Zealand's history.[26] On the other hand, advances in electoral laws applicable to the general electorates were often not implemented in the Māori seats.[27] Furthermore, the number of Māori seats was set at four between 1867 and 1993, even though the number of MPs representing general electorates over that period had increased from 72 to 99. The effect was that Māori were proportionately under-represented in Parliament.

To be eligible to vote in Māori electorates, a person must be of New Zealand Māori[28] descent and must be registered on a separate Māori electoral roll. Persons of New Zealand Māori descent must choose, in the 'Māori electoral option', whether they will be registered on the general roll or on the Māori roll.[29] Since 1993, with the introduction of mixed member proportional representation (MMP), the number of Māori seats changes according to the number of Māori enrolled on the Māori roll.

Since the 2001 census, there have been seven Māori seats, compared with 62 general geographical electorates. The remainder of the 121 members of the New Zealand Parliament are allocated to party representatives, based on the proportion of votes won by their party.[30]

In the 2001 census, 526,281 people identified themselves as of Māori ethnicity, out of a total New Zealand population of 3,586,731.[31] Māori therefore make up approximately 14.67 per cent of the New Zealand population. In the 2001 Māori electoral option (which determined the number of Māori electorates for the 2002 and 2005 elections), about 55 per cent of persons of Māori descent chose to be registered on the Māori electoral roll.[32]

26 Until 1975, Sir James Carroll KCMG (1911) MLC (1857–1926; Minister of Native Affairs 1899–1912 and acting Prime Minister of New Zealand in 1909 and 1911), the son of a farmer of Irish descent and the chieftainess of an East Coast Māori tribe, was the only Māori who had won a general seat in the House of Representatives. It should be noted that, from 1893 to 1967, persons of over 50 per cent Māori descent could only vote in and stand for election to the Māori seats.

27 For example, the secret ballot, introduced generally in New Zealand in 1870, was not implemented in the Māori seats until 1937, and electoral rolls were not kept for the Māori electorates until the middle of the twentieth century. See N. Atkinson, *Adventures in Democracy: A History of the Vote in New Zealand*, 2003, p 172.

28 Persons of Pacific Island Polynesian descent who are qualified to enrol may only enrol to vote in a general electorate.

29 See Electoral Act 1993 (NZ), ss 76–78.

30 Normally the New Zealand Parliament consists of 120 members, but following the 2005 election there is one 'overhang' seat caused by the Māori Party winning more electorate seats than their proportional representation would allow.

31 Statistics New Zealand, 2001 Census. The statistics used are those for the 'usually resident' population.

32 New Zealand Electoral Commission, *New Zealand Electoral Compendium*, 3rd edn, 2002, Wellington. It should be noted that all persons of Māori *descent*, not only those who identified as being of Māori *ethnicity*, may elect to be on the Māori electoral roll.

Consideration of the introduction of a similar system in Australia

Table 16.1 sets out the number of Indigenous persons resident in each Australian State and Territory, and the current number of seats in each house of the various State and Territory Parliaments.

In order to assess the feasibility of introducing a system of Indigenous representation into the Parliaments of one or more of the Australian States or Territories, some explanation is required of the range of electoral systems currently found across those States and Territories. Five of the Australian States have bicameral legislatures, the lower house being called the 'legislative assembly' and the upper house the 'legislative council'. Queensland,[33] the Australian Capital Territory and the Northern Territory each have a unicameral legislature consisting of a legislative assembly only. In the States with bicameral legislatures, if it were decided that there should be separate Indigenous representation in the Parliament, the question would arise whether those representatives should be elected to the upper or lower house.

In all States and Territories apart from Tasmania and the Australian Capital Territory, the legislative assembly is comprised of members elected to represent geographical electorates – one member per electorate, the same as for the federal House of Representatives. The number of electorates, and of electors per electorate, varies considerably from State to State. In Tasmania, the State is divided into five legislative assembly electorates; the assembly is constituted of five members from each electorate. In the Australian Capital Territory, there are three electorates, the legislative assembly consisting of eight members from one electorate and five members from each of the other two.

The method of election for the upper house in those States with bicameral legislatures also varies from State to State. The legislative councils of New South Wales and South Australia are elected by the State voting as a single electorate. In both States, the terms of legislative councillors are twice as long as those of members of the legislative assembly and only half of the legislative council seats are contested at each general election. A different model is used in Victoria: the State is divided into 22 electoral provinces and each province is represented by two legislative councillors – one of whom is elected at each general election. As in New South Wales and South Australia, each member of the council retains their seat for two terms of the legislative assembly and half of the councillors (i.e. one from each electoral province) contest their seat at each election. In Western Australia, legislative councillors each represent one of six electoral regions: two such regions elect seven councillors each, and the others each elect five representatives.

33 See Constitution Act Amendment Act 1922 (Q); Constitution Act Amendment Act 1934 (Q), s 3.

Table 16.1 Indigenous representation in government

State/Territory	*Indigenous persons resident in State/ Territory*	*Percentage of Australian Indigenous population*	*Total population of State/ Territory*	*Indigenous persons as percentage of State/ Territory population*	*Indigenous persons aged 18+*	*Total persons aged 18+*	*Number of seats (lower house)*	*Calculated quota per seat (lower house)*	*Number of seats contested per election (upper house)*	*Calculated quota per seat (upper house)*	*No of Indigenous aged 18+ divided by calculated quota (lower house)*	*No of Indigenous aged 18+ divided by calculated quota (upper house)*
Australian Capital Territory	3,576	0.872	309,184	1.157	1,933	229,644	17 (3 multi-member electorates)	–	(No upper house)	–	–	–
New South Wales	119,865	29.235	6,311,168	1.899	63,925	4,732,885	93	50,891	21	225,375	1.256	0.284
Northern Territory	50,785	12.387	202,729	25.051	29,295	145,128	25	5,805	(No upper house)	–	5.046	–
Queensland	112,772	27.505	3,585,639	3.145	60,353	2,668,080	89	29,978	(No upper house)	–	2.013	–
South Australia	23,425	5.7134	1,458,912	1.606	12,821	1,110,267	47	23,623	11	100,933	0.542	0.127
Tasmania	15,773	3.847	454,841	3.468	8,356	336,720	25 (5 electorates of 5 members each)	13,469	15	22,448	0.620	0.372
Victoria	25,078	6.117	4,612,097	0.543	13,718	3,475,197	88	39,491	44 (22 provinces of 2 members each)	78,982	0.347	0.174
Western Australia	58,496	14.267	1,832,008	3.193	31,802	1,356,291	57	23,795	34 (6 multi-member electorates)	–	1.337	–
Other Territories	231	0.056	2,668	8.658	160	1,861	–	–	–	–	–	–
Total for Commonwealth	410,001	100	18,769,246	48.720	222,363	14,056,073	150	93,707	76 (12 per State, 2 for ACT and NT)	–	2.373	–

The Tasmanian legislative council comprises 15 members, each elected to represent a single geographical electorate; the same method of election as the other States' lower houses.

The question of to which House of Parliament any Indigenous representative should be elected in a State with a bicameral legislature may depend upon the manner in which the Indigenous representative or representatives are to be elected. It would seem natural that, if Indigenous representatives were to be elected by Indigenous voters across the State voting in a single electorate, those representatives should sit in the House of Parliament whose members are elected in the manner most similar to that method: for example, the legislative council in New South Wales or South Australia, or the assembly in Tasmania. On the other hand, another important consideration in determining in which chamber any Indigenous representative might sit would be the relative powers of the two houses. If it were thought that the Indigenous representative should be able to influence the formation of government, they should sit in the lower house. However, if the purpose of the Indigenous representative was seen more as a public voice capable of influencing legislative decisions and proposing amendments to legislation, the upper house might be more appropriate.

The most obvious difficulty facing those seeking to implement a system of separate representation for Indigenous persons in the Australian States is the very low numbers of Indigenous persons relative to the total Australian population. In the 2001 Australian census, approximately 410,000 persons identified themselves as Indigenous (Aboriginal or Torres Strait Islander), out of a total population of nearly 19 million.[34] On those figures, the Indigenous population of Australia represents only about 2.18 per cent of the total Australian population, in contrast with New Zealand, where Māori make up about 15 per cent of the population.

As will be evident from Table 16.1, in the four States with proportional representation in their legislative councils, each seat in the council represents far more voters than there are Indigenous electors in the State. The effect is that Indigenous persons with even just one representative in any of those houses would enjoy a disproportionately high level of voting power. That would be so even if the number of legislative councillors were doubled (or, in New South Wales or South Australia, if the numbers remained the same but terms were reduced so that the legislative council was dissolved and completely re-elected at every general election, which would have a similar effect).

Even in the more numerous Houses of Assembly, the Indigenous population would not justify, on democratic grounds, a separate representative in the ACT, South Australia, Tasmania or Victoria. In New South Wales and Western Australia, a single Indigenous representative would be justified and

34 Australian Bureau of Statistics, 2001 Census.

in Queensland, two could be elected without infringing the principle of 'one vote, one value'.

A further complication is that, even within a single State, it cannot necessarily be assumed that the Indigenous population is homogenous. Significant differences in language, culture and political beliefs and interests may divide Indigenous populations in different regions. It is possible that only one or two parliamentary representatives for all Indigenous persons in a State, while giving Indigenous people an identifiable voice, might produce a Parliament less representative of the diverse views of Indigenous people than one in which those persons are represented geographically.

Further, it should not be assumed that all Indigenous persons would want to vote in an Indigenous electorate rather than a general geographical electorate. The New Zealand experience suggests that, if given the option, many Indigenous persons may prefer to vote in a general electorate. A compulsory system that required Indigenous persons to vote in a separate electorate is likely to be regarded as offensive and racially discriminatory. Indeed, any system that provides Indigenous people with separate representation in matters that have no special connection with Indigenous affairs is probably subject to the same criticism.

It follows that the New Zealand model that has been discussed above could not readily be translated to any of the Australian States or Territories. The possible exception to that statement is the Northern Territory, where Indigenous persons make up about a quarter of the population. However, a closer consideration of how such a system might work in the Northern Territory reveals a further difficulty.

Supposing that all Indigenous persons over the age of 18 years in the Northern Territory were to vote in a separate Indigenous seat or seats, then, based on the 2001 census data, the House of Assembly might include up to five representatives for Indigenous electors.[35] However, because of the relatively few seats in the Northern Territory legislative assembly, even modest variations in the numbers of Indigenous or non-Indigenous electors from election to election may produce significant variations in the level of proportionality that is reflected in the seats. Ordinarily, the effect of such variations can be reduced by redefining the geographical boundaries of electorates. However, when qualification to vote in a particular electorate depends upon cultural or racial factors, electors cannot be transferred from electorate to electorate so easily. Furthermore, providing a choice for Indigenous electors between voting in an Indigenous seat or a general seat may produce much more variation in the proportion of electors voting in Indigenous electorates.

35 Incidentally, in the current Northern Territory House of Assembly (elected 18 June 2005) there are five Aboriginal members, although each represents a geographical electorate that includes both Indigenous and non-Indigenous electors.

Canada

From the seventeenth century, treaties of peace and friendship were entered into with the Indian nations of eastern North America by both French and English settlers. The treaties conferred hunting and fishing rights in return for peace, but did not involve the cession by the Indians of their lands. In treaties between 1850 and 1921, the Indian nations did cede lands to the Crown in return for hunting and fishing rights and the reservation of some parts of the treaty lands. Thereafter no further treaties were made for more than half a century. However, in 1973, the Supreme Court of Canada recognised the validity of Aboriginal land rights.[36] The government of Canada then resumed a process of treaty making.

Section 35 of the Constitution Act 1982 (Can) provides:[37]

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

. . .

(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.

The Canadian government accepted that the inherent right of self-government is an existing Aboriginal right under s 35 of the Canadian Constitution, and that the rights of self-government may be protected in treaties made under s 35.[38] In August 1995, the government of Canada commenced to negotiate practical and workable arrangements with Aboriginal peoples to implement their inherent right to self-government.

The guiding principle has been one of 'shared sovereignty'. The final report of the Royal Commission on Aboriginal Peoples described shared sovereignty in the following way:[39]

> Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their Constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government.

36 *Calder v Attorney-General (British Columbia)* [1973] SCR 313.

37 See generally P. W. Hogg, *Constitutional Law of Canada*, 4th edn, 1997, pp 689–690.

38 Canadian Government Indian and Northern Affairs website, http://www.ainc-inac.gc.ca/pr/pub/sg/plcly_e.html.

39 *Report of the Royal Commission on Aboriginal Peoples* (1996), vol 2, pp 240–241.

Under the federal policy, Aboriginal groups may negotiate self-government arrangements over a variety of subject matters, including government structure, land management, health care, child welfare, education, housing and economic development. The negotiations are conducted between Aboriginal groups, the federal government and, in areas affecting its jurisdiction and interests, the relevant provincial or territorial government.

The federal government ceded a large part of the Northwest Territories to the Nunavut people in 1993. The self-governing region of Nunavut was formed from the eastern portions of the Northwest Territories of Canada. It comprises one fifth of Canada's total land area, but most of the richest and well-developed parts of the Northwest Territories were not included within Nunavut. Economically, Nunavut relies on the further development of its minimal resources and hunting, fishing, fur trapping, sealing and the production of arts and crafts. The Inuit people hold title to about 20 per cent of Nunavut. About 90 per cent of its budget is provided by the Canadian government.[40]

The Nunavut Act 1993 (Can) established the territory of Nunavut.[41] Executive power was placed in the hands of the Commissioner of Nunavut, who is appointed by the Governor in Council.[42] The legislature is comprised of the Legislative Assembly of Nunavut and the Commissioner.[43] Legislative power extends to the administration of justice, prisons, municipal and local institutions and hospitals and charities. The power to tax was also conferred on the Nunavut legislature, as was the control of property and civil rights. Its power over education was limited to ensure that independent schools could be established. The Nunavut legislature was also given power over the preservation and promotion of the Inuktitut language, agriculture, the incorporation of companies and matters of a local or private nature in Nunavut.[44] The powers of the Nunavut legislature are, however, subject to any other Act of the Canadian Parliament.

A provincial self-government arrangement negotiated by British Columbia is described and discussed in the decision of the Supreme Court of British Columbia in *Campbell v Attorney-General (British Columbia), Attorney-General (Canada) and the Nisga'a Nation*.[45] The Nisga'a nation is comprised of approximately 5,500 members, most of whom reside in four villages along the Nass River Valley,[46] which is close to the Alaskan border, and three urban centres.

40 Nunavut Department of Finance, *Fiscal and Economic Outlook 2006*, available online at http://www.gov.nu.ca/finance/mainbudgets/budget2006efo.pdf.

41 Nunavut Act 1993, s 3.

42 Ibid, s 5.

43 Ibid, s 12.

44 Ibid, s 23.

45 (2000) 189 DLR (4th) 333 (Williamson J).

46 The Nass River is the third largest salmon-producing river in British Columbia.

The treaty with the Nisg̲a'a was implemented by the Nisg̲a'a Final Agreement Act 1999 (BC). The treaty was the first to be signed by British Columbia since 1899.[47] The Nisg̲a'a government is divided into two levels: the Nisg̲a'a lisims government and the Nisg̲a'a village governments.[48] The lisims government is responsible for intergovernmental relationships between the Nisg̲a'a nation and Canada and British Columbia.[49] The village governments are responsible for the government of the various villages of the nation.[50]

Nisg̲a'a government laws must be consistent with the Nisg̲a'a Final Agreement,[51] but, on some subjects, prevail over federal and Provincial law. Those subjects include the identity of the Nisg̲a'a people, their education, the preservation of their culture and the use of their land and resources.[52] Laws affecting children or regulating education must meet comparable Provincial standards.[53] Laws that permit the Nisg̲a'a to establish police services and a police board require the approval of the Provincial cabinet and must also meet Provincial standards.[54] Nisg̲a'a laws establishing courts must comply with 'generally recognised principles in respect of judicial fairness, independence, and impartiality'.[55] The Nisg̲a'a government has no power to make criminal laws.[56] It can make civil laws regulating public order, but those laws are subject to federal and Provincial laws. Similarly, it has no power to make labour laws, but may make representations concerning the effect of a particular aspect of labour relations law upon its culture.[57] Laws with respect to fisheries, forestry and personal and village assets are subject to federal and Provincial laws,[58] as are laws concerning marriage, the sale and consumption of alcohol, gambling licences and social, child, family and health services.[59]

In rejecting the challenge to the treaty made by Campbell, Williamson J held that:[60]

> . . . aboriginal rights, and in particular a right to self-government akin

47 See the Nisg̲a'a Lisims Government Information website, http://www.nisgaalisims.ca/.
48 Nisg̲a'a Final Agreement, Ch 11, [2], [3], [9], [12], [13], [43].
49 Ibid, Ch 11, [3].
50 *Campbell v Attorney-General (British Columbia), Attorney-General (Canada) and the Nisg̲a'a Nation* (2000) 189 DLR (4th) 333 at [37] and [38].
51 Nisg̲a'a Final Agreement, Ch 11, [32]. The legislative arm of the Nisg̲a'a government is called the W̲ilp Si'ayuukhl Nisg̲a'a.
52 Ibid, Ch 11, [34], [37], [39], [41], [44], [89], [100], [103].
53 Ibid, Ch 11, [89], [100], [104].
54 Ibid, Ch 12, [3]–[6]. The laws must also meet prescribed standards.
55 Ibid, Ch 12, [33].
56 Ibid, Ch 11, [59]–[61].
57 Ibid, Ch 11, [64]–[67].
58 Ibid, Ch 11, [55].
59 Ibid, Ch 11, [78], [79], [83], [91], [108].
60 *Campbell v Attorney-General (British Columbia), Attorney-General (Canada) and the Nisg̲a'a Nation* (2000) 189 DLR (4th) 333 at [81].

> to a legislative power to make laws, survived as one of the unwritten 'underlying values' of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867.

Williamson J relied on three early nineteenth-century decisions of the Supreme Court of the USA, in which Marshall CJ had held that the Indian right of self-government had been diminished, but not extinguished.[61]

There is no equivalent Australian constitutional provision to s 35 of the Constitution Act 1982 (Can). Indigenous self-government is inconsistent with the constitutional principles established by the Australian High Court.[62]

Any purely legislative conferral of self-government would be vulnerable to changes in the political philosophy of the government of the day. Perhaps of even more importance is the absence of any history of treaty making in the Australian context and the accepted principle of cooperative coexistence in Australian land rights law.[63]

The Australian outback is sparsely populated land shared by both Indigenous and more recently arrived Australians. In our opinion, these factors all combine to effectively preclude adoption of the Canadian approach.

An Australian alternative

As we foreshadowed earlier, the model we recommend is closely based on the former ATSIC model.

The first step is the formation of a representative Council. The composition and method of election to the Council that would best represent the diverse interests of Aboriginal society is one that must be left to the Indigenous community to determine. However, because the Council will have a part in the government of the State, there is a strong argument that it should conform to certain minimum democratic and human rights standards. The term of the Council should be synchronised with parliamentary elections.

There are a number of alternative electoral systems that might be adopted. The Council might be composed of persons elected by the Aboriginal people voting as a single electorate, by representatives of individual Aboriginal communities, or by some combination of those methods. For example, larger communities might receive more than one seat on the Council, while a number of small communities with cultural or geographical links might elect a single member between them; alternatively, the votes of electors

61 *Johnson v M'Intosh* 21 US (8 Wheat) 543 (1823); *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831); *Worcester v Georgia* 31 US (6 Pet) 515 (1832). Those cases were also cited with approval by the Supreme Court of Canada in *R v Van Der Peet* [1996] 2 SCR 507 at 541.

62 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 31 *per* Brennan J (Mason CJ and McHugh J concurring); *New South Wales v The Commonwealth ('Seas and Submerged Lands')* (1975) 135 CLR 337 at 388.

63 *Wik Peoples v Queensland* (1996) 187 CLR 1.

from smaller communities might receive a greater weighting than those from larger communities.

Consideration will also need to be given to measures that will ensure the proper representation of women. The creation of electorates that cover Aboriginal people living in capital cities and regional and urban centres will also require close attention.

The size of the Council will be a function of the need to reflect the diversity of the Aboriginal community and the pragmatic requirement that it be able to execute its responsibilities efficiently. Again, that would be a matter for careful evaluation, taking into account the precise functions and responsibilities it is given.

There are many existing Indigenous organisations. The structure of those organisations should be integrated with the representative Councils. It may be possible for elected Council members to hold, *ex officio*, positions on a number of Indigenous organisations that fall within, or deliver services into, their electorates. The Council might also be given limited powers of direction with respect to some of those organisations.

It should not be assumed that the transfer of responsibility for the delivery of services to the Aboriginal community to a representative Council requires the creation of a public service department comprising all of the persons who are in any way involved in the delivery of services. It may be more efficient to employ most of those people who deliver those services in general government departments such as health and education, whilst placing higher level managers and policy makers in a small agency that reports to the Council. The specialised agency could then formulate policy, devise benchmarks and monitor standards in services delivered by mainstream departments.

The relationship of the Council to its agency should be analogous to the role of a corporate board. The Council would establish the fundamental principles on which the agency operates. It would set strategic goals. It would counsel and guide the agency's chief executive. The Council would not involve itself in the minutiae of day-to-day decision making.

It is in the relationship between the Council and the government that our proposal radically differs from the ATSIC model. In our view, the Council should not be responsible to a single Minister; rather, the Council should be responsible to the Parliament through its presiding officer, who would act as its special representative or tribune.[64] The tribune would be responsible for the performance of the Council on the floor of the House in the same way that Ministers are responsible for the performance of their departments. The

64 A 'tribune' was an officer in the Roman administration appointed to protect the interests and rights of the Plebeians from the Patricians. It may be possible to adapt a term from an Aboriginal language to designate the position. The Ngarrindjeri word *rupulle* means landowner, negotiator and spokesperson for the tribe. The Pitjantjatjara term *ngapartji ngapartji* means reciprocal exchange.

Council's tribune would not have any voting rights in the Parliament, but would be entitled to respond to criticisms and questions concerning the Council. He or she could comment on, and ask questions in relation to, any matter of concern to Aboriginal people. Additionally, the tribune could introduce Bills during private members' time.

We propose that the Council's presiding officer could be removed with or without cause by a vote of the Parliament. It might be thought that such a step leaves the voice of Indigenous people in an unacceptably vulnerable position. It is arguable, however, that the effect is the very opposite: relations between the Parliament and the Executive would necessarily become more transparent; exchanges between the Executive and the Council would not be exclusively conducted behind closed ministerial doors; issues would not be left unresolved in private. Any move against or criticism of the Council would have to be publicly justified in Parliament. Just as importantly, the Council, through its representative, would have a voice in Parliament. Its representative would enjoy all of the privileges that attach to parliamentary debate including, importantly, the privilege of free speech. Any criticisms of the Council could be fully and freely rebutted. The work and programmes of the Council's agency would be subjected to parliamentary scrutiny. Failings and shortcomings would be immediately addressed and not allowed to compound to a point that threatened the very principle of Aboriginal self-governance.

The model does, however, require that careful attention be given to the method of selecting the Council's presiding officer. It must be decided whether he or she should be elected by a separate vote of the entire Aboriginal electorate or selected by the members of the Council. The former position would give him or her the strength of a personal mandate. However, that very factor might complicate the deliberations and decision making of the Council, making a resolution by consensus less likely. Perhaps as importantly, some persons of outstanding ability may not be prepared to campaign for election, but might accept the position if it were to be offered to them by the Council.

Moreover, if the representative were to be removed by vote of Parliament, the practical effect would be that any replacement must also be made with the consent of Parliament. If the representative were directly elected, the process of finding a replacement candidate, in the event that a representative was ever removed, would be more difficult. These factors seem to favour the selection of the representative by the Council.

In the unlikely event of a deadlock arising over the appointment of a representative who is acceptable to both the Council and the Parliament, it is difficult to envisage any satisfactory solution short of vacating all or some proportion of the seats on the Council and holding fresh elections. A resolution of the conflict in favour of the Parliament is both the most pragmatic solution and one that acknowledges the greater democratic legitimacy of the Parliament.

The proposed model could be implemented at either the State/Territorial

or Commonwealth level. Because the Council's representative would lack any voting power, it is unlikely that any formal constitutional amendment would be required: the representative would not be a 'member' within the meaning of the Commonwealth Constitution. As to the introduction of Bills, it may be necessary to provide for a formal mechanism whereby a Bill proposed by the representative is introduced by an elected member. The Commonwealth Parliament would appear to have power to legislate for such a proposal under s 51(xxvi) of the Constitution, in conjunction with rules made pursuant to s 50(ii).

Conclusion

In putting forward our proposal, we are acutely aware of our very limited understanding of Aboriginal history, law and culture, and indeed the present-day reality of Aboriginal Australians. Our contribution to the debate proceeds from our knowledge of Western constitutional systems. The Australian alternative that we have proposed can be no more than a starting point for a complex debate. It is a debate that should be urgently taken up, lest the Commonwealth's abolition of Indigenous self-governance come to be seen as inevitable or, worse still, politically acceptable. The inevitability of its abolition ultimately depends on the actions of those who share the belief of the United Nation's Human Rights Council that Indigenous self-determination is a fundamental human right.

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