Reform Native Title 2009

A Journal of National and International Law Reform ISSUE 93

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Reform seeks to provide a forum to engage a broad cross-section of the community in constructive, high-quality debate on issues of national and international law reform.

The journal aims to highlight shortcomings in current laws, facilitate discussion on opportunities for uniformity and reform, and significant innovation in law and legal practice. It also provides a comparative analysis of local and overseas reform initiatives.

The views expressed by contributors to *Reform* are not necessarily those of the publisher, the Australian Law Reform Commission.

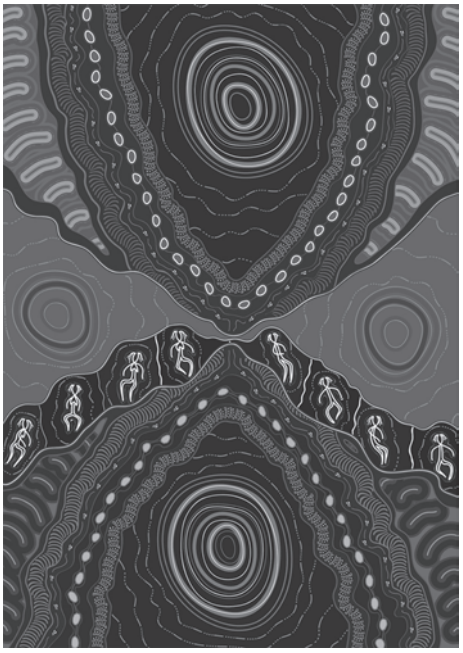
Key Message

The artwork represents the themes and issues surrounding Native Title and Common Law.

While Native Title is a complex issue, this artwork depicts the fundamental elements and issues. Native Title represents understanding and awareness of connection to country, and the significance and historical importance of specific geographic areas to certain language groups and their stories. This relationship to country is the theme that is explored throughout the artwork.

Native Title and Common Law are depicted by the two large circles at the top and bottom of the piece. The red circle, at the bottom, represents Indigenous cultures' relationship to the land, to which Native Title is tied. The blue circle represents Common Law. The smaller circles contained within these central circles represent the history and stories that surround these issues.

Relationship to and understanding of country is one of the most important elements explored in this piece. Specific geographic locations are depicted in the artwork, primarily through the brown circles situated in the centre left and right of the piece. These are also a loose representation of waterholes and gathering places.



Surrounding both key elements (Native Title and Common Law) are a series of smaller, connected circles. These represent the many geographic locations that are important to certain language groups. These smaller circles that surround the Native Title element are blue and red. These colours represent land and sea, two elements that are representative of, and critical to, Aboriginal and Torres Strait Islander culture. Saltwater, and Freshwater peoples.

Travelling from the bottom of the artwork through the centre to the top are kangaroo tracks. Kangaroo is widely hunted in Indigenous culture as hunting is an important cultural tradition. The kangaroo tracks represents the journey of cultural preservation and practices involved in the transfer of knowledge from one generation to the next.

To represent men's law and women's law in Indigenous culture, in relation to Native Title, there are a series of figures in the centre of the piece. The women are to the left of the central point of the artwork, the men to the right. These people also represent the individual storylines and journeys that take place relating to Native Title.

The central circles are surrounded by a series of lines and elements that form an hourglass shape, converging in the middle and widening to the top and bottom of the artwork. This represents a journey of time and positive direction for the future. Through understanding all elements within this hourglass shape (Common Law, Native Title, stories, and relationship to country), a positive future and understanding of Native Title can be gained.

Gilimbaa was born out of a passion to work with Indigenous art and story-telling and the elements they can bring to contemporary design and communication.
It has been a pleasure to contribute this body of work to this edition of *Reform*, and to help in some way to extend the understanding of Native Title.

David Williams
Creative Director

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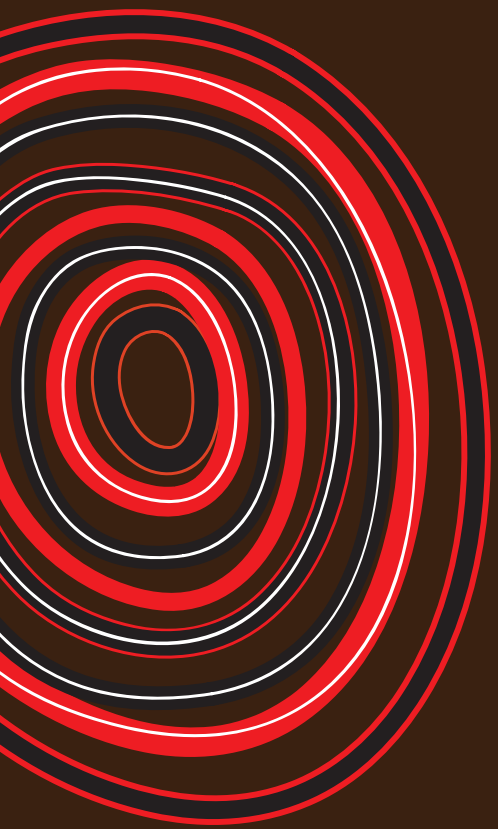

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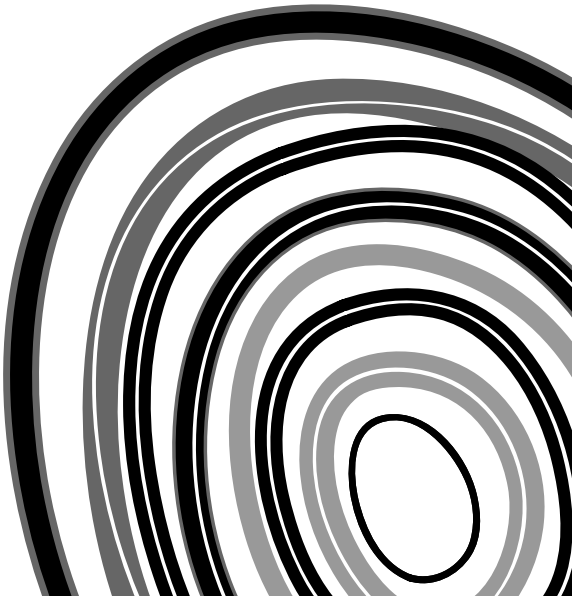


Comment

Emeritus Prof David Weisbrot AM,
President, ALRC

Australia had a change of government in late November 2007, with the Coalition Government led by Prime Minister John Howard replaced after nearly 12 years in power by the Australian Labor Party (ALP), led by Kevin Rudd. The Australian Law Reform Commission (ALRC) is a scrupulously non-partisan agency, whose independence is expressly guaranteed by statute. However, in common with all other public and private institutions, the ALRC operates in an environment that is shaped by the policies and priorities of the government of the day.

To some extent, it is always 'business as usual' in the task of completing inquiries and making recommendations for reform of law and policy. For example, the ALRC's major review of Australian privacy laws and practices was commissioned by the Howard Government with Terms of Reference issued in January 2006. The final report was presented to the new Rudd Government in May 2008 and formally launched by the responsible Ministers in August 2008—but not a single finding or recommendation was altered to reflect the intervening change in government. An article by my colleague Les McCrimmon, summarising the ALRC's three-volume, 2,694 page, magnum opus on privacy, which contains 295 recommendations for reform, appears later in this edition.

However, other initiatives of the new Government have had a more direct influence on the ALRC's work program—and on the selection of 'Native Title' as the focus for this edition of *Reform*.

First, the ALP went into the last election with a strong commitment for more openness, accountability and transparency in the operation of executive government. Among other things, the ALP pledged to implement the major recommendations in the ALRC's report on Freedom of Information (FOI) law and practice, *Open Government* (ALRC 77, 1995), as well as those in the ALRC's review of federal sedition laws, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104, 2006).

In August 2008, the new Attorney-General, the Hon Robert McClelland MP, provided the ALRC with Terms of Reference for its latest inquiry, the Review of Secrecy Laws. In some respects, this is the final piece in the puzzle, since over the past decade or so the ALRC has provided reports and recommendations to government about improving FOI, privacy laws and practices, the protection of classified and security sensitive information, the preservation of archival resources, and client legal privilege in federal investigations. As is so often the case, the current exercise also involves a careful balancing of legitimate public interests: the need for clear and effective mechanisms to protect Commonwealth information, especially where this relates to sensitive matters of national interest, while developing laws and an underlying culture that places a premium on maintaining an open and accountable government by providing access to information wherever possible.

Another of the new Government's priorities is to promote reconciliation with Australia's Indigenous people and communities, and one of its first major, symbolic acts was to offer an apology to the Stolen Generations of Indigenous people that had been separated from their families pursuant to federal, state and territory laws and administrative actions. On 13 February 2008, Prime Minister Rudd, with bipartisan support, made a moving statement of apology to Australia's Indigenous Peoples, including a commitment by the Australian Government to create 'a future where we harness the determination of all Australians, Indigenous and non-Indigenous, to close the gap that lies between us in life expectancy, educational achievement and economic opportunity' and an acknowledgment that 'the laws and practices of successive parliaments and governments have inflicted profound grief, suffering and loss on these, our fellow Australians'.

One aspect of this renewed emphasis on reconciliation is the requirement that every Australian Government agency develop a Reconciliation Action Plan (RAP) that suits its particular role, mission, interests and capacity. I am pleased to report that the ALRC has actively thrown itself into this process, with a high level of energy and commitment displayed by all staff and Commissioners. At the time of writing the RAP had not been finalised, but the intention is to ensure that Indigenous people are effectively engaged in the work of the ALRC and in the processes of law reform, so that Australia's laws have proper regard to Indigenous interests, protect and promote Indigenous culture, and improve social and economic outcomes for Indigenous people.

The ALRC recognises that, as a first principle, our RAP needs to achieve practical outcomes, including participation by Indigenous people in all aspects of the ALRC's work; increased consultation with Indigenous people and communities; and recommendations for law reform that take into account Indigenous perspectives. Special and focused attention will be directed towards building relationships of trust with Indigenous peoples so that they feel encouraged to engage with and contribute to law reform processes and feel these contributions are valued and productive.

The ALRC has worked in areas of particular importance to Indigenous peoples throughout its history, perhaps most squarely in its inquiry into Aboriginal Customary Law—a major project that commenced in 1977, extended across nine years, involved massive research and consultation exercises, and culminated in the publication of the landmark report *Recognition of Aboriginal Customary Laws* (ALRC 31, 1986). Although universally regarded as a triumph of scholarship and public policymaking—and still the 'standard reference' for any consideration of reform in this area[1]—the bulk of the recommendations have never formally been implemented, with governments of both varieties consigning the Report to the 'too hard basket'.

Nevertheless, it is possible to argue that both the inquiry processes and the final report have been highly influential in shaping further developments, by providing information and ideas, stimulating public debate, and contributing to the changing social atmospherics or *Zeitgeist*. The ALRC's Foundation Chair, Justice Michael Kirby, has commented that the ALRC's work was part of the 'softening up process' that eventually led to the High Court's famous *Mabo* judgment in 1992, which established that native title (based on Indigenous customary land tenure) remains in existence in Australia as a matter of common law. As Justice Kirby has written:

> the ALRC report on *Recognition of Aboriginal Customary Laws* has not, as such, been followed up with comprehensive implementing legislation. However, it has been suggested that the report, and the widespread national discussion of the operation of Australian law upon the indigenous people of the nation, stimulated a climate of opinion that resulted in attitudinal changes in the legal profession and judiciary that found reflection in the important decision of the High Court of Australia in *Mabo v Queensland [No 2]*.[2]

Mabo and the subsequent *Wik* case established the basic common law principles, but the detailed laws and procedures for resolving Native Title claims are provided in highly complex legislation, particularly the *Native Title Act 1993* (Cth) (NTA), which incorporates a mix of tribunal processes and Federal Court adjudication. While it is theoretically possible for native title disputes to be settled quickly and cooperatively, the combination of procedural and evidential complexity, high stakes, multiple parties, uncertainty of outcome, and a winner-take-all approach means that most cases are heavily litigated, go on for years, cost a fortune in legal and other costs—and often result in crushing disappointment, since claimants bear the onus of proof in difficult circumstances.

In this edition, Tom Calma, the Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner at the Australian Human Rights Commission, provides a superb overview of what he describes as the 'failing framework' of native title in Australia—and, unfortunately, few would seriously argue with that characterisation. We are also very privileged to include an article by the recently appointed Chief Justice of the High Court of Australia, the Hon Robert French—formerly a Federal Court judge and part-time Commissioner of the ALRC—which offers some ideas for 'lifting the burden' of native title.

The new Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP, has been outspoken about the need to radically overhaul and simplify the NTA. In July 2008, the Minister and Attorney-General McClelland established a broad-based Working Group to advise on how to promote better use of native title payments to improve economic development outcomes and address the economic and social disadvantage facing Indigenous peoples. In December 2008, the Government released a Discussion Paper, which examines the recommendations made by the Working Group and includes legislative and non-legislative proposals for reform of native title. Minister Macklin has kindly provided *Reform* with an article on her vision for better utilising native title agreements and royalty payments to help close the gap between Indigenous and non-Indigenous Australians. Megan Davis, the Director of the Indigenous Law Centre (ILC) at the University of New South Wales (UNSW)—to whom the ALRC also owes a debt of gratitude for her advice, assistance and support with our RAP—contributes an important article on the implications of the United Nations *Declaration on the Rights of Indigenous Peoples* for the development of Australian law, including by way of the recognition of international customary law in the courts. The non-binding—but aspirational and inspirational—Declaration was over 22 years in the making, and was agreed to by the UN General Assembly in September 2007 with only four countries voting against: Australia, New Zealand, Canada and the United States. On 10 December 2008, on the occasion of the 60th anniversary of the UN *Declaration of Human Rights*, Attorney-General McClelland stated that the current Australian Government supports 'the principles underlying the *Declaration on the Rights of Indigenous Peoples*. We are consulting with Indigenous organisations and other key stakeholders on an appropriate public statement to reflect this'.[3]

Also in this edition is an article written by Monica Morgan, a Yorta Yorta woman of the Bangerang Nation, which articulates in very personal terms the impact that an adverse native title determination can have on Indigenous claimants. The perceived failure of a system that gives priority to written evidence over the oral evidence of Indigenous witnesses is forcefully explained. This issue is also discussed in the article by Vance Hughston SC, who notes the positive trend in recent Federal Court cases to give proper weight to the oral evidence of Indigenous witnesses. He cites as an example the decision of then Federal Court Justice French in *Sampi v Western Australia* [2005] FCA 777 at. In that case, Justice French stated that evidence of Indigenous witnesses about their traditional laws and customs and their rights and responsibilities with respect to land and waters, *'is of the highest importance. All else is second order evidence'*. (Emphasis supplied.)

It is worth noting that the joint Report of the ALRC, the NSWLRC and the VLRC, *Uniform Evidence Law* (ALRC 102, 2006), recommended the removal of the remaining evidentiary barriers to the receipt in court proceedings of oral and opinion evidence relevant to Aboriginal or Torres Strait Islander traditional laws and customs. These amendments to the hearsay and opinion rules, and the majority of the other recommendations in the Report, were recently enacted by the federal Parliament through amendments to the *Evidence Act 1995* (Cth).

Sean Brennan, the Director of the Indigenous Rights, Land and Governance Project at UNSW considers the vulnerability of native title in Australia, because the law continues to deny it the full array of legal protections associated with other property rights. Tony McAvoy, one of eight Indigenous barristers currently practising in Australia, with particular expertise in native title and human rights, provides us with his blueprint for reform of the native title system aimed at protecting the 'rights and interests of Indigenous people in Australia, while streamlining the convoluted processes'. McAvoy suggests that there are four key areas in which 'reform may be easily and readily achieved and which would dramatically improve the rate of resolution of native title litigation'.

At the heart of all of this complexity and disappointment lies the fundamental structural problem of translating Indigenous concepts and cultural practices into rights and interests recognised by the courts under Western law. Associate Professor Alex Reilly of Adelaide University, who has published extensively and interestingly on matters of Indigenous rights, land and governance, writes here about native title as a cultural phenomenon.

Another significant contributor to the ALRC's RAP process, Steven Ross, contributes a fascinating piece written with Neil Ward, highlighting the unfortunate retrospective preoccupation of native title considerations, with the focus on the extent to which an ancient customary land tenure system has been disturbed in the 200 years since colonial occupation and the overlay of an entirely different system of property ownership. Instead, Ross and Ward make a strong argument for entrenching a new paradigm of Indigenous involvement in land and water management, based on respect for Indigenous people's *contemporary* relationships with their country.

Graeme Neate, who has been President of the National Native Title Tribunal for nearly a decade, observes firsthand the endlessly recurring pattern of litigation and legislation. Alison Vivian, of the Jumbunna Indigenous House of Learning (at the University of Technology, Sydney), notes that one of the tragic outcomes of the current court-based, native title system is the high degree of disputation it provokes within and between Indigenous communities, and she provides an interesting proposal for the establishment of an Indigenous tribunal that is better placed to resolve these kinds of disputes.

Finally, as the UN *Declaration on the Rights of Indigenous Peoples* makes plain, these issues are not unique to Australia and much can be learned from the experience in other countries. Emeritus Professor Garth Nettheim AO—an absolute legend in this field, co-founder of the ILC and co-author of the leading textbook on Indigenous Law—provides a useful survey of the way in which native title has been handled in other jurisdictions. Two of the ALRC's recent outstanding student interns, Peter Fox and Tracey Nau, have contributed valuable articles on (respectively) the Canadian model for Indigenous Land Use Agreements and international models for determining just compensation for native title.

Endnotes

1. Langton, 'The end of "big men" politics' (2008) *Griffith Review* 22.

2. Kirby, 'Are We There Yet?', in Opeskin and Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 433, 439-440. The *Mabo* case is reported at (1992) 175 CLR 1.

3. For the full text of the Attorney-General's address, see <http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_10December2008-UnitedNationsAssociationofAustraliaConference> (accessed 16 December 2008).

Native title in Australia

Good intentions, a failing framework?

By Tom Calma

On New Year's Day 2009, Australia celebrated the 15-year anniversary of the commencement of the *Native Title Act 1993* (Cth) (NTA).

It was a momentous occasion in the relations between Indigenous and non-Indigenous Australians. The Parliament recognised this country's real history of dispossession and colonisation, and created a way forward:

> [the High Court's decision in the *Mabo* case] presented a huge opportunity for Australia; that here we had a basis for reconciliation formerly denied us but that we had to seize the opportunity...and to do something real and material about a genuine basis of reconciliation.[1]

So when I am asked how the native title system is operating in Australia, it is difficult to give a simple answer. On the one hand, recognition of connection to land and other beneficial agreements and relationships have been achieved for some Indigenous peoples. But on the other hand, it is also a tough system, which at times can be quite cruel. Ultimately, I am not aware of anyone who considers that native title is operating in a way that achieves what it was intended to, nor comes close to realising the human rights of Aboriginal peoples or Torres Strait Islanders.

Every year, I write a Native Title Report which lays out the truths about how the system continues to grind along excruciatingly slowly and how the courts consistently adopt a narrower and more limited interpretation of what native title is. Indigenous people wait, and work, and expend all their effort, resources and hope on a system that one day might recognise some of their rights to protect and practice their culture. Recently, the National Native Title Tribunal revealed that the average contested claim takes more than six years before a determination is made.[2] That is six long years for our elders who often pass away during hearings, fighting for rights to land that have been denied their whole lives.

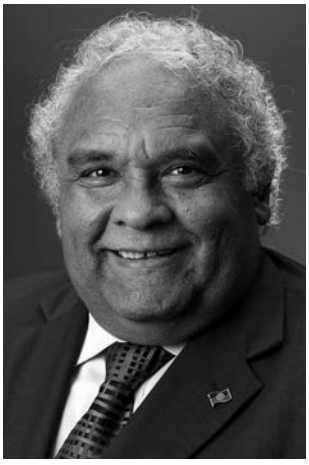
Reducing the High Court's *Mabo* decision to a piece of legislation has proven a difficult task. Rights have been circumscribed, and the power has been shifted to non-Indigenous land owners to ensure 'certainty'. For Indigenous peoples, certainty has meant limited recognition of their native title rights and interests and extremely fragile protection.

Amendments to the NTA in 1998 seriously undermined any benefits the Act could offer for Indigenous Australians. The amendments provided the 'bucket loads of extinguishment' that the then government promised, and shifted the fragile balance of power and possible benefits from Aboriginal and Torres Strait Islander people, to the already powerful non-Indigenous interests.

Human rights treaty committees of the United Nations have observed that the amendments violate Australia's international human rights obligations. The United Nation's Human Rights Committee and the Committee on the Elimination of Racial Discrimination have both voiced their concern that the 1998 amendments roll back the 'protections previously offered indigenous peoples and provide legal certainty for Government and third parties at the expense of indigenous title'.[3]

The result is that native title is at the bottom of the hierarchy of Australian property rights. Recently, ABC News reported that the Northern Territory manager of the National Native Title Tribunal placated non-Indigenous parties to a native title claim, by stating:

> 'Native title has to yield to anyone else's interests,' he said. 'So in those areas where Native Title has been found to exist, say for instance on the pastoral stations ... the rights of the pastoralists prevail. They can continue to get on with their business.'[4]



Tom Calma

Tom Calma is the Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission. He is an elder from the Kungarakan tribal group and a member of the Iwaidja tribal group whose traditional lands are south west of Darwin and on the Coburg Peninsula in Northern Territory, respectively.

It is a disturbing, but honest reminder of just how little protection and respect native title rights and interests receive.

The amended Act, combined with the courts' interpretation, have resulted in a system which now offers extremely limited and delayed recognition of native title. It is now far from the original intent of the law.

This is evidenced by many Federal Court decisions. We have seen a number of cases where a court has denied any recognition of native title rights and interests in the same breath as acknowledging that the peoples before them are the same peoples that owned that land more than 200 years ago.

There are countless reasons why the law may have denied their rights. For many, it is because at some point since colonisation, white settlement and policy meant that the claimants lost their connection with their land, even if it was just for a moment. The more a community was hurt by government's policies, the less likely they can gain recognition of their rights.

The compensation provisions have also failed abysmally. There has not been one successful compensation claim under the NTA. In 2006, applicants who primarily represented the Yankunytjatjara and Pitjantjatjara people, claimed compensation for the extinguishment of their native title rights and interests in Yulara. Yulara, in the Northern Territory, is a town which sits in the shadows of Uluru. Their claim for compensation was denied.[5] If the Traditional Owners of the red centre of this country, an area which most Australians see as the heart of Indigenous Australia cannot gain native title—let alone compensation—then where will Indigenous people be able to succeed?

Even though the basic framework for native title has been weakened and gradually undermined over the years, the pressure on the system to provide better outcomes for Indigenous peoples is increasing. More and more, native title is being touted as an important remedy for Indigenous peoples' ambitions for their land, while governments and some communities shift their focus to how they can use the existing system to achieve broader benefits.

For example, the Minister for Indigenous Affairs and the Attorney-General have formed an informal working group to develop suggestions to ensure that the benefits that Indigenous communities receive under native title agreements can contribute to addressing economic and social disadvantage of communities today and into the future. These agreements are initiated and negotiated under the limited procedural rights Indigenous peoples' still have under the NTA 'right to negotiate' provisions.

The government has stated that it sees that native title has a role to play in closing the gap between Indigenous and non-Indigenous Australians, and can be used to overcome disadvantage.[6] The Attorney-General has committed to making native title work 'better'. To do this, he has committed to working on ensuring all parties to native title have an open and flexible-minded approach to native title negotiations, avoiding litigation, and achieving 'more, and better, outcomes' from native title negotiations.[7]

And so the system has come to a critical juncture. If the government continues to slowly morph the system in this direction through policy announcements, but without strengthening the underlying structure of the system, then it will continue to be laden with broken promises to Indigenous communities. There is a pressing need for an over-arching, system-wide look at reform options for the native title system.

Some of the critical issues that need to be addressed are as follows.

Firstly, there are considerable constraints in the NTA that will prevent parties making progress in improving native title outcomes. Many of these restrictions originate from the initial scope of the NTA, which was intended to have somewhat limited application. The 1998 amendments made the situation significantly worse.

Secondly, 'attitudes' to policy are discretionary and depend on the elected government for each jurisdiction. It does not create certainty, predictability or equity in native title outcomes across Australia. If a government changes then there is no guarantee that the flexible approach will be maintained. The different outcomes that result after a change in government or a change in a government's approach have been seen many times.

As an example, recently an agreement was made to hand Karlu Karlu—a sacred site known to many as the Devil's Marbles—back to its Traditional Owners, the Warumungu, Kaytetye, Warlpiri and Alyawarr peoples. Their original land claim under the Northern Territory land rights legislation was lodged in 1980, but the claim was dismissed by the High Court. On this basis, the then Country Liberal Party government refused to deal with the Traditional Owners.

However, in 2001, when the Australian Labor Party won government in the Northern Territory, it chose to negotiate with Traditional Owners, and came to an agreement to hand back Karlu Karlu, and jointly manage the surrounding national parks. The Central Land Council, who undertook the negotiations on behalf of the Traditional Owners, confirmed the impact that this protracted battle had on the Traditional Owners:

> Many people have passed away: one custodian lost all of his brothers over the years but continued to fight for their site ... I congratulate all of them for their courage, persistence and resilience—it's been a tough, and often a very sad road for all of them and I sincerely hope that these hand backs will provide a sense of peace and relief. I also look forward to the joint management arrangements that follow giving them the level of recognition and involvement in the management of these areas that they deserve for many years to come.[8]

Finally, I am concerned about the breadth of change that can be achieved when nearly all of the state and territory governments have indicated to me that they consider that they have already been acting in a flexible manner for years.[9] Subsequently, they all naturally support the federal government's approach, but it begs the question: how much more flexible will these governments feel they can be within the existing framework?

The Attorney-General recognised that 'tinkering at the edges is not enough'.[10] The NTA must be designed to provide the outcomes that are promised. That is, one that recognises native title rights and interests as defined in *Mabo* for those groups that can establish it, but also one which guarantees a range of other outcomes if they can't.

It is also worth recalling that it was always recognised that native title should not stand alone and that it should be one part of a more comprehensive response to achieve land justice for Indigenous peoples. Former Prime Minister Paul Keating recognised this when introducing the Act:

> The beginning is, as I said, a basis for social justice and reconciliation ... The government will be introducing a social justice package next year amongst which we will have a land acquisition fund, the purpose of which will be to allow Aboriginal people to buy pastoral leases and to convert them into a native title ... In this way we believe that those Aboriginal people dispossessed of their land, who would not have the opportunity of benefits under this legislation or under the High Court's *Mabo* decision, will be able to secure land by purchase which will then have a native title and then have all the negotiating rights attached to it ...[11]

The preamble of the NTA clearly states that the law was intended to be one part of a three pronged policy approach:

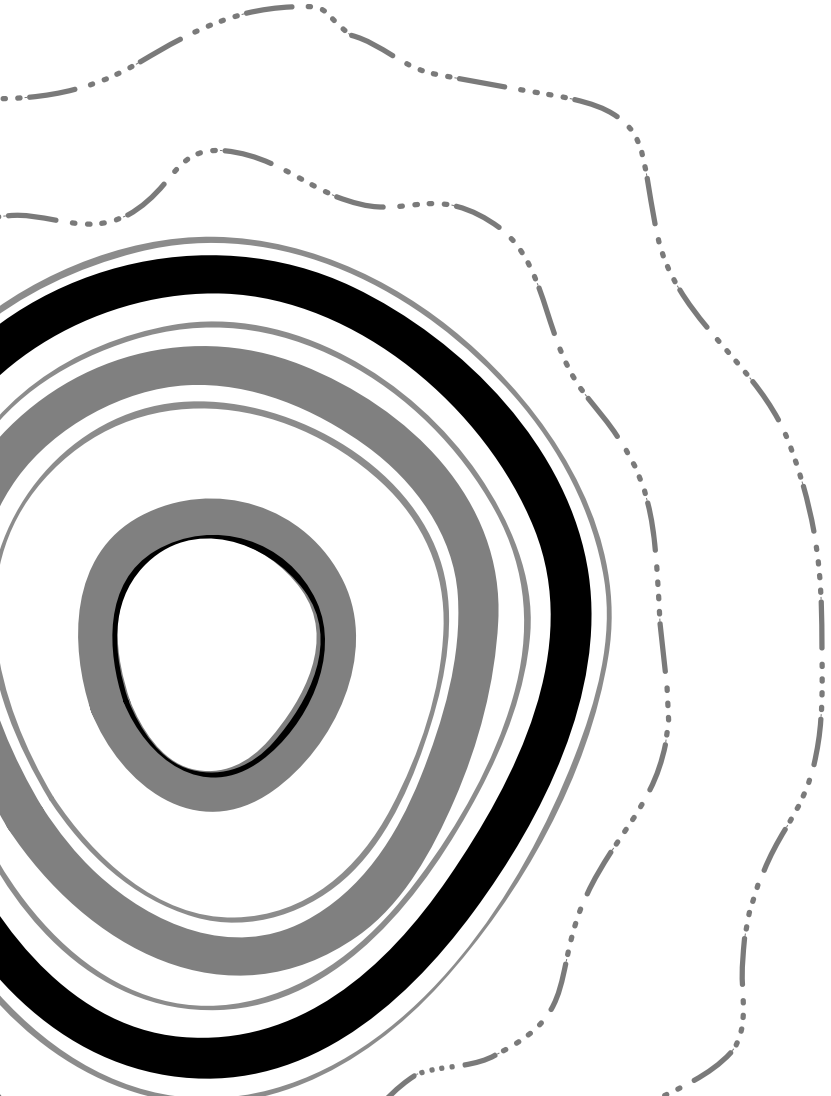
- the NTA would create a system that would recognise a form of native title 'that reflects the entitlement of Indigenous inhabitants of Australia, in accordance with their traditional laws and customs, to their traditional lands';
- a land fund would be established which would assist Aboriginal peoples and Torres Strait Islander peoples to acquire land;
- a broader social justice package would complement these two land-specific policies.[12]

The Indigenous Land Corporation (ILC) constitutes the land fund. It administers a Land Account, but it is questionable whether in its administration, the ILC meets the original intent of the fund and provides an accessible and effective alternative form of land justice when native title is not available. The Act which provides the functions of the ILC (the *Aboriginal and Torres Strait Islander Act 2005* (Cth)) acknowledges its role in reparation for dispossession in its preamble, but does not draw any connection to native title and the complementary role the ILC was created to play. Many Aboriginal people and Torres Strait Islanders have voiced confusion and frustration to me about the ILC's role, activities and the outcomes it is achieving.[13]

The social justice package has yet to come to fruition. By the time a package was being designed the government had changed, and the package was rejected. However, the new government's National Platform states that it will 'recognis[e] that a commitment was made to implement a package of social justice measures in response to the High Court's *Mabo* decision, and will honour this commitment'.[14]

The social justice package and an effective land fund are needed to 'rectify the consequences of past injustices'.[15] The government will also need to come to terms with the failings of the native title system.

The government has committed itself to forging a new, enduring relationship with Aboriginal and Torres Strait Islander peoples, which facilitates reconciliation. Whether we like it or not, the native title system is currently one of the only legally entrenched systems through which this can be achieved. As a result, it holds many of the hopes and aspirations of Indigenous Australians. For every day that native title drags along, it is another day that Australia's First Peoples have their rights cruelly and unnecessarily denied. The Attorney-General stated that as a global citizen in the 21st century, we can no longer sit on the grandstand and criticise other nation's human rights' records; that we have to enter the playing field to engage in a spirit of cooperation.[16] But the Attorney-General's position on the native title playing field is not as a winger waiting for the ball. He should be playing the position he plays in real life on the field in Canberra—the breakaway—the man who starts a new phase of play, gains possession after handling errors and, hopefully, scores a try.



Endnotes

1. Commonwealth, *Parliamentary Debates*, House of Representatives, 22 December 1993 (The Hon Paul Keating, Prime Minister).

2. National Native Title Tribunal, *National Report: Native Title*, June 2008.

3. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40, [498-528] (2000) and Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia,* UN Doc CERD/C/AUS/CO/14 (2005).

4. ABC Darwin, *Indigenous groups make native title claims*, 25 October 2008, <www.abc.net.au/news/stories/2008/10/25/2401038.htm?site=darwin>, at 2 December 2008.

5. *Jango v Northern Territory* (2006) 152 CLR 150; *Jango v Northern Territory* (2007) 159 FCR 531.

6. R McClelland (Attorney-General), speech delivered at the NSW Young Lawyers Forum, Sydney, 29 October 2008.

7. R McClelland (Attorney-General), speech delivered at the Negotiating Native Title Forum, Brisbane, 29 February 2008.

8. Central Land Council, 'Devils Marbles handed back to Traditional Owners', press release, 28 October 2008.

9. Information received in correspondence to me, in response to requests for information for the preparation of the Native Title Report 2008.

10. R McClelland (Attorney-General), speech delivered at the Negotiating Native Title Forum, Brisbane, 29 February 2008.

11. Commonwealth, *Parliamentary Debates*, House of Representatives, 22 December 1993 (The Hon Paul Keating, Prime Minister). See also comments by Justice Brennan in the *Mabo* case: *Mabo* v *Queensland (No 2)* (1992) 175 CLR 1 per Brennan J.

12. *Native Title Act 1993* (Cth), Preamble.

13. Many of these comments were informal comments made to me at the AIATSIS Native Title Conference 2008, held in Perth, June 2008.

14. Australian Labor Party, *Australian Labor Party National Platform and Constitution (2007)*, at: <www.alp.org.au/platform/>, chapter 13.

15. *Native Title Act 1993* (Cth), Preamble.

16. R McClelland (Attorney-General), speech delivered at the NSW Young Lawyers Forum, Sydney, 29 October 2008.

Lifting the burden of native title

Some modest proposals for improvement

By Chief Justice RS French

It is in the nature of native title litigation under the substantive law that it imposes heavy burdens on the human and financial resources of the principal parties involved. These can be alleviated, only to a limited extent, by process improvements.

The procedural changes made to the *Native Title Act 1993* (Cth) (NTA) in 2007 provided some new tools to the National Native Title Tribunal (the Tribunal) and to the parties to assist in a more efficient approach to the resolution of claims. But the claims are proceedings conducted in the Federal Court and their resolution is, to a degree, constrained by the judicial framework. That framework, incorporating as it does, the need to apply the substantive law, requires applicants to prove all elements necessary to make out the continuing existence of native title rights and interests within the meaning of the NTA and their recognition by the common law. They must also deal with sometimes technical questions relating to the identification of other interests, their relationship to native title rights and interests and extinguishment by various categories of past acts.

It has been suggested that a more inquisitorial approach to the judicial resolution of claims would be advantageous. There are limits of a constitutional character which would prevent the Court from becoming an investigative agency in relation to the existence of native title rights and interests. However there is an inquiry power available under s 138B of the NTA which can be harnessed to collect and assess evidence and arrive at conclusions capable of being fed into the mediation process and also capable of being received and adopted by the Court. The power to conduct such inquiries resides in the Tribunal. Such inquiries need not be limited to a single claim (s 138G). They may deal with overlapping claims or regional clusters which are in mediation before the Tribunal (s 138A). These are matters in the hands of the parties and the Tribunal and depend upon a commitment to their use as a means of accelerating claims resolution. It must be acknowledged that any inquiry will involve the deployment of substantial human and financial resources although these can, to some extent, be provided by the Tribunal itself including relevant expert assistance. While an inquiry may be a vehicle for the gathering of oral testimony and expert evidence it must ultimately have regard to the substantive law for the determination of native title rights and interests. It is a tool whose potential is yet to be realised. It cannot be a complete solution to the problems of delay and expense in the resolution of claims. This is true of all process measures.

I would like to raise for consideration three suggestions for changes which might assist resolution whether in the litigation process or in the approach to consent determinations. They are fairly modest changes and do not affect what Brennan J might have called 'the skeletal structure of native title law'. The first is a change to allow a statement of facts, agreed between the relevant state government and applicants for a native title determination, to be relied upon by the Court in making a consent determination. The second is a change to provide for a presumption in favour of the existence of native title rights and interests if certain conditions are satisfied. The third is the introduction of a provision requiring historical extinguishment to be disregarded over certain classes of land and waters when the applicants and the relevant state or territory government have agreed that it should.

Before going to those suggestions, I will refer to the relevant provisions of the NTA and offer a brief overview of some of the requirements for obtaining a determination of native title under the NTA.

The purpose of the NTA

The preamble to the NTA recites the proposition in the decision of the High Court in *Mabo v Queensland (No 2)* that:

> the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands.[1]

It also declares the intentions underlying the enactment of the Act. One of those is rectification of the consequences of past injustices by the special measures contained in the Act. Another is to ensure that Aboriginal people and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire. The preamble has remained unchanged throughout the history of the Act since 1993.

The main objects of the Act, set out in s 3, include: 'to provide for the recognition and protection of native title'. The overview of the Act in s 4 states that it 'recognises and protects

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This article is an edited version of a speech presented to the Native Title Users Group in Adelaide in July 2008. The full text is available online:

<www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj35.html>.

native title' and provides that native title cannot be extinguished contrary to the Act.

As the Full Court observed in *Northern Territory v Alyawarr:*

> The preamble declares the moral foundation upon which the NT Act rests It makes explicit the legislative intention to recognise, support and protect native title. That moral foundation and that intention stand despite the inclusion in the NT Act of substantive provisions, which are adverse to native title rights and interests and provide for their extinguishment, permanent and temporary, for the validation of past acts and for the authorisation of future acts affecting native title.[2]

The normative foundation reflected in the preamble and the stated objects of the NTA indicate its beneficial purpose. There is a sense that the beneficial purpose has been frustrated by the extraordinary length of time and resource burdens that the process of establishing recognition, whether by negotiation or litigation, impose.

(Editor's note: The original speech by His Honour sets out the core provisions of the NTA dealing with determinations and consent determinations, in particular: ss 94A and 223)

Requirements for a determination

It is not necessary to revisit here the entire development of the law of native title through the cases. It is sufficient to focus upon the requirements of ss 223 and 225. The High Court held in *Yorta Yorta v State of Victoria*[3] that the statutory definition in s 223 is central. A determination under the NTA was said to be '... a creation of that Act, not the common law'. This was a key decision and has been criticised as changing the conception of the NTA from that of a vehicle for development of the common law to a kind of statutory fossil bed for the common law.

The NTA requires that the native title rights and interests have the following characteristics:

- they must be communal, group or individual rights and interests of Aboriginal peoples and Torres Strait Islanders;
- they must be rights and interests 'in relation to land or waters';
- they must be possessed under the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or Torres Strait Islanders;
- the relevant people, by their law and customs, must have a connection with the land or waters;
- the native title rights and interests must be recognised by the common law of Australia; and
- each of these is a mandatory requirement for a determination of native title.

Determination of the existence of traditional laws and customs requires more than a determination of behaviour patterns. They must derive from some norms or a normative system. Because there is a requirement that the rights and interests be recognised at common law, the relevant normative system must have had 'a continuous existence and vitality since sovereignty'. A breach or interregnum in its existence causes the rights or interest derived from it to cease beyond revival. It is on this point in particular that great difficulty can arise. These requirements impose the burden of determining continuity of existence of their native title rights and interests upon the applicants at least by inference or extrapolation from various kinds of evidence. In the *Sampi* case,[4] which I heard, that evidence included:

- oral evidence from the members of the native title claim group about their traditions and customs and the longevity of those traditions and customs;
- anthropological evidence;
- linguistic evidence;
- archaeological evidence; and
- historical evidence.

If by accident of history and the pressure of colonisation there has been dispersal of a society and an interruption of its observance of traditional law and custom, then the most sincere attempts at the reconstruction of that society and the revival of its law and custom seem to be of no avail.

The 'connection' requirement in s 223(1)(b) is somewhat elusive. The Full Court in *Alyawarr* endeavoured to come to grips with what it described as 'opaque drafting' which picked up a term used in the judgment of Brennan J in *Mabo (No 2)* and put it into a statutory setting. In the event the Court said:

> ... "connection" is descriptive of the relationship to the land and waters which is, in effect, declared or asserted by the acknowledgment of laws and observance of customs which concern the land and waters in various ways. To observe laws and acknowledge customs which tell the stories of the land and define the rules for its protection and use in ways spiritual and material is to keep the relevant connection to the land. There is inescapably an element of continuity involved which derives from the necessary character of the relevant laws and customs as "traditional". The acknowledgment and observance, and thereby the connection, is not transient but continuing.[5]

The Court noted that the term 'connection' involved continuing assertion by the group of its traditional relationship to the country defined by its laws and customs. This could be manifested by physical presence or in other ways including the maintenance of stories and allocation of responsibilities and rights in relation to it. It was not a qualification or limitation on the range of rights and interests which can be native title rights and interests for the purposes of the NTA.

Section 225 mandates a determination of 'who the persons, or each group of persons, holding the common or group rights comprising the native title are'. As the Full Court said in *Alyawarr:*

> That requires consideration of whether the persons said to be native title holders are members of a society or community which has existed from sovereignty to the present time as a group, united by its acknowledgement of the laws and customs under which native title rights and interests claimed are said to be possessed.[6]

Identification of the relevant group and its precise composition has also given rise to questions of some nicety, the subject of extensive evidence and debate. Are the native title holders to be identified as a society which has subsisted since the time of sovereignty? Are they part of a larger, cultural bloc? Are they to be defined by reference to estate groups specified as distinct native title holding groups limited to interests in particular areas? Is the putative native title claim group an impermissible hybrid of distinct groups, which should be separately identified as such?

The determination must also specify the nature and extent of other interests and the relationship between them and the native title rights and interests. In remote areas this may not pose much of a problem. In areas where there has been a degree of dealing with the land and waters, it may require extensive research.

Consent determinations

Before the Court can make a consent determination under s 87 of the NTA it must be satisfied that the order proposed is 'within the power of the Court' and 'appropriate'. The same requirements apply to a consent determination under s 87A where a part of the area under claim is involved.

Those statutory terms 'within power' and 'appropriate' reflect a principle of general application whenever the Court is asked to make orders pursuant to an agreement between parties to litigation before it. The Court cannot make orders by agreement which it would have no power to make in the absence of agreement. This does not mean that parties who have come to an agreed result must prove their case to the Court. They may have agreed that all the facts exist which support the orders which are sought. But if, for example, the parties to a native title determination application had agreed to a determination of native title rights and interests which were not interests in relation to land or waters, then the Court could not make a determination of such rights or interests. The Court could not make a determination which did not conform with s 225. That is because s 94A requires that it set out details of the matters prescribed in s 225.

The Court must also be satisfied that the proposed determination is 'appropriate'. This is an evaluative term and so has a somewhat elastic application. Where a determination of native title is made that determination binds not only the parties but is good against the whole world. Words like 'to the exclusion of all others' do not apply to exclude only those who are parties to the proceedings. So evidence of the existence of a proper basis for a determination may be required to reassure the judge that the agreement is rooted in reality.

In deciding whether a proposed determination is appropriate the Court will not lightly second guess the agreement that the parties have reached. That is particularly so given that the NTA accords a high priority to negotiated resolutions. This has been recognised by judges of the Court in a number of cases.

The cases do not require that anthropological or other expert reports be put before the Court on each occasion although on many, if not most occasions, such material has been submitted. It may be, however, that a detailed statement of agreed facts, based upon materials contained in such reports or from other relevant sources would suffice. While there may be some variance in what individual judges may require to support a consent determination, there is no rule that the judge must always be provided with volumes of anthropological material. It may be, for example, that a state government has accepted oral accounts from some key members of the native title holders group and, having regard to its own archival materials, is satisfied that it can agree to the determination.

Whatever process is used the material before the Court must be capable of supporting the determination sought. If, for example, anthropological material or a statement of agreed facts were placed before the Court which were inconsistent with the definition of the native title holders group in the proposed consent order, the Court could quite properly require the parties to clarify the apparent inconsistency or amend the proposed determination.

In conclusion, on this topic, there might be some utility in a provision of the Act authorising the Court, in a case where a consent determination is offered, to act upon a statement of facts agreed between at least the applicants and the state. This is on the assumption that all respondents consent to the proposed determination.

It would not be necessary in that event that all respondents sign up to the agreed statement of facts. There will be cases in which the relevant anthropological material has been produced as part of the state's requirement to be satisfied

that the necessary elements to support a determination of native title exist. However, where these elements can be distilled into an agreed statement of facts and placed before the Court, the Court's task will be made easier. The basis for its assessment that the determination is appropriate should be clearer. The alternative requires the Court to peruse the anthropological material itself and discern the elements from often very substantial texts.

Lifting the burden—a presumption

It may be possible to lighten some of the burden of making a case for a determination, whether in litigation or mediation, by a change to the law so that some elements of the burden of proof are lifted from applicants.

A presumption may be applied in a variety of ways in favour of native title applicants. It could be applied to presume continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time. A fact sufficient to engage such a presumption might be that the native title claim group acknowledges laws and observes customs which members of the group reasonably believe to be, or to have been, traditional laws and customs acknowledged and observed by their ancestors. And if by those laws and customs the people have a connection with the land or waters today, in the sense explained earlier, then a continuity of that connection, since sovereignty, might also be presumed. Such a presumption would enable the parties, if it were not to be challenged, to disregard a substantial interruption in continuity of acknowledgment and observance of traditional laws and customs. Were it desired, the provision could expressly authorise disregard of substantial interruptions in acknowledgment and observance of traditional law and custom unless and until proof of such interruption was established.

A presumption can be challenged by a respondent party, including the relevant state or territory. And if there were concerns on the part of states about expanding the scope of compensation claims in respect of historical extinguishment, it may be that the presumption might not be applied to such cases. It would be important that any presumption be robust enough to withstand the mere introduction of evidence to the contrary. Some presumptions are little more than platforms for inferences and collapse upon the introduction of evidence to the contrary whatever its probative value. A presumption subject to proof to the contrary is to be preferred.

(Editor's note: His Honour then set out a draft of a form of provision containing a presumption.)

Agreement to disregard extinguishment

The second suggestion, by way of modest amendment to the NTA, would allow extinguishment to be disregarded where an agreement was entered into between the states and the applicants that it should be disregarded. Such agreements might be limited to Crown land or reserves of various kinds. The model for such a provision may be found in ss 47 to 47B. By way of example, arcane argument over long dead town sites might be avoided by resort to such agreements. Presumably some form of registration or formal public record of the agreement would have to be maintained. Native title so agreed would also be subject to existing interests. If, for example, the vesting of a reserve was taken to have extinguished native title an agreement of the kind proposed could require that extinguishing effect to be disregarded while either applying the non-extinguishment principle under the NTA or providing in the agreement itself for the relationship between native title rights and interests and the exercise of powers in relation to the reserve.

Conclusion

The preceding suggestions are modest and are offered as a basis for discussion. They will not lift the entire burden of bringing native title determination applications. In combination with process improvements, they may contribute to some further mitigation of the burden of these proceedings.

Endnotes

1. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
2. *Northern Territory v Alyawarr* (2005) 145 FCR 442, at [63].
3. *Yorta Yorta v State of Victoria* (2002) 214 CLR 422.
4. *Sampi v Western Australia (No 2)* (2005) 224 ALR 358.
5. *Northern Territory v Alyawarr* (2005) 145 FCR 442, at [88].
6. Ibid, at [78].

Can native title deliver more than a 'modicum of justice'?

By Jenny Macklin MP

Native title promised a genuinely new beginning for Australia.

Prime Minister Paul Keating spoke passionately of this new beginning in his speech commending the then *Native Title Bill 1993* to the Australian Parliament. He said:

> The [High Court[1]] saw a 'conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal people'. They faced 'deprivation of the religious, cultural and economic sustenance which the land provides' and were left as 'intruders in their own homes.
>
> To deny these basic facts would be to deny history—and no self-respecting democracy can deny its history. To deny these facts would be to deny part of ourselves as Australians. This is not guilt: it is recognising the truth. The truth about the past and, equally, the truth about our contemporary reality. It is not a symptom of guilt to look reality in the eye—it is a symptom of guilt to look away, to deny what is there. But what is worse than guilt, surely, is irresponsibility. To see what is there and not act upon it—that is a symptom of weakness. That is failure.[2]

The truth about our contemporary reality, 15 years since this speech, is that native title remains critical to Indigenous people's social, cultural, spiritual and economic well-being and remains a potentially important contributor to expanding economic opportunities. This potential has not been realised. Better use must be made of native title payments under mining and infrastructure agreements. In this short article, I will touch upon some examples of where payments have been used to create long-term economic opportunities. However, I will also consider why this is not happening as much as it should and offer some ideas on improving the standard of agreements, so that benefits can flow to current and future generations.

On 13 February 2008, Prime Minister Kevin Rudd apologised to Indigenous people, and in particular to the Stolen Generations, on behalf of the Australian Parliament. By acknowledging past injustice, the National Apology promised a future where:

> we harness the determination of all Australians, Indigenous and non-Indigenous, to close the gap that lies between us in life expectancy, educational achievement and economic opportunity. A future where we embrace the possibility of new solutions to enduring problems where old approaches have failed. A future based on mutual respect, mutual resolve and mutual responsibility.

The National Apology recognised the distance we have to travel before Indigenous people enjoy the same advantages as other Australians. Closing the gap between Indigenous and non-Indigenous Australians is now a national priority, which the Government is pursuing in collaboration with the Council of Australian Governments (COAG).[3]

Dialogue and partnership are foundation elements of the Rudd Government's policy approach to Indigenous Affairs. Dialogue lays the basis for a common understanding of the challenges and opportunities involved in closing the gap. In crafting solutions, we must go beyond addressing individual indicators and work for and across whole communities.

I recognise, however, that individual indicators of advantage and disadvantage remain central to the challenge of closing the gap. Australia's Indigenous population lags behind the overall Australian population in areas of income, employment, health, housing, education and life expectancy. The reasons for such inequity might be found in the past, but the responsibility for change lies with the present and the future. The urgent questions confronting me, this Government, and the whole Australian community are: what do we do now, and how do we do it?

One answer is undoubtedly to build on initiatives that are already making a difference. For many years now, there has been engagement between Indigenous Australians and the resources industry, particularly in making agreements about access to Indigenous land to facilitate mining and other resource development activities. It is often observed that many Indigenous Australians live on land rich in resources that create wealth for business and the nation, but that deliver little return for Indigenous Australians.[4]

Some in the resources industry have negotiated progressive and sustainable agreements with Indigenous partners, delivering economic and social benefits for current and future Indigenous communities.

Rio Tinto, the global mining giant, has made a notable contribution, through the farsightedness of its executives and managers and the leaders of the Indigenous communities with whom the company has engaged. In 2005, Rio Tinto and the Miriuwung and Gidja peoples of the East Kimberley region of Western Australia signed an agreement recognising pre-existing Aboriginal relationships to the area, setting out ambitious employment targets and providing financial

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compensation to traditional landowners. This involved the payment of moneys into two trusts: one focused on the Aboriginal groups' longer term aspirations for education, community development and investment for their children; the other providing a shorter term income stream along with financial literacy training.[5]

Also in the Kimberley, an agreement was reached in 2006 between the Tjurabalan native title holders and Tanami Gold, providing for employment targets and a community trust. One of the aims of the agreement was to ensure that the mining benefits would be long-lasting, recognising that improving living standards and health and welfare of the community would take time. The media reported that 'the Tjurabalan have really gone about it in a very responsible way ... working on an agreement which benefits the Tjurabalan people as a whole, as opposed to just individual payments'.[6]

Another example of innovation and a long-term strategy can be found in Central Australia. Several years ago, the Northern Territory's Central Land Council entered into an agreement with mining company Newmont Gold to establish a trust for the benefit of the Warlpiri people, specifically for training and education, resourced through royalty payments for mining on Warlpiri land.

In late 2008, I was in Yuendumu to sign a Regional Partnership Agreement, building on the work of the Land Council, the Warlpiri people and Newmont. The agreement has long-term objectives and the capacity to deliver employment, education, and short and longer term economic initiatives.

The *Native Title Act 1993* (Cth) (NTA) underpins many of these agreements, as it provides a process for dialogue and establishes a 'right to negotiate' for native title holders or registered native title claimants in relation, for example, to the issue of mining leases.

Agreements negotiated under the NTA are the major means of engagement between Indigenous people, industry and governments and enable Indigenous people to plan and make decisions on a range of issues affecting their lives and their environments.

After 10 years of these agreements[7]—and so far, unquantifiable amounts in payments to native title holders—the challenge of addressing Indigenous disadvantage remains. Unfortunately, many agreements do not provide benefits over the long term, by way of business development opportunities, employment targets or properly managed community funds. Not all meet the standards set by the Rio Tinto and Newmont agreements, and there is little to guarantee high standards in the future.

I believe that payments made over the coming decades must provide benefits that last for generations. To achieve this, Indigenous people and organisations must be encouraged to apply income streams to optimal effect while at the same time minimising cash payments to individuals in circumstances where these payments are unlikely to yield lasting benefits.

There are clearly problems with agreements providing unstructured and large up-front cash payments to individuals or groups within a wider family or community grouping. People with low levels of financial literacy may find it difficult to manage these payments and as a consequence they may not be invested to maximise and generate wealth into the future. The mining sector is generally moving away from offering up-front payments in agreements. However, not all companies embrace industry best practice and some Indigenous people continue to demand such payments. The result is often conflict within Indigenous communities as direct payments to some individuals and not others create division and inequity. The payments are rarely directed to benefit the whole community or to achieve longer-term investment strategies.

In my view, government must exert its influence to ensure that the financial benefits of agreements create employment and educational opportunities for individuals and are invested for the long-term benefit of communities. Many would disagree with me, as financial transfers through private agreements could be regarded as not properly the subject of government interference or regulation. If that is so, then the outcome needs to be achieved in other ways.

The policy challenge is both to respect the rights of Indigenous peoples to make agreements in relation to their land, and to ensure the benefits that result are used to make a difference, not just to their lives but also to the lives of their children and grandchildren.

Recently the Attorney-General and I set up a Native Title Payments Working Group, a group of experts brought together to share their perspectives and find a way forward. The Working Group considered the type of benefits to be provided through agreements and identified the characteristics of good agreements. They also made the case for increasing the transparency of agreements. The main focus of the Working Group's report was on the changes that needed to be made to the current tax regime to streamline the administrative complexities and burdens that arise in the management of benefits, including specific ideas for making agreements more effective and sustainable.

The Attorney-General and I have released a discussion paper which builds on the report of the Working Group and looks at potential changes to the way payments are negotiated and structured to improve accountability and to provide greater assurance to Indigenous interests.[8] The discussion paper considers how the governance processes of Indigenous organisations receiving native title payments and related benefits can be strengthened, so that they can manage the benefits in a way that looks to the future.

For mining companies at the negotiation table, it raises the need for strategies recognising that their social licence to operate is as important as their commercial imperative to develop. There are many issues in play—the transparency of agreements, improved governance arrangements, and incentives for parties to agreements to make strategic decisions about investing in their futures.

Government has a responsibility to better manage this environment. This might be achieved through policy reform, law reform, or both. I look forward to the ideas and responses generated by the discussion paper. While I do not have set opinions about the way forward, I am firm in my view that something needs to be done about these issues and that action is needed in 2009.

I do not accept that native title is only about the cultural value of land and access to it. As important as cultural benefits are, native title also has an economic and commercial dimension. It would be shameful if the very substantial proceeds expected to flow to Indigenous people over the next two decades are not used to help close the gap between Indigenous and non-Indigenous Australians. As Paul Keating recognised in 1993, such failure would betray not only the Indigenous people of Australia, but all of us, our traditions and our future.

Endnotes

1. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

2. Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2878 (Paul Keating, Prime Minister).

3. The Council of Australian Governments (COAG), the peak intergovernmental forum in Australia, has agreed to six ambitious targets for closing the gap between Indigenous and non-Indigenous Australians across urban, rural and remote areas:
   - to close the gap in life expectancy within a generation;
   - to halve the gap in mortality rates for Indigenous children under five within a decade;
   - to ensure all Indigenous four years olds in remote communities have access to early childhood education within five years;
   - to halve the gap in reading, writing and numeracy achievements for Indigenous children within a decade;
   - to halve the gap for Indigenous students in year 12 attainment or equivalent attainment rates by 2020; and
   - to halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade.

4. For a broader discussion on this topic, see M Langton and O Mazell, 'Poverty in the Midst of Plenty: Aboriginal People, the "Resource Curse" and Australia's Mining Boom' (2008) 26(1) *Journal of Energy & Natural Resources Law* 31.

5. There are numerous articles discussing this agreement. However, for details on the type of benefits provided see: Argyle Diamonds, *Communities and Environment: Indigenous Land Agreement* <www.argylediamonds.com.au/comm_land_agreement_text.html> at 17 December 2008. (Argyle Diamonds is owned and operated by Rio Tinto).

6. R Williams 'Mining Rites' *The Age* (Melbourne), 17 May 2008 <http://business.theage.com.au/business/mining-rites-20080516-2f63.html> at 17 December 2008.

7. An explanation of Indigenous Land Use Agreements (ILUAs) can be found at the National Native Title Tribunal website: National Native Title Tribunal, *Indigenous Land Use Agreements* (2008) < www.nntt.gov.au/Indigenous-Land-Use-Agreements/Pages/About_iluas.aspxIt>. The website states that: 'An indigenous land use agreement is an agreement between a native title group and others about the use and management of land and waters'.

8. Australian Government Discussion Paper, *Optimising Benefits from Native Title Agreements* (2008) <http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_DiscussionPaper-OptimisingbenefitsfromNativeTitleAgreements> at 17 December 2008. The closing date for submissions on the discussion paper is 13 February 2009.

Adding a new dimension

Native title and the UN Declaration on the Rights of Indigenous Peoples

By Megan Davis

Megan Davis

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The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) was passed by the General Assembly on 13 September 2007. The Declaration constitutes a non-binding and aspirational Declaration of the General Assembly.[1]

The adoption of the Declaration was a triumph for Indigenous peoples after persevering for more than 20 years to secure an international instrument aimed at recognising the distinct cultural rights of Indigenous peoples and providing redress for the injustice of the dispossession of Indigenous lands. It was also a triumph for the United Nations (UN), which had made the adoption of such a Declaration the major objective of the UN's International Decade of the World's Indigenous Peoples (1995–2004).[2]

The Declaration has extensive provisions relating to the recognition and protection of Indigenous lands. In fact, the land, territories and resources provisions were the most controversial articles in the text of the Declaration. Controversy over Indigenous rights to land prolonged the Geneva Working Group that elaborated on the Declaration. Yet now that the Declaration is an international instrument, the land rights provisions should have an influence on future developments in native title law and policy. Despite its non-binding status, the Declaration represents an important framework from which the Australian state can re-engage Indigenous communities in relation to native title on the basis of internationally recognised and accepted standards pertaining to the rights of Indigenous peoples to land and the recognition of their culture.

Today, many Indigenous peoples are questioning how the Declaration can assist Indigenous peoples in improving the native title system. It may be that the Declaration—which does not create any new rights, but rather recognises rights that already exist in international law—can facilitate a correction of native title law and policy which has proven to be profoundly disappointing for many Aboriginal communities. In particular, disappointments have resulted from the limiting way that the courts have interpreted s 223 of the *Native Title Act 1993* (Cth) (NTA).

The land rights provisions of the Declaration

Articles 24–30 of the Declaration relate to land and resources, and reflect the importance of land and the environment to Indigenous peoples and the survival of their culture. The importance of Indigenous peoples' relationship to land is reflected in the Preamble:

> *Concerned* that Indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,
>
> *Recognizing* the urgent need to respect and promote the inherent rights of Indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.

As with many of the clusters in the Declaration, this section contains rights that are already recognised in other international instruments. In particular the land and resources section draws heavily from International Labour Organization, *Indigenous and Tribal Peoples Convention,* No 169.

Two of the Declaration's most controversial articles on land and resources are contained in art(s) 25 and 26:

> [25] Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
>
> [26] 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

> 3.States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned.

Perhaps the single most controversial proposal by the Working Group, however, was draft art 27, which would have recognised the right to restitution of the lands, territories and resources which Indigenous peoples have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and fair compensation. One legal commentary provided to the UN suggested that this means that:

> Substantively, the principle of free, prior and informed consent recognizes Indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful choices by Indigenous peoples about their development path.[3]

However, the final version, which appears as art 28 of the Declaration, provides for a right to redress 'by means that can *include* restitution' (emphasis supplied) or other forms of just compensation:

> 1. Indigenous peoples have the right to redress,by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
>
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

What relevance is the Declaration?

The Declaration is non-binding and this means even if the Australian Government endorses it, it has no legal effect. Having said that, some international lawyers are now arguing that some of the land articles in the Declaration already constitute emerging customary international law with respect to the rights of Indigenous peoples.

In fact, James Anaya and Siegfried Wiessner argue that there is already a distinct body of customary law that accords with the Indigenous right to:

> demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used.[4]

Their study involved a global survey of state practice relating to Indigenous land recognition. Their argument is that the Canadian, Australian, New Zealand and United States (CANZUS) objections to the Declaration do not diminish the contribution those states have already made to global state practice when it comes to recognition of Indigenous land.

This customary norm of state practice was referred to by the Inter-American Court of Human Rights in the *Mayagna (Sumo) Awas Tingni Community v Nicaragua* decision.[5]

Consequently, while it is true that the Declaration is non-binding in and of itself, state practice clearly demonstrates that aspects of its operative provisions relating to land may already amount to state practice—and this is a result of Indigenous land laws already recognised by member states, including the four states that objected to the Declaration in the General Assembly.[6] This state practice developed over a long time and independently of the Declaration. For example, in Australia, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the High Court's decision in *Mabo v Queensland (No 2)* and the NTA are all examples of state practice that have contributed to this developing customary norm, independent of the Declaration.[7]

Already one jurisdiction has applied the principles within the Declaration as a framework for determining land rights. One month after its adoption, the Supreme Court of Belize applied the Declaration in handing down a decision relating to Mayan rights to lands and resources. Chief Justice Conteh found that Belize was obligated by international law to recognise, respect and protect Mayan customary land rights. In finding that there was overwhelming evidence of Mayan customary land tenure, Belize should be:

> unwilling, or even loath to take any action that would detract from the provisions of the Declaration importing as it does, in my view, significant obligations for the State of Belize in so far as the Indigenous Mayan rights to their lands and resources are concerned.[8]

Conclusion

In Australia, international law may be used by the courts when attempting to construe the meaning of a statute. It is a general rule of statutory construction that, in the event of ambiguity, interpretation should be consistent with international law, including customary international law.[9]

The Declaration will add a new and important dimension to the native title debate in Australia. The Declaration reveals the contemporary way in which Indigenous peoples' lives and cultures have developed. It recognises the importance of Indigenous rights to land and situates that right between the state and the Indigenous domain. The Declaration provides an instructive list of standards that increasingly is being practised by

member states, courts, United Nations agencies and human rights advocates. For this reason the Declaration will be immensely important for Indigenous strategy in native title, especially through the courts.

Endnotes

1. G.A. Res. 61/295,U.N. Doc. A/RES/47/1 (2007).

2. UN General Assembly, *International Decade of the World's Indigenous People*, Res. 52/108, 18 February 1998, para 6.

3. United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, *Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept, submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation,* E/CN.4/Sub.2/AC.4/2004/4, [56].

4. S James Anaya and Robert A Williams, 'The Protection of Indigenous Peoples Rights over Lands and Natural Resources under the Inter-American Human Rights System (1999) 12 *Harvard Human Rights Journal* 57; SJ Anaya and Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment' *Jurist* (2007) available at <www.law.arizona.edu/news/Press/Anaya100307.pdf> (accessed 16 December 2008).

5. *Mayagna (Sumo) Awas Tingni Community v Nicaragua (2001)* Inter American Court of Human Rights. A copy of the judgment is reported in 'The Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua' (2002) 19 *Arizona Journal of International and Comparative Law* 415.

6. SJ Anaya and Grossman, 'The Case of Awas Tingni v Nicaragua: A New Step in the International Law of Indigenous Peoples' (2002) 19 *Arizona Journal of International and Comparative Law* 8. The full text of the petition can be found at S James Anaya, 'The Awas Tingni petition to the Inter-American Commission on Human Rights: Indigenous lands, loggers and government neglect in Nicaragua' (1996) 9 *St Thomas Law Review* 157.

7. See *Mabo v State of Queensland (No 2) (1992)* 175 CLR 1, and the *Native Title Act 1993* (Cth).

8. *Aurelio Cal, et al v Attorney General of Belize*, Supreme Court of Belize (Claim 121/2007) (18 Oct 2007) (Mayan land rights).

9. *Polites v Commonwealth* (1945) 70 CLR 60.

Native title: Looking forward through the past

By Graeme Neate

It is more than 16 years since the common law of Australia first recognised native title, and 15 years since national legislation created a scheme for the recognition and protection of native title.

Although law and practice are developing, much has been achieved in a relatively short period. But significant challenges remain if the promise of native title is to be realised for at least some Indigenous Australians and for the broader community.

To assess whether the native title system is achieving its objectives, it is useful to understand a little of the history and context of the scheme, and how it is administered.

Litigation, legislation, litigation, legislation, litigation...

On 3 June 1992 the High Court of Australia delivered judgment in the historic *Mabo v Queensland (No 2)* case. By majority,[1] the Court ruled that:

> the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the Indigenous inhabitants, in accordance with their laws and customs, to their traditional lands.[2]

The decision was the first time that an Australian court recognised the entitlements of Indigenous people to their traditional lands under their traditional laws. It followed 10 years of legal proceedings[3] and attracted considerable controversy.

Although the *Mabo* judgment concerned an island in the Torres Strait, its implications were national and a national legislative response was appropriate. In December 1993, after long and difficult debates, the Australian Parliament passed the *Native Title Act 1993* (Cth) (the NTA).

The NTA was not a complete or final statement of the law and the courts were soon presented with more issues. There are now more than 500 written judgments of the Federal Court dealing with native title issues, in addition to landmark judgments of the High Court and some judgments of other courts and tribunals. The National Native Title Tribunal has made numerous determinations in relation to future act issues brought before it for decision.

Some decisions of the High Court, as well as gaps exposed by experience in administering the NTA, prompted further legislation. The NTA was extensively amended in 1998 and again in 2007.

The scheme for resolving native title claims

The Federal Court has jurisdiction to hear and determine native title applications, and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court.[4] The NTA established the National Native Title Tribunal[5] with functions that include 'providing assistance, mediating or conducting a review in accordance with any provision of this Act'.[6]

Once an application is filed in the Federal Court, responsibility for processing or advancing the resolution of the application shifts between the Court and the Tribunal. In broad terms:

- the Tribunal is responsible for registration testing, notifying and mediating claimant applications (under the supervision of the Federal Court); and
- the Court is responsible for deciding questions of fact or law (either as referred to it by the Tribunal or in hearing an application where the parties have not reached a mediated outcome) and making determinations of native title.

The Court refers each application to the Tribunal for mediation as soon as practicable after the Court has settled the party list, unless it considers that mediation will be unnecessary or there is no likelihood of agreement between the parties. In other words, court-ordered mediation is mandated by the NTA.

The legislative scheme clearly favours mediation rather than litigation as the primary means of resolving native title claims. The NTA makes numerous references to mediation in relation to claimant applications,[7] and various judges have drawn attention to the importance of mediation to the resolution of native title matters.

Graeme Neate

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According to a Full Court of the Federal Court, it is particularly true of native title litigation that the best outcome is one resolved between the parties, rather than one imposed by a court.

> Orders resolving native title litigation are usually extremely complex. They usually deal in detail with the entitlements of people who will have an ongoing relationship with each other. Because of these factors, it is preferable that the affected people discuss, and attempt to reach agreement about, those entitlements.[8]

The High Court has also endorsed the desirability of mediated agreements on native title issues.[9]

The NTA lists the matters to be mediated, which are the matters to be included in a determination of native title.[10]

If a matter goes to trial, the Federal Court can make a determination that native title exists, but the Court cannot and will not determine all the consequences of such a determination. There is work for the parties to do to make the Court's orders effective on the ground.[11]

It is clear from judgments of the High Court[12] and the Preamble to the NTA that, in some parts of Australia, groups of Indigenous people will find it difficult, if not impossible, to demonstrate that their relationship with their traditional country meets the standard of proof required for a determination that native title exists. In some areas where people have maintained their group's strong traditional connection, few, if any, native title rights and interests will have survived the cumulative effect of various dealings in relation to the land. In other words, as a matter of law, native title has been extinguished even though on the facts native title rights could subsist but for the extinguishment.

In some cases, parties may wish to explore options other than, or in addition to, a determination of native title. Those options might satisfy their interests and hence deal with some or all of the issues that prompted the claim group to make a native title application. These options are known as 'non-native title' or 'non-determination' outcomes.[13]

The outcomes could include statements of formal recognition of traditional ownership of lands in which native title has been or might have been extinguished, consultation or joint management agreements in relation to the use of traditional lands, and the grant of interests in those lands under state or territory land rights legislation or other legislation.[14]

If such other outcomes can be negotiated, at least some of those applications will be withdrawn, or will be resolved by a determination that native title does not exist. That will dispose of the proceeding so far as the Federal Court is concerned, but also lead to a mediated outcome, which gives a measure of substantive satisfaction to the parties.

Consequently, although the mediation of native title applications is focused on matters specified in the NTA, the parties may negotiate about those and other matters leading to creative and flexible solutions that deliver benefits beyond narrowly prescribed 'native title' outcomes.

Native title mediation has features that are quite distinct from most other types of mediation.[15]

- It often involves scores if not hundreds of parties.
- It usually involves people and/or institutions who have never met, and consequently the Tribunal is involved in developing. relationships for the purposes of mediation.
- It constantly involves reconciling culturally different views of land and waters.
- It does not necessarily commence because of a dispute but by an application for the determination of pre-existing rights that may affect the rights and interests of others. Paradoxically, mediation in these circumstances can precipitate disputes between the native title claim group and others whose rights and interests could be affected by a determination of native title.[16]
- It usually takes years before the issues are resolved.[17]

Outcomes achieved

Between the commencement of the NTA on 1 January 1994 and 31 December 2008, some 1,797 native title claim applications were made. Of those, 1,283 were finalised, some by determination of native title but about 85% by other means such as discontinuance or amalgamation.

Native title legislation has delivered legal recognition and legally enforceable rights in relation to substantial areas of land and waters throughout Australia. Much of that recognition has been by the consent of the parties. Native title is no longer as controversial or divisive as it was a decade ago. It is part of the legal and social landscape, and many agreements are reached without people proving that they have native title.

The outcomes to date can be summarised in quantitative, qualitative and procedural terms.

Quantitative: At 31 December 2008 there had been 118 Federal Court decisions relating to determinations of native title affecting 146 applications of which:

- 83 are determinations that native title exists over the whole or part of the applications area; and
- 35 are determinations that native title does not exist (most of them in New South Wales).

Those determinations cover some 889,477 km² (or 11.6%) of the landmass of Australia and 27,380km² of sea. Most have been achieved by consent of the parties rather than following a judicial hearing. In addition, at 31 December 2008, 359 Indigenous land use agreements had been registered under the NTA covering some 1,101,467 km² (or 14.3%) of the landmass of Australia and 2,555 km² of sea . Much of that area is not covered by determinations of native title.

The Indigenous groups most likely to establish native title are in remote and very remote areas. Some groups have acquired recognition of their native title in relation to much (if not all) of their traditional lands.

Qualitative: There are various qualitative benefits from native title schemes for the direct beneficiaries and the broader community.

One should not underestimate the social and psychological benefits for a group of Aboriginal people or Torres Strait Islanders of being recognised as the people for a particular area by the Australian legal system and, as a consequence, by the rest of Australia.

This is land where the rights of a specific group have been recognised for the first time in more than 200 years.

Procedural: For some groups, the act of recognition will be the principal outcome and benefit of the native title process. For others, their recognition as native title holders (or at least registered native title claimants) will have additional tangible benefits.

Although native title is not itself a tradeable commodity, and hence has no market value, the relevant legislation confers a range of procedural rights and legal protections. Native title holders can negotiate the terms on which some activities (such as mining) occur or other interests are granted.[18] From those negotiations can flow further recognition, training, employment and other economic opportunities.

In his 2006 judgment at the end of long-running native title litigation, Justice Ron Merkel referred to 'the desirability of seeing the resolution of native title claims as a means to an end, rather than an end in itself'. As his Honour stated:

> Achieving native title to traditional country can lead to the enhancement of self respect, identity and pride for Indigenous communities. However, native title can also be seen as a means of Indigenous people participating in a more effective way in the economic, social and educational benefits that are available in contemporary Australia. Obtaining a final determination of native title, where that is achievable, can be a stepping stone to securing those outcomes but cannot, of itself, secure them.[19]

Such statements reflect the trend to see native title within a broader social, economic and legal context, and not just confined to the recognition and exercise of ancient rights grounded in the past.

Critiques of the native title system

Although much has happened since the *Mabo (No 2)* judgment, native title law and practice are still developing. The NTA and judicial decisions have received mixed assessments.

Despite the specific outcomes achieved and the broader progress made to date, there is no shortage of analysis and criticism of the processes and the potential outcomes.

Politicians, judges and parties have expressed frustration at the costs, delay and technicality of native title processes. They have pointed out that some claimants die before their applications are finalised. Others have criticised the scheme relating to future acts on land where native title exists (or may exist), and the content of some of the negotiated outcomes.

The NTA has been much reviewed. For its first 12 years, a Parliamentary Joint Committee inquired into aspects of its operation. Each year the Aboriginal and Torres Strait Islander Social Justice Commissioner provides a report on the operation of the NTA and its effect on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders.

Other reviews have been conducted. Legislative and administrative reforms have followed, or have been prompted by experience of the system or judicial decisions.

Obstacles and opportunities to overcome them

As at 30 September 2008 there were 477 current outstanding claimant applications across Australia, with approximately half referred to the Tribunal for mediation. Many of them were lodged more than five (or even 10) years ago. The Tribunal estimates that on current trends it will take about 30 years to finalise those claims and the claims yet to be lodged.

Steps need to be taken to resolve these claims in more timely and efficient ways.

Among the challenges are finding ways to more efficiently prepare and assess materials in support of claims, as well as to resolve or remove overlapping disputed claims, reduce the number of parties to some claims, and find creative ways to reach broader settlements.

Increasing clarity of the law, greater familiarity with the processes, wide experience in negotiating outcomes and the guidance provided by them, should inform improvements in reaching just and enduring outcomes.

Conclusion

How much has been achieved from the native title scheme?

The answer will depend on who you ask and which parts of Australia you are considering. Some Aboriginal people and Torres Strait Islanders have received a measure of legal recognition of themselves and their traditional lands or waters, or have negotiated suitable agreements about what happens on and to those areas. They may feel satisfied that, after generations of neglect or marginalisation, their people have received such standing and have secured those outcomes.

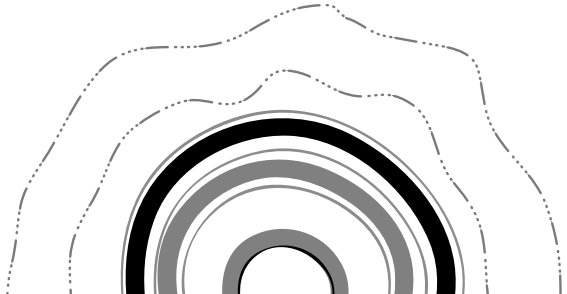
Others have not benefited, and will not benefit, directly or indirectly from the native title scheme. They may continue to feel marginalised or neglected—both as a group and in relation to their traditional areas over which they have no control. For some Indigenous groups, the operation of the native title scheme, or the concurrent operation of different schemes over the same areas, can bring to the surface historical grievances between Indigenous people or give rise to fresh disputes. In other words, such schemes can lead to as many problems as they solve.

Some non-Indigenous people or entities whose legal rights over land and waters are exercised concurrently with, or subject to, the rights of specific groups of Indigenous people have found that negotiations or arbitrations have led to workable outcomes. Business can proceed, and positive new relationships have been established or existing relationships have been strengthened. Others may consider that the prospect or process of negotiating with Indigenous groups is not worth the effort or the cost. They will take their business elsewhere or amend their proposals to avoid the need for substantive engagement with Indigenous people.

Native title is not a panacea. But it has provided, and will continue to provide, a platform on which many groups of Indigenous Australians can build—drawing on the cultural heritage of their past, and working with governments, industries and local communities, to create a better future.

Endnotes

1. Mason CJ, Brennan, McHugh, Deane, Toohey and Gaudron JJ; Dawson J dissenting.
2. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 15.
3. For a detailed history of the litigation, see BA Keon-Cohen, 'The Mabo litigation: a personal and procedural account', (2000) 24 *Melbourne University Law Review* 893-951.
4. *Native Title Act 1993* ss 81, 61, 13, 213.
5. Ibid, s 107.
6. Ibid, s 108(1B)(a).
7. Eg. *Native Title Act 1993* ss 4, 86A, 86B, 86C, 86D, 86E, 108, 123, 131A, 131B, 136A, 136D, 136G, 136GA, 136GB, 136GC, 136GE, 136H, 138E, 138F, 183.
8. *Attorney-General of the Northern Territory v Ward* (2003) 134 FCR 16, introductory statement of the Court, per Wilcox, North and Weinberg JJ.
9. *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 617 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.
10. *Native Title Act 1993* ss 86A(1), 225.
11. *See Smith v Western Australia* (2000) 104 FCR 494, 500 [27].
12. See eg, *Western Australia v Ward* (2002) 213 CLR 1, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
13. See *Native Title Act 1993* s 86F.
14. See *Frazer v Western Australia* (2003) 128 FCR 458 at [24]. For other examples see the National Native Title Tribunal, *Annual Report 2003-2004*, 62-63.
15. See also Australian Law Reform Commission, *Managing Justice*, (ALRC 89), 2000, [7.42].
16. L Boulle, 2005, *Mediation: Principles, Process, Practice*, 2nd edn (2005), 22.
17. An analysis of the 110 claimant applications that had been determined at 30 June 2008 shows that: for the 63 determined by *consent*, the average time for achieving a determination was 68 months (five years and eight months) and for the 47 *litigated* determinations, the average time for achieving a determination was 84 months (seven years).
18. See C Sumner, 'Getting the most out of the future act process', 2007 at <www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Pages/Speeches-and-papers-2007.aspx>, (accessed 7 December 2008).
19. *Rubibi Community v Western Australia (No 7)* [2006] FCA 459, [166].



What has native title done for me lately?

By Monica Morgan

As I write I'm sitting in the gunjah of my mum, Elizabeth Morgan-Hoffmann, on the banks of the Dhungulla (Murray River) at Cummeragunja, a place where many a campaign for the advancement for the rights of Aborigines has been hatched, while trying to imagine the future for Yorta Yorta people post-native title.

It has been 10 years since the 'Tide of History' decision of the Yorta Yorta/Bangerang native title application by Justice Olney on 18 December 1998. Following Olney's decision and an unsuccessful appeal to the Full Court of the Federal Court, we won special leave to appeal to the High Court, but lost when the High Court heard our case—the majority upholding the Full Federal Court decision. In all, we spent almost six years and millions of dollars within the native title legal system, only to be told that native title does not exist for the Yorta Yorta/ Bangerang Nation.

The decision was so mean-spirited that Olney used a petition signed by 42 men residing on 'Maloga' a mission station in 1881, as the date on which the Yorta Yorta had abandoned their native title rights. As this took place prior to the *Racial Discrimination Act 1975* (Cth), it ensured that the Yorta Yorta was not eligible for compensation on the grounds of extinguishment. His reasoning was that, even though there was little doubt that the missionary had written the petition, he concluded that the paragraph, which stated that all our land within our tribal boundaries has been taken possession of by Government and white settlers, established that the Yorta Yorta had abandoned their traditional way of life. If one were to read further into the paragraph it also states that our hunting grounds are used for sheep pasturage and the game reduced and in many places exterminated, rendering our means of subsistence extremely precarious, and often reducing us and our wives and children to beggary.

When Gough Whitlam handed over the title of Watti Creek to the Gurindji, he was acknowledging the land as their traditional homelands and even supported them in developing their own cattle station. I am sure the Gurindji did not view acceptance of this piece of paper as abandoning their culture and traditional way of life; it was and is seen as a continuance of traditional culture and self-determination. The fact that the government acknowledged that the traditional lands of the Gurindji were in the control of Lord Vesty, an English pastoralist, did not render them any less Gurindji nor did it mean losing their native title. So why in southern Australia in exactly the same circumstance, but a different era, does our native title become extinguished?

Why bother? I am reminded of a yarn the old people told about a white fella coming down our river, the Dhungulla. The white fella's name was Edward Curr, and the British colony had just carved out nearly a quarter of our country and gave it to him as grazing lands for his sheep and cattle. Ironically it was Curr's unsubstantiated writings, an ethnocentric evaluation on the laws and customs of my people, which were used by Justice Olney in making his decision. Well, anyways, this old man Kiaia walked out on the log of a fallen tree as far out over the river as he could and shouted to the white fella 'Yanaka! Yanaka!' ('Go away! Go away!'). He was declaring his ownership for his country, including the river. He was saying, 'This is mine, you are not welcome!' What did the strange white fella do? Was he raising his hand in a friendly gesture? Was he intending to give his reason for being in someone else's country? Was he going to ask permission or pay for the rights to be on Yorta Yorta country? No. He raised his rifle and gave out a shot toward the old man.

Our history during this time is the same for all of Australia, resistance with spears and nulla nullas followed by shootings, massacres, diseases, capture and rape of women, the rounding up of our people onto missions and reserves, rations, dog passes and the removal of our children. Extermination or adaptation, that was the choice. Aboriginal people were nothing more than savages, natives with no more rights than the kangaroo and emu.

Resistance would need to take on a different tack. For the next 150 years, our mob would use other methods to campaign for our rights through the use of deputations, petitions, civil disobedience and finally statements of demand for land, rights and justice.

In 1990, our people heard of the land claim by Eddie Mabo and the Murray Islanders for recognition as the sovereign owners of their land and waters. My mother spent many months talking with Bryan Keon-Coen (the Queen's Counsel who took on the *Mabo* case) urging him to assist the Yorta Yorta to launch a similar case in the Australian courts.

Monica Morgan

Monica Morgan is a Yorta Yorta woman. She is a founder of the Murray Lower Darling Rivers Indigenous Nations (MLDRIN). Monica has a long history in advocacy for Indigenous land and water rights and for the rightful place of Indigenous women. She also worked at the Murray Darling Basin Commission where she established the Indigenous Partnerships Project under The Living Murray Initiative, and has authored and co-authored a number of publications on Native Title and Water Rights including Indigenous Rights to Water in the Murray Darling Basin. Monica is a current member of the UNESCO Panel Cultural Diversity in Water.

Eventually he agreed, with the first stage of our case being prepared through the Victorian Legal Service. When Eddie Mabo and the Murray Islanders won their case in the High Court, we felt a sense of excitement that this was an opportunity to gain recognition and our land rights. During the course of the next year we were told that new legislation that would deal with our claims would be enacted in the federal Parliament. We were told that if we wanted funding to fight our case we would have to go through this new legislation. It was the *Native Title Act 1993* (Cth). Our people decided to apply for native title.

In Olney's deliberations and final determination he chose the writings of an ethnocentric, land-grabbing, self-proclaimed expert who wrote his memoirs after leaving Yorta Yorta country some 40 years later, as his primary source, even though Curr was ridiculed by all scholars and experts of the day. Olney dismissed the claimants' own self recognition and oral history as not being reliable, not as reliable as the written word, and full of embellishment. This is an antiquated, backward notion of Indigenous peoples. The Yorta Yorta right to an identity is grounded by the principles inherent within the United Nations *International Covenant on Civil and Political Rights,* that every person or group of people have a fundamental right to an identity, their own process of governance, culture, social and religious belief.

What we found during the course of our native title claim is nothing but an endorsement of the existing status quo enjoyed through the process of invasion and the subsequent colonisation of Yorta Yorta country. This went unabated from the early 1800s to the present day, resulting in the occupation on our traditional lands and waters by people with rights 'greater' than the Yorta Yorta's rights. The prevailing discrimination in the process of devising native title legislation, including later amendments by both Labor and Liberal governments, meant the redistribution of our lands and waters. This discrimination left Yorta Yorta people the most disadvantaged in regards to land holdings and the waters in our own country. This loss of jurisdiction over our own lands and waters has severely restricted our ability to receive an economic base from the natural resources and its investment within our traditional country. When posed with the question of the waste of money fighting a legal battle, I answer, 'What is the price for justice, when compared to the social, cultural, spiritual and emotional cost of having your land appropriated and exploited for European economic greed?' Thus the question of equity is very much alive with regards to the ability of the Yorta Yorta people to fulfill our obligations in the protection and maintenance of our social, cultural, economic and environmental way of life.

The fact that the Yorta Yorta/Bangerang native title application was not successful does not and will never change the fact that my people of the Yorta Yorta are the traditional and sovereign owners of our lands and waters. For justice to be met there is need for a treaty or treaties to be negotiated with the Yorta Yorta nation and all other Indigenous nations, recognising that the invasion and possession of our lands was illegal and unlawful. Native title is nothing more than window dressing to continue to exploit and deplete our resources and it will never meet the need for land rights and self determination.

Oh, and what happened to Kaia as he was screaming obscenities at the white intruder? A young girl, Undyarning, had heard of the fire stick that made a big sound and smoke and could strike people down dead and even though she was shaking, she quietly walked out along the log and gently took the old man's hand and led him back to the safety of the bank. The old man lived but he could never have imagined the degradation that not only his people but also his beloved river would endure over the next 150 years. That small girl would one day speak to her children and her grandchildren, who then would pass it on to their grandchildren, of what she learnt about speaking your mind, making your point, regrouping and waiting to continue the struggle another time. At the end of the day, when Curr, his descendants and most other white fellas have had their fill and used all the resources from our lands and waters, Undarnying's people will always be where they belong; in their traditional country.

Aboriginal land still vulnerable

By Sean Brennan

The *Mabo* decision by the High Court in 1992 was historic because the common law of Australia recognised the pre-existing property rights of Aboriginal and Torres Strait Islander people. But it came so late—more than 200 years after the process of British colonisation commenced—that compromises were made.

Native title is particularly vulnerable to being wiped out or diminished because the law denies it the full array of protections enjoyed by other property rights. This has become clearer in the years since 1992, mainly through later High Court decisions. Our judges faced choices in these early test cases about how much protection this new branch of Australian law would offer Indigenous property rights. Often the choices they made reinforced the vulnerability of native title, rather than its parity with the rights of non-Indigenous owners.[1]

The most recent High Court decision on native title continues this pattern. On its face, it suggests that *all* types of property could be taken by government from one owner, simply to put it in the hands of another who seeks to make private profit from it (a 'private-to-private transfer'). But in reality it is likely that such compulsory acquisition powers will be exercised more often over precisely the land most likely to contain the strongest native title rights. Indeed, the Northern Territory experience discussed in the High Court case *Griffiths v Minister for Lands, Planning Environment* [2] bears out this theory. It prompts the question whether the Commonwealth Parliament should step in to strengthen the position of native title holders in the face of 'private-to-private transfers'.

Compulsory acquisition

Everyone's land is subject to the possibility of compulsory acquisition by the government. The power to resume land is seen as inherent to sovereignty, that is, the legal and political authority to govern a society. However, because the Anglo-Australian legal system has always treated property rights seriously, there are built-in protections for owners facing compulsory acquisition. Some are found in the rules of the common law and the way statutes are interpreted by judges. Others are spelt out in statutes and others are even embedded in the Constitution itself. These protections deal with issues like notice, negotiations, the assessment of land value and the payment of compensation.

At the outset I said that Australian judges had defined native title to be more vulnerable than other forms of property ownership. A key weakness is that, when faced by native title, the government did not need to resort to prior compulsory acquisition and bother with these in-built protections for property owners. It could simply grant land to others over the top of native title. That kind of one-step *inconsistent grant* is simply not possible where someone owns land under mainstream property law. That single proposition of native title law—the legal doctrine of extinguishment by inconsistent grant—explains how so many Indigenous groups came to be *lawfully* dispossessed, in the eyes of the courts.

When the political campaigns of the 1960s and 1970s for land rights began to pay off and Parliaments around Australia started restoring land to Aboriginal and Torres Strait Islander people, many of those new laws included added protections against any further dispossession. Land rights statutes often contained a provision that said that the government cannot simply exercise its powers of compulsory acquisition over newly-restored Indigenous land and once more eat into the Indigenous estate. Resumptions of land could only occur by a separate Act of Parliament—that is, with transparency and the strong possibility of political opposition.

In native title law too, Parliament provided a level of protection in the face of compulsory acquisition. The federal *Native Title Act 1993* (Cth) (NTA) built on the principles of the *Racial Discrimination Act 1975* (Cth). Along with mining projects, compulsory acquisition was seen as threatening the greatest harm to this newly recognised property right known as native title. So a special process was inserted in the NTA, built around direct negotiations and, if agreement proved elusive, arbitration (a process often referred to as the 'right to negotiate').

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Together, the *Racial Discrimination Act*, the right to negotiate and the requirement for a separate acquisition statute in land rights legislation turned the tide on dispossession. Native title was still more vulnerable than other forms of ownership, but there were significant legal barriers in the way of a government seeking to strip Indigenous property rights in order to put to land in the hands of a private profit-making entity.

Native title rights reduced after 1998

Some of those statutory protections were reduced when the Commonwealth Government amended the NTA in 1998 and certain states and territories followed suit. The Northern Territory Government created a very wide acquisition power, without spelling out that the power included private-to-private transfers.

According to the Northern Land Council, the Territory Government issued 82 compulsory acquisition notices after the power was widened in the late 1990s and on every occasion, the land was claimed or claimable by Aboriginal people.[3]

In the *Griffiths* case, Aboriginal people from the small outback town of Timber Creek challenged this use of compulsory acquisition powers to seize native title land and subsequently grant it to a private business. They argued that common lawprinciples prevented a 'private-to-private transfer', unless the acquisition law was totally explicit. Without those clear words, an acquisition could only be for a public purpose such as building a school, road or hospital, not for private profit.

The legal challenge failed because the High Court, by five judges to two, decided that there was no legal problem with an acquisition of this kind. This surprised many people, because hostility to using the government's coercive powers of compulsory acquisition to enrich private interests runs deep in the common law.[4]

The risk is that, of all the land that might be resumed for private enrichment rather than public purpose, prime native title land (that is unalienated or so-called 'vacant' Crown land) is probably the most susceptible. That is how it turned out in the Northern Territory after 1998. To avoid further potential for racial discrimination in the way Australian property law operates, one solution is for the Commonwealth Parliament to amend the NTA to strengthen protections for native title land against private-to-private transfer.

Endnotes

1. S Brennan, 'Native Title in the High Court of Australia a decade after Mabo' (2003) 14 *Public Law Review* 209, 217-218.

2. *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20.

3. ABC Radio National, 'Land Appropriation in the NT', *The Law Report* (20 May 2008), <www.abc.net.au/rn/lawreport/stories/2008/2247140.htm#transcript> at 5 November 2008.

4. K Gray, 'There's No Place Like Home!' (2007) 11 *Journal of South Pacific Law* 73; M Taggart, 'Expropriation, Public Purpose and the Constitution' in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (1998), 91–112.

A practitioner's perspective of native title

By Vance Hughston SC

The passage of the *Native Title Act 1993* (Cth) (NTA) created expectations among the nation's Indigenous people but those expectations have often not been met.

Each native title case depends on its own facts and the history of its claimants' and their ancestors. This can lead to what appears to be unequal treatment as between different claimant groups. For example, where the land and waters concerned are remote and of little economic value, consent determinations are readily agreed to by government on the basis of comparatively modest evidence. For those native title claimants and the government parties involved, the system for resolving native title claims could be said to have worked well. Where, however, the land and waters concerned are in more settled areas or—although remote—are economically valuable, different considerations will apply. These are the claims which are likely to be opposed and to proceed to a contested hearing. These are the claims that place a heavy burden on the financial and human resources of the principal parties involved and, in particular, on the limited resources of native title applicants.

Applications for determination of native title under the NTA are proceedings commenced and conducted in the Federal Court. The filing of an application is the first step in what may become major contested litigation in which the applicants must prove each element required to establish the existence of native title. Furthermore, although the Court has a discretion, the rules of evidence will generally apply.[1] In *North Ganalanja Aboriginal Corporation v Queensland*,[2] five Justices of the High Court stated in a joint judgment that the issues of fact raised by a native title claim were complex and in the event of opposition would be likely to take significant time and resources to determine. Such has proved to be the case.

The major problem with the system for resolving native title claims is not hard to identify. It is the significant time and resources needed to resolve those native title claims which are opposed by government and other respondents. The problem is compounded by the limited physical capacity of most representative bodies, the scarcity of financial resources and the small number of experienced lawyers and anthropologists who are available to work on native title claims.

The significant amount of time and resources required to prepare and prosecute a native title claim is largely a result of the substantive law. In particular, the substantive law requires native title claimants to prove substantial continuity in the acknowledgment and observance of traditional laws and customs and the continued existence of the rights and interests which derive from those laws and customs from sovereignty through until the present day. This imposes a significant forensic burden on native title claimants. Clearly, the collective memory of those living today will not extend back to anything like sovereignty or the time of first contact. Extensive (and expensive) expert evidence is generally required to address this gap. In native title cases—unlike other cases in the Federal Court's civil jurisdiction—Indigenous witnesses are often required to give all or at least much of their evidence orally. This practice adds markedly to the time which it takes to hear a native title claim and hence also to the cost of the hearing.

The Federal Court has consistently recognised that in all native title cases, the evidence of the Indigenous witnesses will provide the most compelling evidence.[3] In *Sampi v Western Australia*, French J said that the Aboriginal evidence about their traditional laws and customs and their rights and responsibilities with respect to land and waters, 'is of the highest importance. All else is second order evidence'.[4] Although it is the best evidence, it can also be the most difficult to prepare and present. In my experience, Aboriginal people, whether living in remote or settled areas, are invariably reticent about divulging cultural and personal information to strangers. Many older people in particular may conceal or downplay the significance of traditional beliefs and practices when talking to those who are not Indigenous. There is still a fear of possible ridicule or worse, if traditional beliefs and practices are revealed to non-Aboriginal people. Sensitive information is generally only imparted gradually, over time. Several lengthy visits will be required to take a statement from a witness and to explain to that witness what it is that the Court will require of him or her.

All practitioners who work in the area of native title are aware of the practical realities of resource limitation on all parties in native title litigation. In particular, there are only limited human and financial resources available to applicants to prepare and present their claims. In those circumstances, it is important that those funds which are available are used in a way which will best ensure that Indigenous witnesses are properly and adequately proofed and are otherwise

Vance Hughston SC

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prepared to give their evidence. It is important, too, that practitioners give attention to ensuring that the Indigenous evidence is given in a manner that is both efficient and effective. In this respect it is far easier on the witness and will save considerable Court time if all or most of a witness' evidence in chief can be reduced to the form of a detailed written statement.

There appears, however, to be a strongly held belief among many practitioners that for Indigenous evidence to be given any weight, it must be given orally. Accordingly, many native title cases are conducted as common law trials. Directions are made for the filing of substances of the Indigenous witnesses' evidence and at the hearing the Indigenous evidence is adduced orally. When one bears in mind the complexity and the breadth of the issues which must be covered in an Indigenous witness' evidence—and adds to this the fact that many of those witnesses are likely to be elderly, in frail health and possess little formal education—the difficulties which they face in giving lengthy oral evidence should be obvious. Those difficulties are compounded by the fact that each of the principal respondents is generally separately represented and, as such, is entitled to object to questions put in examination in chief and to cross-examine.

In other cases, a modified version of the above practice has been adopted. Under this modified practice, the applicants are ordered to file and serve detailed statements from the Indigenous witnesses as opposed to substances. The respondents are then afforded a right to say which parts of a witness' statement can be admitted into evidence and which parts cannot. Those parts of a witness' statement that have been objected to by the respondents are excluded from the evidence and must be led orally. In effect, the respondents obtain the benefit of receiving a detailed signed statement from each witness, while maintaining a right to pick and choose which parts of that statement can be admitted into evidence. The contents of the signed statements can be used as the basis for the cross-examination of the Indigenous witnesses.

This insistence upon Indigenous witnesses giving all or much of their evidence orally is at odds with the Court's usual practice in its civil jurisdiction. The practice routinely followed in the civil jurisdiction of the Federal Court is to have a witness adopt his or her statement as true and correct, and then to admit that statement into evidence. As Weinberg J observed in *Platcher v Joseph*:

> 'The approach of calling a witness to adopt a previous statement as true and correct is routinely followed in this Court. Indeed that approach is expressly contemplated by s 37(3) of the *Evidence Act 1995* (Cth) which allows a written statement or report to be tendered or treated as evidence in chief of its maker, pursuant to Rules of Court.'[5]

In *Bennell v Western Australia*,[6] the Court in taking the Aboriginal evidence followed the Court's standard approach in civil litigation of permitting the Aboriginal witnesses to adopt their witness statements as true and correct and then admitted those statements into evidence. The Court did, by way of modification to the usual approach, allow counsel for the applicants to ask a brief series of questions which were designed to put the witness at his or her ease and to bring out the main points of their evidence. The Court observed that this procedure worked well.[7] The Court heard the evidence of all 30 Aboriginal witnesses and inspected a number of sites during a total of 11 days 'on-country' hearings. The expert evidence was then heard immediately after the Aboriginal evidence without any lengthy adjournment in between. Collectively, these procedures provided for a shorter and more efficient hearing of native title connection issues than is usually the case.

Although it is important that Indigenous witnesses continue to be able to give their evidence on their traditional country and under circumstances which take account of their cultural and customary concerns[8], it is also important that they not be treated any less favourably than non-Indigenous witnesses. The time and money presently spent in adducing lengthy evidence in chief from Indigenous witnesses could be better spent in preparing the case for hearing and in particular in ensuring that the Indigenous witnesses are fully proofed and prepared to give their evidence and to be cross-examined on that evidence.

Endnotes

1. *Native Title Act 1993* (Cth) s 82(1).
2. *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 596, 614.
3. See for example, *De Rose v South Australia* [2002] FCA 1342 (O'Loughlin J, [351]).
4. *Sampi v Western Australia* [2005] FCA 777, [48].
5. *Platcher v Joseph* [2004] FCA FC 68, [163].
6. *Bennell v Western Australia,* [2006] 153 FCR 120.
7. Ibid, [52].
8. See *Federal Court Rules,* Div 6, O 78.

Native title litigation reform

By Tony McAvoy

Contrary to the beliefs of a number of the individuals involved in native title processes, native title litigation is unique.

While it is true that the preparation and hearing of evidence is not markedly different to any other litigation,[1] the whole of the codified system for determination of native title rights and interests must be recognised as a process which continues to be mired in unresolved race politics. The challenge is to diminish or remove that which makes it unique.

There can be no doubt that the 1998 amendments to the *Native Title Act 1993* (Cth) (NTA) were designed to deliver 'bucket loads of extinguishment'.[2] Nor can there be any doubt that the introduction of the threshold test and tying of future act procedural rights to Federal Court proceedings were acts designed to make access to procedural rights a difficult and costly process.

I have been asked and will attempt to corral my comments to areas for necessary reform in native title litigation. Additionally, I have made some brief comments which I have grouped under the headings 'substantive reform' and 'if I had my way reforms'. As partisan as it may be, the aim of my reform recommendations are to protect the native title rights and interests of Indigenous people in Australia, while streamlining the convoluted processes.

Litigation reform

There are four areas in which reform may be easily and readily achieved and which would dramatically improve the rate of resolution of native title litigation (and case flow figures for the Federal Court). They are:

- corporate applicants;
- separating future act procedural rights from native title determination proceedings;
- regularising the application and pleading process; and
- clarifying the consent determination process.

Corporate applicants

The NTA provides for native title applications to be made by a person or persons claiming to hold native title either alone or with others.[3] The interpretation of the wording in s 61(2) and (3) of the NTA by the Court in *Western Australia and the Northern Territory of Australia v Patricia Lane, Native Title Registrar and Others*[4] had the effect of removing the capacity to claim native title through an incorporated body.

In that case, O'Loughlin J observed, at [42], that s 61 required an application to be made by a person or persons claiming to hold native title either alone or with others. His Honour said:

> The concepts of corporations and statutory bodies are, in relative terms, recent inventions of the Western world and are unknown in Aboriginal law or custom. The provisions of the *Acts Interpretation Act 1901* (Cth) cannot be called in aid, according to the applicants' argument, because the relevant provision, para 22(1)(a) states that a reference to a person including a body corporate will not apply where a contrary intention appears; here it is said that such a contrary intention appears.

The above passage appears to have settled the issue and applicants in all native title applications have since been required to be natural persons. An amendment, which could be made relatively easily, could require an applicant to be a 'person or persons claiming native title either, alone, with others, or on behalf of others'.

The need for such an amendment arises out of other rulings of the court to the effect that the applicant in native title proceedings is a single entity, and therefore the persons who comprise the applicant must be of one mind.[5] In the event of there being some deadlock because of the inability to reach singularity of mind, the courts have shown a readiness to remove one or more people from the application.[6] The process for the removal of people from the group comprising the applicant is not a simple process and has the potential to create division in the claim group, which is difficult to overcome.

A further difficulty that I have observed is the knowledge the applicants have of the difficulties that accompany removal. This equates to an overall lack of accountability to the claim group. Bearing in mind that many claims presently before the courts were filed prior to 2000, the opportunities for abuse of the position are apparent.

If, however, a claim group was able to authorise a corporate entity to be the claimant, the decision makers in respect of the all - important role of providing instructions would be the directors of the corporation. The benefits would include: the existence of a decision-making framework which could ultimately be challenged, in separate proceedings if necessary; the decision makers (directors) would be subject to scrutiny and

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accountability; and decision makers could be changed with relative ease. Most importantly, for the purposes of reforming the native title system, the legal representatives of the applicants would be able to obtain instructions quickly and with certainty.

Since the introduction of the 1998 amendments to the NTA, native title holders are required by law to nominate a corporate entity to hold their native title rights and interests as an agent or on trust. There is no logic in forbidding the making of an application by what, in many cases, will be the same corporation which may ultimately hold the native title.

Separating procedural rights from determination applications

The coupling of access to procedural rights to the making of an application for determination of native title rights and interests was premised upon the misguided view that such coupling would expedite the resolution of native title rights and interests over those areas in which there was ongoing interest and activity. The 1998 amendments were pushed through—with a new threshold to establish a claim—under the mistaken belief that native title would cripple mining and other industries. This has not transpired, and it is now appropriate to re-cast the balance.

I propose that the National Native Title Tribunal (NNTT) become the procedural rights oversight and management body, and a specialist mediator as and when so appointed by the Court. I suggest that if the applicants in proceedings presently before the Court were given the option of discontinuing proceedings on the basis that they would retain their procedural rights, a vast majority of current applicants would take this opportunity.

There are numerous reasons why there are so many applications currently before the Federal Court that are registered but proceeding at an inexorably slow pace. For a large proportion of those claims, however, the progress or lack thereof is out of the applicant's hands.

Under the above-noted proposal, the NNTT would continue to be the body that applied the registration test to native title determination applications. Groups claiming native title, however, could simply apply for registration without the need to commence court proceedings.

The NNTT also should keep a register of s 29 notices, and an online diary of closing dates for the making of applications for registration as a registered procedural rights holder. At present, it does not appear that any single agency keeps a register of s 29 notices—the obvious candidate would be the NNTT. Upon being entered on the register as a registered procedural rights holder, the registration would remain in place until such time as native title is determined, but without the obligation on any party to bring a determination application.

Regularising the application process

Assuming access to procedural rights could be separated from the determination process, it also is my view that the native title determination application process needs to be regularised to some extent. In particular, the application merely should be, a document that sets out the parties and the relief sought, together with any interlocutory relief sought. An application in the form of the Federal Court Rules Form 5 is appropriate.

I also would recommend a practice direction to the effect that:

- at or about the expiration of the notification period the applicant would be required to file and serve Points of Claim;
- within a suitable time, all respondents who had entered an appearance would be required to file Responses to the Points of Claim;
- the parties would then be directed to attend before a Registrar of the Court for a conference with a view to satisfying the Registrar that all reasonable steps to achieve a negotiated outcome of the proceedings had been taken, and to clarify the real issues in dispute so that appropriate directions may be made for disposition of the matter; and
- the matter would be remain in mediation before the Registrar for as long as progress towards a negotiated outcome was being achieved. The Registrar also would have the power to refer matters or issues to the NNTT for further mediation.

Again, I stress that such a realignment of native title litigation process with the mainstream of court business can only be done where claims which are not ready to proceed are discontinued, and procedural rights retained.

Clarifying the consent determination process

At present there appears to be three different schools of thought within the Federal Court concerning the requirements which must be established before the court will be satisfied that it is 'appropriate' under ss 87 and 87A to make consent orders. The three views appear to be:

- nothing less than evidence meeting all the essential elements of native title will suffice;
- an agreed statement of facts addressing each of the elements as required by the statute will be sufficient; and
- a statement from the government parties to the effect that the they have received the applicant's evidence and are satisfied that it is sufficient to make out the native title rights and interests sought.

To address this issue, an amendment could be made to ss 87 and 87A to make it clear that *appropriateness* is confined to ensuring that the parties have had appropriate legal advice. Alternatively—which in my view involves an unnecessary level of scrutiny by the courts—appropriateness could be demonstrated by the filing of an agreed statement of fact.

Such reforms, if implemented, would reduce the Federal Court list, ensure that all applications have clearly identified issues in dispute, enable parties to provide instructions to legal representatives with speed and certainty, and establish a uniformity of approach in applications for consent determinations.

Substantive reform

Substantive reforms which should, at the very least, be the subject of detailed discussion include:

- greater protection for native title rights and interest pending determination of proceedings—including the repeal of s 24HA of the NTA[7]—and remedying the disastrous effects of the decision in Lardil [8] (which has effectively neutralised procedural rights);
- taxation reform to allow native title groups to receive and distribute native title benefits in a tax free environment. It is also worth considering incorporating statutory trusts into which native title groups could, but would not be obliged to, direct compensation monies to be received and distributed; and
- amending the procedural onus in respect of claims of extinguishment. The only parties in native title proceedings which have information concerning the extinguishment of native title are government parties. They are also the only parties that raise claims of extinguishment. Government parties should be required to give notice to the applicants of those lands over which native title is said to be extinguished at an early stage in proceedings.

'If I had my way' reforms

Finally, if I was the Attorney-General of Australia, I would:

- amend s 223 of the NTA to make it clear that native title rights and interests are all those rights and interests in the land which the sovereign has not alienated and in respect of which there is a satisfactorily described claim group, who have proved descent from the original inhabitants;
- contemplate removing native title claims from the adversarial process necessarily required by the Federal Court and consider the creation of a Commission which would conduct inquiries; and
- provide a framework for comprehensive regional settlements, with substantial incentives for the states to commence, negotiate in good faith and conclude such agreements within reasonable timeframes.

The demand for a more outcomes-focused native title claim process is not something you would hear a native title claim group or applicant disagree with—unless of course the blame for the difficulties in the process were laid at their feet. Some of the problems can be dealt with relatively easily, but others will take real understanding of the process and a commitment to pushing aside the obstacles.

Endnotes

1. Putting to one side the preparation of statements regarding matters of spiritual belief and the general preference for applicant lay evidence to be heard 'on country'.
2. Tim Fischer, Deputy Prime Minister, interview with John Highfield, 'ABC TV World at Noon', 4 September 1997.
3. *NTA 1993* (Cth) s 61(2).
4. *Western Australia and the Northern Territory of Australia v Patricia Lane, Native Title Registrar and Others* [1995] FCA 1484 (24 August 1995).
5. Eg, *Ankamuthi People v Queensland* [2002] FCA 897 (17 July 2002).
6. *Button v Chapman on behalf of the Wakka Wakka People* [2003] FCA 861 (20 August 2003).
7. Section 24HA of the NTA provides a right to comment in respect of the management or regulation of water.
8. *Lardil, Kaiadilt, Yangkaal & Gangalidda Peoples v State of Queensland* [2001] FCA 414 (11 April 2001).

Conflict management in the native title system

A proposal for an Indigenous Dispute Resolution Tribunal

Alison Vivian

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By Alison Vivian

One of the tragic outcomes of the current native title system is the extent to which it creates and exacerbates conflict within and between Indigenous communities.

These disputes delay the resolution of proceedings and impact on native title outcomes, but more importantly, frequently damage or destroy relationships. These disputes have such power to cause bitter and deep division because 'native title is not just about land. It is about culture and way of life'.[1] In fact it is the very nature of native title and aspirations surrounding its attainment that too often leads to conflict.

Dispute arising from the native title system

Within the native title system itself, disputes arise between Indigenous communities, often relating to disputed boundaries and overlapping claims.

The Native Title Act 1993 (Cth) (NTA) requires precise boundaries to claim areas, yet as Justice Nicholson identifies, 'tribal boundaries in Aboriginal Australia were frequently blurred and indistinct'.[2] Thus, a source of conflict is almost mandated by the legislation. Similarly, the NTA prescribes that overlapping claims, to the extent to which they cover the same area, must be heard together,[3] regardless of different levels of readiness and potentially very different aspirations.

More damaging is conflict arising within Indigenous communities claiming native title. Disputes arise over exclusive versus inclusive concepts of 'society'; whether a claim is rightly clan based or a claim to communal title; who within a community may speak for country; and who is entitled to benefit from any recognition. Painful questions of legitimacy may arise.

Accusations are made of claims made by people without traditional connection to country, altering equilibrium and cohesion between Indigenous people with different histories living on the same country. Community members, known for their role as peacemakers, have been forced to take sides at personal cost. Important evidence relating to law and custom may not be heard because of reluctance of elders and respected persons within communities to take sides. Historical feuds may be played out in the claim process and assertions causing harm and grief, once made, cannot be withdrawn.

Intra-Indigenous disputes can do irreparable damage to community and family relationships, but also may do serious damage to the merits of the claim itself. Litigation is a strategic enterprise. Claimants present their strongest case to be answered by respondents. Decisions are made about the evidence to be presented, witnesses to be called and submissions to be made about interpretations of the law and evidence, with the potential for interpretation in different but equally valid ways.

Indigenous combatants can do severe damage to the claims of others through attacks on the legitimacy of traditional laws and customs and challenges to continuity based on differing interpretations of law and custom. On occasion, these attacks are more pointed and sustained than those made by non-Indigenous respondents.

A need for an alternative approach

Disputes emerging from the native title system appear on their face to be intra-cultural in nature. However, native title exists at the intersection of Australian common law and the traditional laws and customs of Indigenous peoples.[4] Thus, these disputes are of significant complexity, existing at the interface of two normative systems. In essence, legal questions are posed by the NTA—but are answered by reference to Indigenous laws and customs.

While it must be acknowledged that the resolution of disputes is hampered by loss of cultural identity and the weakening of protocols dealing with land or cultural authority, native title disputes differ from disputes over land arising from Indigenous people as between themselves. For example, native title determinations require the identification of artificial constructs, such as: what constitutes the relevant 'society', a conceptual tool[5] and capable of various levels of aggregation;[6] or whether rights and interests should be classified as 'group', 'communal' or 'individual', a statutory construct and one unlikely to be used by Indigenous people themselves.[7]

Australian courts have recognised that they are not the appropriate vehicle for resolution of these disputes. The Federal Court has repeatedly observed that the allocation of rights and interests and determination of membership of the native title holding group is properly a matter for the Indigenous community according to its laws and customs.[8] The Court has identified that these are likely to be disputes between the registered native title body corporate and those claiming to be native title holders.[9] Similarly,

courts have preferred that resolution of intra-Indigenous disputes be resolved by mediation—with variable levels of success. More importantly, dealing with such disputes is the right and responsibility of Indigenous peoples as an expression of autonomy, exercising responsibility for the functioning of their own communities.

Appropriate vehicle for resolving disputes

The question arises as to what is the appropriate vehicle for resolving native title disputes. This is a question of significant complexity, with two sources of law co-existing in an environment where one so markedly dominates the other. Is it appropriate that there be indigenisation of existing mainstream justice systems or should an entirely separate Indigenous dispute resolution system be established? Alternatively, could a hybrid system be proposed?

Indigenisation of existing mainstream justice systems has the danger of legitimising the very institutions that have entrenched colonisation and marginalisation of Indigenous people. Indeed, there is the danger that Indigenous participation can delegitimise Indigenous authority, which may be compromised once adopted and rationalised by formal non-Indigenous systems.[10] There is a question as to whether indigenisation of mainstream justice systems can be an adequate response to address Indigenous disadvantage and aspirations, or whether modification of institutions actually reinforces disadvantage by only adopting 'aspects of Indigenous knowledge, values and processes that do not conflict with Western values and laws'.[11] Assistant Professor Dale Dewhurst terms this as 'taking the mainstream adversarial system and pasting Aboriginal spirituality on top',[12] while Professor Larissa Behrendt describes it as 'attempting to make the dominant legal system more acceptable to Indigenous people'.[13]

One option may be to reject interface institutions entirely and promote the development of a separate Indigenous dispute resolution institution, operating entirely outside the dominant Australian legal system—a model illustrated by the Navajo court system which consists of a Supreme Court, District and Family Courts and a peacemaker program implementing Navajo law.[14]

However, it is the underlying ambiguity of native title disputes, being simultaneously intra-cultural and inter-cultural, that suggests the pragmatism of a tribunal at the interface of Australian mainstream law and culture and Indigenous law and culture, and not a distinct, coexistent system.

A specialist tribunal

The concept of specialist courts and tribunals is familiar within the Australian legal environment. Koori courts, family courts, drug courts and small claims courts are commonplace. Similarly, specialist tribunals dealing with a multitude of issues are familiar, with tribunal models varying enormously. Some have expert members, judicial members and lawyers. Some are inquisitorial, others adversarial. Membership of tribunal panels may vary in number and composition depending on the issue to be resolved and may consist of legal and non-legal members. The content of required expertise, whether legal or non-legal, and who is to provide such expertise primarily revolves around the nature of the issue. Thus, a specialist tribunal dealing specifically with intra-Indigenous disputes should not be controversial.

It is vital to its ultimate success that a tribunal professing to provide Indigenous dispute resolution processes embodies Indigenous values and has legitimacy with the people over which it presides. Dr Loretta Kelly and Professor Larissa Behrendt observe the need for dispute resolution processes that utilise Indigenous cultural values, reinforce those values and reassert Indigenous authority.[15] They note the importance of reasserting Indigenous authority at the community and family level where Aboriginal people are 'very much engaged with disputes and outcomes that are focused on issues that fundamentally affect the people involved'.[16]

However, a framework that overtly legitimises Indigenous authority is not in itself sufficient. Existing at the interface of Indigenous and non-Indigenous law, it is crucial that the tribunal have legitimacy within both Indigenous and non-Indigenous communities as a respected institution of Indigenous and non-Indigenous systems of law.

As described, disputes within and between Indigenous communities crystallised by the native title process are both intra-cultural and inter-cultural in nature. They are intra-cultural in that the resolution of dispute will require application of cultural norms in a culturally appropriate environment. They are inter-cultural in the sense that the question raised by the dispute is externally imposed: What is the 'society'? Are the rights group or communal rights? Where are the boundaries, etc? Thus, it seems appropriate that an Indigenous dispute resolution tribunal should embody intra-cultural and inter-cultural sensibilities and may include Indigenous and non-Indigenous expertise.

There are no formal Indigenous legal institutions in Australia recognised by the Australian mainstream legal system. Indigenous courts applying Indigenous law as stand-alone institutions or within a genuinely pluralist framework do not exist.

Currently, the only formal input by Indigenous people into the mainstream Australian legal system is in an advisory capacity in the Koori Courts in Victoria and other community courts in South Australia, New South Wales, Queensland, Western Australia and the Northern Territory.[17] Examples do exist of non-judicial Indigenous decision-making bodies such as the Victorian Aboriginal Heritage Council—a body of Indigenous experts presiding over applications for status as registered protectors of Aboriginal heritage.

Internationally, a variety of Indigenous dispute resolution bodies exist within or adjacent to mainstream non-Indigenous legal systems, including the Tsuu T'ina First Nation Court in Canada, dispute resolution under the Nisga'a Final Agreement in Canada and the Waitangi Tribunal in New Zealand. These models may provide valuable input into the structure, function and jurisdiction of an Indigenous tribunal, including the recruitment and 'qualifications'/qualities of the Indigenous decision makers, Indigenous-specific strategies and processes, utilisation of 'expert' input, and achievement of flexible and creative outcomes.

Essential issues for consideration in establishing an Indigenous Dispute Resolution Tribunal

- ***Who should be members of the tribunal?*** What are the qualities required of members and what range of expertise is needed? Clearly senior Indigenous people must be members but what other expertise is needed? Should expert anthropologists, historians or linguists be members?
- ***Should non-Indigenous people be members or should the tribunal be Indigenous only?*** If there are to be non-Indigenous members, how are they to be selected and by whom?
- ***How is power imbalance to be altered?*** Should panels always have a majority of Indigenous members? Would that be sufficient? Who has the final authority? If a non-Indigenous judge is sitting on a panel with two senior Indigenous people and there is not unanimity, how is the decision determined?
- ***Should tribunal members be appointed by the appropriate Minister or by Indigenous communities themselves? Is there a representative quality to the tribunal?*** Judges in all jurisdictions in Australia are appointed by the appropriate Minister after a process of broad consultation but this process is controversial and open to criticism for political bias. Election of decision makers, as in the United States, however, is open to populist pressure and threatens judicial independence.
- ***How should the tribunal be funded?*** The tribunal would be funded by non-Indigenous governments. To protect it from political interference would it be prudent to create an independent self-managing institution?
- ***What training will be required?***

A full analysis of these models is not possible in this article, but five common features emerge:

1. 'People and protocols' must have legitimacy with the parties in dispute, especially where knowledge and understanding of cultural values and processes are paramount.
2. Processes must consistently demonstrate and embody Indigenous authority, with deference to Indigenous knowledge on cultural questions.
3. There must be a focus on community healing.
4. There must be flexibility and creativity in conceptualising and designing specific approaches for the particular dispute and particular parties.
5. Institutional change is required. It is not sufficient merely to attempt cross-cultural sensitivity; a pluralist environment must be created.

Disputes before the envisaged tribunal will vary considerably in the degree of contentiousness and an essential feature of such a body is that it must have authority, legitimacy and capacity to deal with the disputes over which it presides. Some disputes will be factual in nature, some will involve disputes relating to interpretations of traditional law and custom, and others will involve application of the NTA and judicial precedent. Most disputes will involve combinations of these elements. Because of the unique nature of the disputes, flexibility and creativity will be essential, with an ability to tailor an approach specific to the requirements of the parties.

Without wishing to be prescriptive, and cognisant that any model of Indigenous dispute resolution must be shaped by the Indigenous people involved and with a conscious intention to address power imbalance, a possible two-stage dispute resolution model is proposed. It consists of active facilitation followed by arbitration.

On referral to the tribunal, disputing parties would first meet with the Indigenous Registrar to discuss the parameters of the dispute and possible approaches to its resolution. The initial stage would comprise active facilitation conducted by an Indigenous mediator, elder or respected person or persons, or a combination of these people chosen by the parties from a pool of facilitators. Parties would also have the option to choose facilitators from outside the formal tribunal system. Facilitators might be chosen for their knowledge of the specific situation or their reputation with the disputing parties. Kelly and Behrendt identify the importance of local knowledge in resolving disputes—in terms of personalities involved, historical conflict, and an understanding of complex roles and family relationships.

Processes would be flexible and not bound by procedural technicalities but would be shaped by the parties and facilitator/s. There may be input from other sources—be it a conference of expert historians, anthropologists, linguists or panel of traditional owners and respected persons chosen by the parties. Referral of specific legal questions to an arbitration panel or judge for determination could occur. If there is no resolution from facilitation, the matter would be referred to an arbitration panel for binding decision, with flexibility and responsiveness to the parties in dispute again being central.

The size and composition of the panel would depend on the nature of the dispute—whether it was to be resolved by traditional law and custom, non-Indigenous law or was a question of fact. The panel may consist of senior Indigenous people resolving a boundary dispute; a panel of senior Indigenous people determining who is entitled to exercise what rights and interests; or a panel of legal members and senior Indigenous members determining the nature of rights or the aggregation that constitutes a society. Again, there may be input from a conference of experts or panel of senior Indigenous people chosen by the parties. As decisions of the tribunal would be binding, rules of natural justice would necessarily apply and applications for judicial review for jurisdictional error could be made to the Federal Court.

The creation of a system capable of tailoring an approach specific to each dispute will be challenging. However, despite any difficulties, the benefits are potentially transformative and are worth pursuing.

Endnotes

1. L Kelly & L Behrendt, *Resolving Indigenous Disputes. Land Conflict and Beyond* (Sydney: Federation Press 2008),112.
2. *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) , [117] (Nicholson J).
3. *Native Title Act 1993* (Cth) s 67.
4. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] 214 CLR 422, [31].
5. *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] 145 FCAFC 442, [2005] FCAFC 135, [78].
6. *Bennell v Western Australia* [2006] FCA 1243 (19 September 2006), (Wilcox J) [424].
7. *De Rose v State of South Australia (No 2)* [2005] 145 FCR 290, [2005] FCAFC 110, [38].
8. *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* ALR 539, [2004] FCA 472; *Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425; *De Rose v State of South Australia (No 2)* 145 FCR 290; [2005] FCAFC 110; *State of Western Australia v Ward* (FC) (2000) 99 FCR 316, [2000] FCA 191; *Moses v State of Western Australia* [2007]160 FCR 148, [2007] FCAFC 78.
9. *State of Western Australia v Ward* (FC) 99 FCR 316, [2000] FCA 191 at [213]
10. C Cunneen, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *The Australian and New Zealand Journal of Criminology.*
11. C Bell, 'Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks' in C Bell & D Kahane (eds) *Intercultural Dispute Resolution in Aboriginal Contexts* (2004) 241, 243.
12. D Dewhurst, 'Parallel Justice Systems' in C Bell & D Kahane (eds) *Intercultural Dispute Resolution in Aboriginal Contexts* (2004) 213, 226.
13. L Behrendt, *Aboriginal Dispute Resolution. A Step Towards Self-Determination and Community Autonomy,* (Sydney: Federation Press, 1995).
14. *See The Judicial Branch of the Navajo Nation* <www.navajocourts.org> (accessed on 5 July 2008).
15. L Kelly & L Behrendt, 'Creating Conflict: Case Studies in the Tension Between Native Title Claims and Land Rights Claims', (2007) 8 *Journal of Indigenous Policy—Indigenous Land: The War on Terra* 73, 92.
16. Ibid.
17. Auty notes that while there is uniformity surrounding these initiatives, they are nonetheless 'insistently individual'. K Auty, 'We Teach All Hearts to Break—But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' (2006) Vol 1 – Special Series, *eLaw Journal* 101, 104 <https://elaw.murdoch.edu.au/issues/special/we_teach.pdf> (accessed 4 July 2008).

Steven Ross

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Neil Ward

Neil Ward is the Living Murray Indigenous Partnerships Project Senior Manager with the Murray–Darling Basin Commission. Neil has more than 20 years' experience working in Australian land management agencies. With the realisation many years ago that meaningful Indigenous involvement was integral to good land management, he has been working since 1990 to increase the level of Indigenous engagement and empowerment in natural resource management. A major focus of his current role with the Murray–Darling Basin Commission is to introduce—in partnership with the Murray Lower Darling Rivers Indigenous Nations—use and occupancy mapping as a tool to assist Indigenous people to articulate their contemporary relationship with the land.

Mapping Indigenous peoples' contemporary relationships to country

The way forward for native title & natural resources management.

By Steven Ross and Neil Ward

Under the umbrella of a 2006 memorandum of understanding, the Murray Lower Darling Rivers Indigenous Nations (MLDRIN) and the Murray–Darling Basin Commission (MDBC) are working together to improve Indigenous peoples' involvement in the management of the Murray–Darling Basin's natural resources.

Throughout Australia there is still general scepticism about the cultural validity of Indigenous people's relationship with their traditional country. However, mainstream Australian society recognises and acknowledges to some extent the cultural base and customary economy of Indigenous people in remote (northern) Australia. Indigenous people's relationship with the land is not so well recognised in settled (southern) Australia—including the Murray–Darling Basin—where the impacts of colonisation have been more pronounced and enduring.

In south-eastern Australia, the pattern of European encroachment and development has resulted in much of the best land being taken, granted or sold by the colonising governments to non-Indigenous Australians. One of the outcomes of this situation is that the possibility of Indigenous communities gaining land through native title claims or having a meaningful role in the management of their traditional lands has been greatly reduced.

In the *Yorta Yorta* case, Justice Howard Olney, of the Federal Court, dismissed the native title claim, concluding that:

> 'The evidence does not support a finding that the descendants of the original inhabitants of the claimed land have occupied the land in the relevant sense since 1788 nor that they have continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to land of their forbears. The facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs.' [1]

Many Indigenous people believe this finding was just an extension of the process of colonisation. To them, the case demonstrated that the oral evidence of elders was devalued in the current legal system. Fundamentally, in the struggle for recognition and land rights, many Indigenous people now feel that they are facing a mainstream Australian society that has been rewarded by colonisation, does not wish to move from the status quo and is not willing to give space to Indigenous people.

The spatial context

The Murray–Darling Basin, the catchment of the Murray and Darling Rivers, covers an area of 1,061,469 square kilometres (14% of the country's total area) and is the agricultural food bowl of Australia. From an Indigenous perspective, the Basin is home to about 40 Indigenous nations and is situated in the heart of the settled region of the country. Based on 2006 census data, the Murray–Darling Basin has a population of just over two million people, of which approximately 70,000 are Indigenous, representing 15% of the national Indigenous population. The 2005–06 Australian Bureau of Statistics Agricultural Census found that 84% of the land in the Murray–Darling Basin is owned by businesses engaged in agriculture. Furthermore, it is estimated that Indigenous people have ownership or rights (known as the Indigenous estate) to less than 0.2% of the area of the Murray–Darling Basin. This figure compares poorly with the figure of about 20% held through Indigenous communal rights and interests by Indigenous Australians across Australia's total land mass. Although much of this land is remote and commercially marginal by mainstream market criteria, it nevertheless has high conservation and cultural value.

Water management

The history of European settlement of the Murray–Darling Basin and the emphasis on water use for increasingly intensive agricultural production has resulted in the over-allocation of water. As a result, the river system has become very seriously degraded. Consequently, the ability of Indigenous people to enjoy and exercise their strong relationship with land and water has been severely compromised.

One of the consequences of the current circumstance is that for Indigenous people, the Murray–Darling Basin is now a place where virtually all the water is allocated for consumptive purposes (eg, water extracted for irrigation of crops, drinking water for farm animals and domestic use for people living along the River Murray and in adjacent towns and cities) and the land is owned or controlled by others.

The MDBC has been working with its partner governments to acquire water through improving the efficiency of the water distribution network and irrigation practices, as well as by purchasing water entitlements on the open market. The water acquired through savings and purchases is then used to create 'environmental flows' aimed at helping restore the environmental health of key flood-dependent ecosystems.

In focusing on the creation of environmental flows to benefit the health of the river system, governments have in recent years understood the requirement to take into account the needs of a multitude of resource users. Considerable effort has been directed towards involving the Basin's communities in the decision-making process, with particular emphasis on the Indigenous communities. MLDRIN believes that one of the major impediments to Indigenous involvement in the Murray–Darling Basin is the false notion in the minds of some natural resource managers and policy makers—reflecting the broader Australian society's view—that the Indigenous population in settled Australia has lost its connection with the land; justifying the 'tides of time' view put by Justice Olney.

Since the 1970s, the predominant avenue followed by governments to involve Indigenous people in natural resource management and decision-making in the Basin has been through the protection of cultural sites, such as shell middens, burial grounds and stone quarries. There is no doubt that for Indigenous people, caring for archaeological sites is an important part of looking after their traditional lands and maintaining their identities, while also providing reference points for the larger picture of their long-term and ancient relationship with the land. However, management of ancient sites alone does not readily translate to the cultural, social and economic aspirations of Indigenous people in the 21st century—particularly when the resources are not available to achieve the level of protection aspired to by Indigenous communities and inferred by the legislation.

Modern land management requires reversing degradation and accepting the concept of 'peopled landscapes' as a fundamental and essential part of a healthy and sustainable environment. Therefore, the knowledge, values and perspectives of local Indigenous people are now seen by progressive natural resource managers as vital to achieving a more comprehensive and holistic approach to land management, and are integral to improving the health of the land—in large measure because approaches based on western science alone have so clearly failed.

However, to erase this incorrect and—in MLDRIN's opinion—'convenient' perception of a disconnected Indigenous population in settled Australia, natural resource managers need to consider more innovative and appropriate ways to involve Indigenous people in the management of land and water.

The Living Murray Indigenous Partnerships Project

MLDRIN and the MDBC have accepted this challenge and have worked together over a number of years on evolving the MDBC's approach to Indigenous engagement. Together, these two organisations have developed and endorsed an approach that respects Indigenous people's traditional relationship with their land, but in a contemporary and realistic context. This approach is based on the Living Murray Indigenous Partnerships Project, which has taken a principle-based approach aimed at achieving consistent and grounded involvement of Indigenous people in the Living Murray's decision-making and planning processes, focusing on their social, spiritual, cultural, environmental and economic interests. A key dimension of the project, in its conceptual phase, was to undertake some form of cultural mapping.

Cultural mapping is a very broad term for spatially representing Indigenous geo-spatial 'subjectivities' and is implemented using a wide range of approaches with various applications and interpretations. In Australia, it has usually referred to the mapping of archaeological sites. In the pursuit to resolve the obvious gaps in understanding and to better explain Indigenous people's contemporary connection to land, the Indigenous Partnerships Project's investigations led to a different version of cultural mapping, employing Canada's 'use and occupancy' mapping methodology.

Use and occupancy mapping

Use and occupancy mapping is a type of survey that utilises a rigorous, well-considered, social-science methodology that has been widely implemented in Canada. It is an environmentally and politically defensible technique that will help Indigenous people document the many ways in which they currently use the land—technical legal constraints aside. MLDRIN anticipates that there is a huge potential for use and occupancy mapping to assist Indigenous leaders in articulating how they would like to see land and water managed to meet their future social, environmental, spiritual and economic aspirations.

One of the fundamental problems with the current manner in which Indigenous people are included in management decision making is that, in order to qualify under the terms determined by native title or land management bureaucracies, often unrealistic claims need to be made about their connections to the land. It is as if they have to be living 'pre-colonially' and must therefore understate their contemporary connections to their land and water. This is not surprising given that native title law in Australia requires claimants to demonstrate that they acknowledge and observe traditional law and custom 'substantially uninterrupted since sovereignty', and that only the laws and customs that existed prior to British sovereignty are appropriately 'traditional' for native title purposes. Therefore, an approach based on use and occupancy mapping, which identifies and validates Indigenous people's contemporary relationships with the land, should go a considerable distance towards ameliorating this predicament by reducing the need to justify a relationship with the land based on pre-colonial status.

MLDRIN and the MDBC hope that use and occupancy mapping will shift the perceptions of non-Indigenous people away from viewing Indigenous people as pre-colonial, and towards an appreciation and understanding of their current and vital relationship to country—and, consequently, assist in defining their rightful role in natural resource management leadership.

Mapping the Murray–Darling Basin

The introduction of use and occupancy mapping to Australia is being undertaken in a carefully considered and planned manner reflecting The Living Murray's Indigenous Partnerships Project's engagement principles, such as utilising informed consent, building capacity to engage, and ensuring a respectful, inclusive approach.

The steps towards introducing use and occupancy mapping have included: developing local expertise (which included a delegation of five Indigenous people meeting with First Nation people in Canada to learn about their use and occupancy mapping); pre-testing the methodology with a small number of traditional owners from two locations along the Murray (the Barmah–Millewa Forests in part of Yorta Yorta country and in Ngarrindjeri country covering the Murray Mouth, Coorong and Lower Lakes); undertaking a pilot mapping project with the Yorta Yorta people; and developing a specific training approach to be implemented in early 2009. The pilot was particularly important because it enabled Indigenous people in Australia to create their own use and occupancy maps, gaining the benefits of participating in the mapping methodology and creating tangible evidence of their relationship with their country.

From a resource manager's perspective, it is relatively easy to see the potential of use and occupancy mapping as a natural resource management communication tool. Through this mapping, an Indigenous community's contemporary relationship with their country can be illustrated. For example, activities like fishing, kangaroo hunting, turtle egg collecting, gathering of weaving plants, camping, and use of spiritual and burial sites can all be shown spatially in a way that can be used in discussing how management could bring about changes on the ground, as envisioned by Indigenous people.

A legal view

The process of introducing use and occupancy mapping has not been without hurdles. One Indigenous nation expressed strong concerns that the new suite of information derived from use and occupancy mapping might prove to be deleterious to a native title claim. This position was respected and it was recognised that different legal contexts applied in Canada and Australia, and so use and occupancy mapping may have differing consequences in the two countries.

Legal opinions were sought from experienced and highly regarded native title lawyers in Australia. The consensus of the legal opinions was that use and occupancy mapping could find wide application in a legal context, ranging from laws with an Indigenous focus, to laws that offer special consideration for Indigenous people, to much broader use in natural resource laws. For example, use and occupancy mapping may help Indigenous people to prepare native title claims, prepare connection reports for native title mediations and identify places and objects of significance for heritage protection purposes.

Use and occupancy mapping also could be used to demonstrate the content of Indigenous custom in cases in which laws permit Indigenous people to carry out an otherwise prohibited activity due to their customs. Such an example would be flora and fauna conservation laws that allow Indigenous people to keep or use plants and animals that would otherwise be protected, where this activity is in accordance with Indigenous tradition or custom.

Furthermore, use and occupancy mapping could provide a standard starting point for legislation that mandates consultation with Indigenous people, and could support Indigenous people's assertion of the rights of minorities under human rights legislation by giving contemporary content to Indigenous customs. Interestingly, with respect to both environmental and natural resource decision-making law and human rights law, the point was made that use and occupancy mapping could be an important tool for cross-cultural communications by helping to provide substance to such currently nebulous concepts as 'cultural values', 'cultural resources' and 'social considerations'. These matters are often required to be protected or considered in catchment and coastal planning laws, including various water allocation regulations.

With respect to native title, the legal view was that although there potentially could be risks under some circumstances, if use and occupancy mapping were built into the collection of Indigenous nations' evidence and the building of their legal case from the outset, then the potential benefits would far outweigh the risks.

In conclusion, the introduction of use and occupancy mapping has required vision and strong leadership from MLDRIN, the Yorta Yorta Nation and the MDBC Living Murray Committee and Executive. Together, it now seems likely that this collaborative effort can contribute to the adoption of a different perspective and a new paradigm of Indigenous involvement in natural resource management—one based on respect for Indigenous people's contemporary relationship with their country.

Endnotes

1. As quoted on appeal in the High Court judgment of Gleeson CJ, Gummow and Hayne JJ, in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 (12 December 2002), [107].

Native title as a cultural phenomenon

By Alex Reilly

The description of native title first articulated in *Mabo v Queensland (No 2)*[1] and reproduced in the *Native Title Act 1993* (Cth) (NTA) required a translation of Aboriginal laws and customs practiced on traditional lands into rights and interests over that land that are capable of recognition by the Australian legal system.

One wonders whether the High Court of Australia could have foreseen just how difficult this translation would prove to be in practice, and what an enormous body of cultural information would be generated in the attempt to perform the translation. In this article, I discuss some of the difficulties that have been faced in performing this cultural translation, and also some of the important and perhaps unexpected benefits for Aboriginal communities from participating in the native title claim process regardless of the success of their claims.

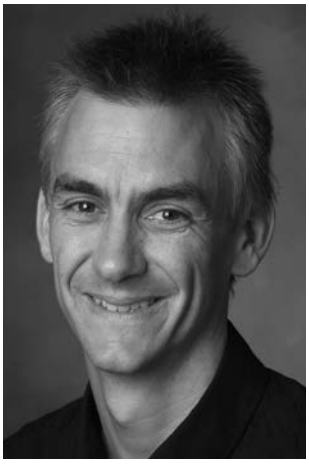
Native title has been described as a 'recognition space'.[2] The recognition space is a way of bridging the gap between Indigenous relationships to land, and common law rights and interests in land. The law starts from the premise that the common law is capable of recognising Indigenous relationships to land, and works out ways to attach legal rights to these relationships through the concept of native title. Through native title, the common law can recognise Indigenous relationships to land even though the common law might not understand the nature of the relationships underpinning those rights.

The task of translating Aboriginal traditional practices into rights recognised under law requires several steps. First, Aboriginal cultural practices need to be presented in a form and in a language that is understandable within a Western cultural framework. Second, having made this translation, the courts convert cultural connections to land into discrete rights and interests in the land. The first of these translations is performed by Aboriginal claimants themselves presenting oral evidence of their connections to land, including the presentation of ceremonies and dreaming stories, demonstration of hunting and cooking practices, revelation of spots on the land which are sacred, and what makes them so, and so on. This evidence is corroborated by evidence of anthropologists, linguists, archaeologists, genealogists, cartographers and historians who are called as expert witnesses to assist the court in the process of translation.

One example of the difficult process of translation can be seen in the determination of claim boundaries. To be accepted for registration, claimants must demarcate the area of land under claim in such a way that the boundaries of the application can be identified.[3] There is a further and separate requirement that the claim contain 'a map showing the boundaries of the area' covered by the application.[4] Since the advent of native title, there has been an ongoing debate among anthropologists and geographers over the possibility of recording the boundaries of Aboriginal lands; a debate from which Aboriginal voices have been largely absent.[5]

Boundaries are a legal necessity in native title, regardless of their role in Aboriginal law and custom. For example, a river might form a boundary to a native title claim, and as such present a clear delineation of what is in the claim area and what is outside it. According to Aboriginal tradition, the river may perform, on the other hand, a completely different function which disturbs the clarity of this boundary. A river might, for example, be considered important due to its role as a shared resource, or a place at which a Dreaming transfers from one Country to the next, or due to its status as a link between people.

The law is open to receiving evidence of traditional laws and customs if it assists in the task of determining native title rights and interests, such as boundaries. Hence, there is great power in marking holiday-time walking tracks on a map, or places of special significance. But what of traditions that do not mark the land? What of relationships or connections that are not experienced spatially or territorially, or if they are experienced in this way, are not capable of being represented on particular territory, even metaphorically? Perhaps not surprisingly, faced with these difficulties, claimants have insisted that courts go out to their traditional lands, to experience the lands through their eyes. There is a hope that the country will reveal itself to judges in a way that does not rely on cartographic representations of claimants' relationship to country. On occasions, judges have expressed how these visits to country to hear evidence have profoundly affected their understanding of claimants' cultural connections to land. Nevertheless, for most claims, boundaries have been transposed on existing topographical maps with the assistance of mapping agencies. They commonly follow existing land tenure boundaries, thus avoiding the need to address the difficult cultural questions about the possibility of constructing boundaries to traditional lands.



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He is a project partner in the Gilbert and Tobin Public Law Centre Indigenous rights, land and governance project and has been a researcher and collaborator on two Australian Research Council projects; one considering the use of Australian colonial history in Indigenous claims to land and compensation, and another developing a legal framework for regional governance for Aboriginal and Torres Strait Islander communities in Australia.

Claimants face a difficult decision of just how much of their culture they are prepared to share in order to establish their connection to land. The more information that claimants share, the greater the chance of convincing the court that the claimants have retained a traditional connection to land.

On occasions, when information is culturally sensitive, or indeed restricted, claimants have asked the courts to receive the information according to particular protocols. For example, where cultural information is gender restricted, claimants have asked that only persons of that gender (including respondents, their lawyers and court staff such as the judge) be present when this information is shared. Faced with such requests, courts have had to make rulings on the reception of evidence which balance the requirements of cultural sensitivity with the right of respondents to know the basis of the claim, in order to put their case in response.

It is a measure of the law's confidence that it believed native title rights and interests could be derived from an interrogation of Aboriginal laws and customs across more than 200 years of Indigenous occupation of land in Australia. The law has not shied away from the task at hand. It has employed the full range of resources known to it. It has modified rules of evidence to accommodate the particular needs of Aboriginal oral testimony, it has employed a full range of relevant experts, and has visited country.

In relation to expert evidence, academics working in the field of Aboriginal studies have been funded through the claims process to conduct detailed research into specific claim areas. Lawyers have assisted claimants to gather cultural information, and clarify dreaming and other stories. These stories have often been written down for the first time as a result of the claims process. Communities have generated art exhibitions which reflect cultural information that has been used in the claims process. For some communities, participation in the claims process itself has been a source of cultural pride and rejuvenation.

Native title judgments are an important historiography of claim areas, and summarise the particular research findings of expert anthropologists, archaeologists, linguists and genealogists. Court files are an extensive source of cultural information, and stand as a testament to the richness of Aboriginal cultures in Australia. They also present an archive for communities to preserve their cultural knowledge, and a resource for future academic study, subject to access rights.

Because of the stringent requirements of continuity of tradition in the proof of native title, on occasions, this wealth of cultural information has not been sufficient to establish a native title claim.[6] On occasions, although the court has accepted that the claimant group are the present Aboriginal owners of claim area, this has not translated into a finding that they have the requisite traditional connection to the claim area to the time of the assertion of sovereignty.

The rejection of native title claims has been a difficult blow for some communities, and the subject of much critical academic and political commentary.[7] This rejection has been particularly difficult when a community has exposed itself through the sharing of sensitive cultural information with the court as part of the claims process. It has been important to distinguish between the strength of a community's on-going cultural practices and relationships to land and the possibility of translating evidence of these practices and relationships into particular native title rights.

From a different perspective, native title has required the non-Indigenous legal system to extend its own cultural boundaries. Native title has seen the extension of property concepts and theory in Australia. For example, in *Wik Peoples v State of Queensland*, the High Court recognised the possibility of the coexistence property rights (native title and other interests) in the same land.[8] *In Yanner v Eaton*, the Court recognised that the State of NSW could not have exclusive property rights to native fauna, allowing for continued traditional hunting practices on State land.[9]

More generally, the recognition of the existence of native title has meant that the Australian legal system has acknowledged a strong degree of legal pluralism in Australia. Aboriginal law can be the foundation of mainstream legal rights. Despite the many limits that have been placed on the practical expression of this recognition, it has profound implications for who we are as a community in Australia.

Endnotes

1. *Mabo v Queensland (No 2)* (1992) 175 CLR. 1.
2. See, among others who have used this concept to explain native title: N Pearson, 'The Concept of Native Title at Common Law' in G Yunupingu (ed), *Our Land is Our Life: Land Rights—Past, Present and Future* (1997); C Mantziaris and D Martin, *Native Title Corporations, A Legal and Anthropological Analysis* (2000), 9; L Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95.
3. *Native Title Act 1993* (Cth) s 62(2)(a).
4. Ibid, s 62 (2)(b).
5. See for example, P Sutton, *Country: Aboriginal Boundaries and Land Ownership in Australia*, Aboriginal History Monograph 3, Aboriginal History Inc, Canberra, 1995.
6. For example, *Yorta Yorta Peoples v Victoria* [1998] FCA 1606.
7. See in particular, commentary surrounding the failure of the *Yorta Yorta* claim.
8. *Wik Peoples v State of Queensland* (1996) 187 CLR 1.
9. *Yanner v Eaton* (1999) 201 CLR 351.

Native title in other lands

By Garth Nettheim

Native title was recognised as an element in Australia's common law, as derived from English law, only as late as 1992. And yet Britain had a long history of recognising the land rights of Indigenous peoples.

Indeed, the Admiralty's instructions to Lt. James Cook in 1768 for his first voyage into the Pacific told him what he should do in the event that he found 'the great south land':

> You are also *with the consent of the natives* to take possession of convenient situations in the country in the name of the King of Great Britain, or, if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors. [Emphasis added].

The expedition reached the east coast of Australia and encountered 'natives' but (for various reasons) did not obtain their consent before claiming possession of the eastern half of the continent. Settlement proceeded at Port Jackson in 1788, and later elsewhere, on the assumption that such consent was not needed.

Yet earlier British colonial expansion had proceeded on the assumption that Indigenous consent was needed. The negotiation of treaties was an important element in the settlement of British colonies in North America. And in 1840 the establishment of the British presence in New Zealand was based on the Treaty of Waitangi.

Apart from the effect of treaties, after the United States achieved independence the Supreme Court in 'the Marshall cases', beginning with *Johnson v McIntosh,*[1] affirmed that the prior territorial rights of Indigenous peoples continued after settlement, though subject to the ultimate power of the government to extinguish that title and to grant land to settlers. As Richard Bartlett has stated:

> 'The common law has developed a uniform jurisprudence upon native title . . . It was the only possible accommodation of the rights of settlers and aboriginal people. It was what pragmatism demanded.'[2]

Bartlett went on to explain that native title was repeatedly affirmed by decisions of the US Supreme Court and formed the basis of law and policy in that country. Canada gave a 'similar pre-eminence' to the concept as recognised in cases such as *Calder v Attorney-General for British Columbia*.[3] In New Zealand, native title was recognised in *R v Symonds*.[4]

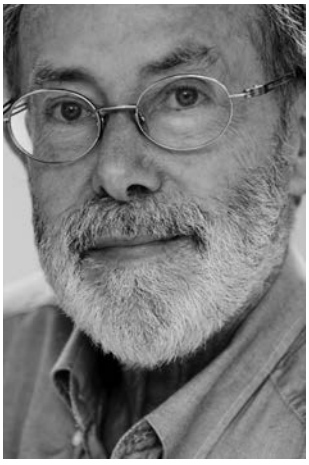
Such precedents were drawn on in the Mabo litigation in Australia. The effect of the decision of the High Court of Australia in *Mabo v Queensland (No 2)* was to bring the common law in Australia into line with the developments elsewhere.[5]

But in the US, Canada and New Zealand native title receives some underpinning from treaties and/or from constitutional provisions. Treaties have not been an aspect of the situation in Australia, and there are limited constitutional provisions to reinforce native title.

One important legislative protection has been the force of the *Racial Discrimination Act 1975* (Cth) in overriding contrary state legislation. This was a critical factor in the success of the *Mabo* litigation. But the Commonwealth Parliament itself has the power to displace the operation of the Act, and it has done so on several occasions.

The Commonwealth Constitution, unlike the constitutions of the USA and Canada, contains very few 'bill of rights' provisions. One which is significant in relation to native title is the guarantee in section 51 (xxxi) of 'just terms' compensation when the Australian Parliament legislates with respect to the acquisition of property.

After the 1992 High Court decision in *Mabo (No 2)* there were strong political pressures from mining companies, farmers and others for the Australian Parliament to legislate to override the recognition of native title altogether, or at least to limit its impact on non-Indigenous interests. It was true that the law on native title as declared by the High Court allowed for the extinguishment of native title by governments, and the history of two centuries of land grants would have extinguished native title in much of Australia. But the effect of the *Racial Discrimination Act* may have been to override the grant of interests to others after it commenced operation.



Garth Nettheim

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Eventually the *Native Title Act 1993* (Cth) (NTA) attempted to achieve a fair balance between Indigenous and non-Indigenous interests. Under the Howard Government, the NTA was subject to major amendments in 1998 to shift that balance more in favour of non-Indigenous interests.

There has also been a body of court decisions, and the effect of some of these, in combination with the legislation, has been to make it more difficult for some native title claims to succeed. Australian courts have tended to feel bound by these developments and less at liberty to follow common law developments elsewhere. There has been increasing emphasis by Indigenous Australians on seeking to advance their goals through negotiated agreements.

But, in the meantime, the *Mabo (No 2)* decision itself has been relied on by courts in other countries such as Malaysia and Belize in achieving their own recognition of native title.

Endnotes

1. *Johnson v McIntosh* (1823) 21 US 240; 8 Wheaton 543; 5L Ed 681.
2. R Bartlett, 'Mabo: Another Triumph of the Common Law' (1993) 15(2) *Sydney Law Review* 178, 181–182.
3. *Calder v Attorney-General for British Columbia* (1973) 34 DLR (3d) 145.
4. *R v Symonds* [1847] NZPCC 387.
5. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

Native title, economic development and the environment

By Neva Collings

Economic development underpins 'development' which is a fundamental human right of all peoples. Yet native title is not conducive to 'development' and is in most cases an inferior form of land title. Other forms of Aboriginal title such as Aboriginal freehold under land rights legislation enables greater opportunity for development outcomes.

There is an often-touted view that economic development is somehow contradictory to traditional land use, and what it means to be Indigenous. There is also a view that development threatens conservation objectives. With the burgeoning recognition of the value of environmental services and stewardship provided by land holders—particularly that provided by Indigenous peoples who have nurtured their lands and territories for millennia—there are emerging commercial opportunities that credit land management practices while achieving conservation objectives and traditional land use. For example, carbon credits, bio-banking, geo-sequestration, bio-mass power generation and wildfire management all provide opportunities for Aboriginal people. Whether Indigenous landholders can benefit economically from such opportunities, and develop economically, depends on the full recognition of legal title to their traditional lands and not just the native title rights.

Aboriginal and Torres Strait Islander peoples control between 16 and 20% of Australia under a range of land title regimes.[1] Nearly all (98.6%) of Indigenous owned or controlled land is in very remote areas of Australia.[2] This represents a significant proportion of the Australian land and seascape. The stumbling block is that exclusive possession and legal title to land is required to enter into commercial agreements, and to reap economic benefits. This is not always the case with native title where a bundle of rights approach means traditional owners may only be granted limited access to their traditional lands.

It is imperative that legislation conferring land rights and native title be reformed to enable Indigenous people to take full advantage of the emerging environmental land management opportunities as a springboard for economic development. It is also important for economic development to be firmly grounded on principles of self-determination and sustainable development, which will have the dual outcomes of economic development and environmental conservation. Presently this is stymied by native title due to the length of time it takes to obtain native title determinations and the non-exclusive nature of many determinations.

The different categories of title throughout Australian jurisdictions include freehold title, inalienable freehold title, lease-in-perpetuity and land held in trust.[3] State and territory jurisdictions have legislation that confers freehold land rights, such as the New South Wales *Aboriginal Land Rights Act (1983)*. The federal *Native Title Act 1993* (Cth) (NTA), however, confers native title, which is a communal title. This article will explore the limitations of native title.

Economic development

The Australian government has pledged that 'economic development will lie at the heart of a Rudd Labor Government's efforts to improve the lives of Indigenous Australians', by 'helping individuals and communities achieve economic self-reliance'.[4] It 'supports the efforts of Aboriginal people to use their land for economic development'.[5] However, the scope for native title to contribute to economic development is itself problematic.

Before exploring in summary the key problems with native title in the context of economic development, it is important to appreciate the basis of the right to development, which is articulated in the United Nations Declaration on the Right to Development. Article 1 states that:

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to *participate in, contribute to, and enjoy economic, social, cultural and political development*, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

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Development is not limited to material and economic outcomes but encompasses the constant improvement of the wellbeing of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of resulting benefits. As noted by Tom Calma, the Aboriginal and Torres Strait Islander Social Justice Commissioner:

> Development is not only a human right in itself, but also defined by reference to its capacity as a process to realise all other human rights. ...The goal of social and economic development is relevant to self-determination; because social wellbeing and economic prosperity will sustain independent, self-determining Indigenous communities.[6]

Taking into consideration all facets of development—economic, social, cultural and political—payments for land management services provided by Indigenous landholders can achieve the range of outcomes and complement conservation outcomes. Yet Indigenous peoples have sometimes been marginalised from development outcomes on their lands.[7]

Land management environmental services

There is significant potential for Indigenous landholders to obtain income from land management practices, but which generally require exclusive possession due to the commercial nature of such dealings. The potential for Aboriginal land to be part of the climate change mitigation response is noted in the *Garnaut* final report, which proposes that 'government regulation or acquisition may be justified where land is of significant conservation value, or where certainty of outcome is required'.[8] Approximately 10% of the Indigenous estate, or 2% of Australia's landmass, is within the boundaries of the National Reserve System.

Already, traditional owners in the Northern Territory have entered into land management agreements that involve burning practices. The West Arnhem Fire Management Agreement (WAFMA) was signed in August 2006. It creates a partnership between Darwin Liquefied Natural Gas (DLNG), the Northern Territory Government, the Northern Land Council (NLC) and traditional owners from coastal Maningrida to the headwaters of the Katherine and Mann rivers. Under the WAFMA, the Northern Territory Government will contract the NLC and traditional owners to implement the fire management strategy.[9] DLNG will provide about $1 million per year for 17 years to the traditional owners for this purpose.[10]

Traditional owners and land managers will carry out the burning, which will also be monitored by the Tropical Savannas CRC.[11] WAFMA is designed to offset about 100,000 tonnes of greenhouse gas emissions per year.[12] Unchecked wildfires create about 40% of greenhouse gas emissions in the Northern Territory.[13]

The Commonwealth Government is currently considering the introduction of a Carbon Pollution Reduction Scheme (CPRS) that would commence in 2010. At present, the CPRS green paper

> canvasses options and preferred approaches on issues [related to the scheme], such as which industry sectors will be covered and how emission caps will be set. It also includes ways to address the impacts on Australian households, emissions-intensive trade-exposed industries and other strongly affected sectors.[14]

The green paper makes it clear that 'only forestry activities that are recognised in Australia's Kyoto Protocol accounts will be eligible for inclusion in the [scheme]'.[15] This is likely to significantly restrict the capacity of Indigenous people to be involved in the scheme. In addition to this restriction, the government has stated that 'emissions from the uncontrolled burning of savannah in the tropical north of Australia, which can be reduced through controlled burning management practices',[16] are unlikely ever to be included in the scheme. Later in the report, seemingly in contradiction to the previous point, the government states its commitment 'to facilitating of the participation of Indigenous land managers in carbon markets and [a promise to] consult with Indigenous Australians on the potential for offsets from reductions in emissions from savanna burning and forestry opportunities under the scheme'.[17] It is therefore unclear what opportunities will arise for Indigenous Australians from CPRS at this time, although this is likely to become clearer later this year when draft legislation is introduced.

Avoided deforestation is also an issue that the international community is exploring and is being discussed at international climate meetings in Poznan in December 2008 and Copenhagan in 2009. If, internationally, avoided deforestation becomes part of the formal international mechanisms under the United National Framework Convention on Climate Change, it is likely to become part of any CPRS over time. This could provide considerable opportunities for Indigenous land rights, including native title land.

Native title reform

Native title over lands and waters is the legal recognition of the rights and interests of Aboriginal and Torres Strait Islander people over lands and waters according to their traditions, laws and customs. The purpose of the NTA is to protect and recognise native title by providing a national scheme for its recognition and protection, and to provide for the coexistence of native title with the national land management system.[18]

The scope for traditional owners of native title lands to develop by taking advantage of emerging commercial land management opportunities requires a land base. Legal title is considered critical to leveraging outcomes from property. Yet this is obstructed by the onerous requirements of proving native title

and thwarted by the bundle of rights approach that may not confer exclusive possession.

However, the Aboriginal and Torres Strait Islander Social Justice Commissioner has described the native title claim process as being in 'gridlock' given the length of time to process claims, and the energy, emotion and resources involved.[19] On the rare occasion a native title claim succeeds, the rights and interests are limited over native title lands. Furthermore, common law recognition through litigation is difficult.

One of the primary difficulties with the native title claim process is that claimants have to show that they have existed as a community continuously since British acquisition and continued to observe their laws and customs.[20] To add a further layer of difficulty, traditional laws and customs are transmitted orally, which means evidence may be inadmissible or restricted under the hearsay rule. This test means it is far more difficult to prove native title in south-east and southern parts of Australia, where dispossession occurred first.

Supposing a native title claimant succeeds in proving native title by continuous connection, native title is either partially or fully extinguished by non-Indigenous interests over the land under claim. If only partially extinguished, this partial access to land does not enable traditional owners to derive economic benefits from the land because it does not allow for co-existence and diversity of interests to be pursued over a parcel of land.[21] As noted by the Aboriginal and Torres Strait Islander Social Justice Commissioner in his 2006 N*ative Title Report:*

> The economic effect of the legal test for extinguishment is to permit the expansion of non-Indigenous interests in land and erode the Indigenous land base.[22]

The formulation of native title as a bundle of rights was established in the High Court in *Western Australia v Ward*.[23] Therefore, native title is not title to land as such, but a bundle of rights that can each be extinguished. This means that native title holders may be granted rights to do only certain things on land, not gain the title to the land itself. Clearly, this limits development because economic development is not possible without legal title. Exclusive possession is possible, but only where there is no extinguishment by other interests on the land.

Without title to land, 'there is no entitlement to participate in the management of land, control access to land, or obtain benefit from the resources that exist on the land'.[24] Furthermore, classifying native title rights as 'traditional' inhibits the economic use of such rights, and stifles the development trajectory Indigenous peoples are entitled to pursue as of right. Indigenous people have to rely on a combination of different systems of state land rights to ensure economic development occurs.

Endnotes

1. Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005*, Productivity Commission, (2005), [11.26].
2. Ibid.
3. The intricacies of economic development and native title have been comprehensively documented and critiqued by the Aboriginal and Torres Strait Islander Social Justice Commissioner.
4. Australian Labor Party Policy Statement, *Indigenous Economic Development (2007)*, <www.alp.org.au/download/now/indig_econ_dev_statement.pdf>, (accessed 17 December 2008).
5. Ibid.
6. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, (2007) 31.
7. Ibid, 115.
8. R Garnaut, *The Garnaut Climate Change Review Final Report (2008)*, Ch 15.
9. M Scrymgour (Minister for Environment, Northern Territory) 'Multi-Million Dollar Arnhem Land Greenhouse Gas Fire Sale' *Media Release*, 24 August 2006 <http://newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=283&d=5> (accessed 17 December 2008).
10. Tropical Savannas CRC (2006) 'Fire Agreement to Strengthen Communities' in Issue 33, *Savanna Links*.
11. Tropical Savannas CRC (2006) *Annual Report 2005–06*.
12. Northern Territory Government (January 2007) 'Fire plan leads the world' Issue 8, *Common Ground*.
13. Tropical Savannas CRC (2007) 'Eureka win for Arnhem Land fire project', in Issue 34, *Savanna Links*.
14. Department of Climate Change *Carbon Pollution Reduction Scheme Green Paper* (2008), available at <www.climatechange.gov.au/greenpaper/index.html.
15. Ibid, Summary, 17.
16. Ibid, Summary, 19.
17. Ibid, Summary, 38.
18. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, (2008) ch 1.
19. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006* (2007).
20. *Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58.
21. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006* (2007), 37.
22. Ibid, 39.
23. *Ward v Western Australia* (1998) 159 ALR 483.
24. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006* (2007), 40.

A captive of statute

By Lisa Strelein

We have heard it so many times that it becomes rehearsed: the starting point for any native title application under the *Native Title Act 1993* (Cth) (NTA) is the definition of 'native title' in s 223.[1]

This provision sought to encapsulate the concept of native title first outlined in *Mabo's* case,[2] in particular as explained by Justice Brennan:

> Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land.[3]

This was translated by the drafters of the NTA to read:

> **223(1)** The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.

Many expected that this language would allow the development of common law native title to continue while establishing structures under the NTA for identification, protection and extinguishment.[4]

However, an increasingly explicit distinction has been drawn by the courts between common law native title and native title under the NTA—particularly in the interpretation of s 223, which has not only come to define 'native title', but also the requirements of proof. The result is a voluminous amount of case law, much of it surrounding the meaning of one word: 'traditional'.[5]

The distinction between statutory and common law native title remains abstract, as no 'common law' native title case has proceeded through the courts since *Yanner* in 1999.[6] The structure of the NTA provides a process for the registration of claims and procedural rights for claimants prior to a determination. Any activity by government or private interests that may affect native title must go through the procedures set out in the NTA.[7] This procedural regime has effectively 'captured' the whole native title market.

Definitional struggle

The distinction between common law native title and native title under the NTA emerged in the influential decisions of the High Court in 2002, *Ward* and *Yorta Yorta*. In *Ward* the Court was critical of arguments that began with a common law analysis based on *Mabo* and *Wik*:[8]

> No doubt account may be taken of what was decided and what was said in *[Mabo]* when considering the meaning and effect of the NTA... It is, however, of the very first importance to recognise two critical points: that s 11(1) of the NTA provides that native title is not able to be extinguished contrary to the NTA and that the claims that gave rise to the present appeals are *claims made under the NTA for rights that are defined in that statute.*[9]

The Court ascribed to the common law the role of 'recognition', as encapsulated in s 223(1)(c),[10] or more correctly, the limits of recognition under the common law.[11]

Yorta Yorta was concerned with the proof of native title, but again affirmed the primacy of the NTA. Focusing on s 223(1)(a), the Court embarked on a painful statutory interpretation exercise that added numerous interpretive layers to the terms of the provision, beginning with the word 'traditional':

> A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the *Native Title Act*, 'traditional' carries with it two other elements in its meaning.[12]

These two elements were focused on continuity: first, the age of the laws and customs, tracing their origins prior to the assertion of British sovereignty; and second, their current observance and continuous existence and vitality, substantially uninterrupted, since sovereignty.[13] The Court also introduced the idea of a 'normative society' to clarify the source of laws and customs',[14] recognising that laws and customs may change and adapt but must find their source in a pre-British-sovereignty normative society. Most recently in *Bennell*, the Full Federal Court added the proviso that continuity be demonstrated 'for each generation'.[15]

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Section 223(1)(b) also has work to do. In *Bennell*, the Full Federal Court explained that the:

> genesis of the term 'connection' in the NTA is to be found in Brennan J's judgment in *Mabo (No2)*. We refer to it, not simply because it highlights 'the opaque' drafting of s 223(1)(b); but also because it has had influence in shaping aspects of the content of the connection requirement in this Court's jurisprudence on s 223(1).[16]

In *Ward*, the High Court had held that only those rights and interests that give rise to a connection to land and waters are protected by the NTA.[17]

The opening provision of s 223 has also received judicial attention. In *De Rose (No 2)*, the Federal Court noted that:

> It is hardly likely that the traditional laws and customs of Aboriginal peoples will themselves classify rights and interests in relation to land as 'communal', 'group' or 'individual'. The classification is a statutory construct, deriving from the language used in *Mabo (No 2)*.[18]

In *Bennell*, the majority were uncomfortable with the idea of 'communal title' and argued that:

> The definitional focus in s 223(1)(a) on 'rights and interests', not only contrives the inquiry to be undertaken in determining a claim of native title, it also is reflected in what is required in an order of the Court [under s 225] when making a determination that native title exists in relation to a particular area.[19]

This 'statutory typology' made the Full Court in *Bennell* question earlier presumptions that native title will normally be communal title.[20] They drew a further distinction between statutory and common law native title as property, and stressed that '*Mabo (No 2)*, though the herald of the NTA, was a decision at common law'. While I disagree with the Full Court's analysis, it is further confirmation that statutory native title is seen as something different from—and less than—common law native title.

Judicial constraints and choices

Given the genesis of native title as a common law concept, the approach taken by the courts seems extraordinary, reading significant import into words that were part of a barely developing Australian jurisprudence at the time they were captured in the statute, while ignoring the rich traditions of common law native (or Aboriginal) title both prior to and since *Mabo*.

In the months that followed *Mabo*, the High Court was heavily criticised for overt judicial activism.[21] The recognition of native title, and the protection afforded by the *Racial Discrimination Act 1975* (Cth), forced the hand of Parliament to clarify how native title would be accommodated into Australia's existing framework. By and large, the then Labor Government publicly accepted the decision.[22] However, the response of the incoming Liberal Government to the *Wik* decision was quite different, with the public criticism of the High Court by senior Ministers leaving no doubt that they did not trust the Court with the development of native title law and would legislate to restrict the recognition and protection of native title.[23]

Australia's tradition of judicial deference may have impelled the High Court to withdraw once the legislature had asserted its intentions by statute.[24] But where does the Court cross the line between judicial deference and judicial impotence? Sadly, the courts historically have used the separation of powers to shield the acts of the legislature against Indigenous populations.[25]

Further, jurisdiction over the NTA is vested in the Federal Court, rather than in the ordinary courts—where common law native title would reside. The Federal Court can only carry jurisdiction ascribed to it by statute.[26] Its work is almost exclusively in the application and interpretation of Commonwealth legislation. This statutory bias in the Federal Court's work creates a presumption that the external reference points should not be required if the words of the statute are clear.

Rules of interpretation

The problems created by the courts' statutory native title approach are compounded by their failure to take into account common law traditions for the interpretation of legislation or agreements concerning Indigenous peoples. These rules have their roots in the common law protection of the rights of citizens against arbitrary exercises of power by the state, especially in relation to property.[27] The *Mabo* decision, while recognising the power of the state to take the property of Indigenous peoples, held that the exercise of such power 'must reveal a clear and plain intention'.

> This requirement, which flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land, has been repeatedly emphasized by courts dealing with the extinguishing of the native title of Indian bands in North America. ...It is patently the right rule.[28]

As a compromise, accommodating 200 years of the exercise of legislative and executive power without regard for Indigenous interests, *Mabo* held that extinguishment can occur by necessary implication (eg where inconsistent rights have been granted to another), despite the absence of an express intention to extinguish the rights of Indigenous peoples.[29]

The NTA Future Act regime was introduced to ensure that native title would not be extinguished without due process. But the principle of clear and plain intention and beneficial construction has been lost. Even if we can accept that native title has become a statutory right, the common law rules regarding the interpretation of legislation should not have been ignored.

The High Court recently considered the power of the Crown to compulsorily acquire the private rights of one group of citizens—in this case the native title holders—for the immediate benefit of another private citizen.[30] The majority did not venture outside the four walls of the statutes involved. Relying on the 'freehold equivalence' tests in the NTA, the Court dealt with this issue as simply a matter of two indistinguishable competing interests in land.[31] Ironically, the majority judgments point to the purpose of the future act provisions to avoid racial discrimination, yet the result achieved that very effect.[32]

In dissent, Justices Kirby and Kiefel considered the common law tradition that protects the rights of individuals from arbitrary deprivation by the state. Justice Kirby went further, emphasising that the unique nature of native title and the special connection to the land it seeks to protect requires additional rigours.[33] He referred to his discussion of the applicable principles in *Ward*:

> Because the statutory concepts of 'recognition' and 'extinguishment' are themselves ambiguous or informed by the approach of the common law, this Court should adopt, and consistently apply, several interpretative principles in giving those concepts meaning. First, it should observe the principle that, in the case of any ambiguity, the interpretation of the statutory text should be preferred that upholds fundamental human rights rather than one that denies those rights recognition and enforcement. Secondly, so far as is possible, it should take into account relevant analogous developments of the common law in other societies facing similar legal problems. Thirdly, a clear and plain purpose is required for a statute to extinguish property rights, particularly where the legislation purports to do so without compensation.[34]

By treating native title the same as any other fungible property right, the law threatens the cultural survival of Indigenous peoples.

Common law native title

It is certainly worth exploring whether a nascent common law native title remains claimable in Australia, and at some point it may be necessary to consider the difference between the two forms of native title in order to determine compensation.[35] A common law claim will raise two issues. First, what impact has the NTA had on common law native title? That is, may the common law still develop separately, or does the NTA permanently change the common law of native title? Second, would the Courts take a different view if they were working without the statutory net of the NTA? While the Courts attribute the current standards of proof to the carefully chosen words of the legislature, it has been their choices in the interpretation of 'tradition', for example, that has worked against the rights of native title claimants. Despite the risk of leaving native title in the hands of the courts, Noel Pearson has suggested repeal of s 223, to make clear that native title should be defined by the common law.[36]

Common law native title has a long history that did not commence with *Mabo*—it begins as far back as *Calvin's Case* and the *Case of Tanistry* in 1608,[37] which began to define the common law treatment of the rights of the peoples of English colonies and conquests.[38] Drawing on the development of these doctrines in various jurisdictions, the High Court rejected the historical legal position in Australia.

> A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[39]

However, the work to overcome the injustice of the legal heritage in Australia did not end with *Mabo*.

Common law native title has developed in other jurisdictions since *Mabo*. While *Mabo* has been influential internationally, there are also differences that may lead to a more just native title doctrine. The requirements of proof, the nature of the right and who holds it, as well as the powers of government have all been scrutinised,[40] and decisions relied upon by the High Court in *Mabo* have been considered and reconsidered elsewhere.[41]

The common law may provide a more principled approach to native title than we currently see in NTA cases.[42] By focusing on the terms of the statute, the Courts have ignored the history of the native title doctrine. In so doing, they ignore—and thus perpetuate—the racially discriminatory aspects of native title that require remedy. Likewise, this approach has meant that developments in international law, which might have been taken into account in developing the common law, have been ignored.

The promise of *Mabo*, that Australian law must keep step with the international community and not be frozen in an age of racial discrimination, has been thwarted by the NTA.[43] Many parties to native title claims are looking for alternatives, including some state governments—which must say something about the adequacy of statutory native title as a remedy. It is time to review Australia's approach to the recognition and protection of the rights of Indigenous peoples to their lands, both by the courts and the legislature, to ensure a remedy that is based on equality of peoples and the special place that land holds for Indigenous peoples.

Endnotes

1. See *Bodney v Bennell* [2008] FCAFC 63 (Bennell), [137]. See also *De Rose v South Australia (No 2),* [2005] FCAFC 110 (8 June 2005) *(De Rose (No 2))* [28]; *Commonwealth v Yarmirr; Yarmirr v Northern Territory* [2001] HCA 56 (Yarmirr), [7]; *Western Australia v Ward (2002)* 213 CLR 1, [16] (Ward); *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, [32] *(Yorta Yorta).*

2. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 *(Mabo).*

3. *Mabo* [83]. Brennan J's judgment was concurred with by Mason CJ and McHugh J, and thus became the preferred one.

4. N Pearson (Paper presented to the Federal Court of Australia's Native Title User Group, Adelaide, 9 July 2008).

5. See generally S Young, *The Trouble with Tradition: Native Title and Cultural Change* (2008).

6. *Yanner v Eaton* (1999) 201 CLR 351, regarding the use of native title as a defence to a criminal prosecution.

7. This is known in the legislation as the 'Future Act' process. The *Native Title Act 1993* (Cth) s 11 renders invalid any act that does not go through this process.

8. *Wik Peoples v State of Queensland* (1996) 187 CLR 1.

9. *Ward,* [16] (emphasis added); reiterated at [25].

10. *Ward,* [20].

11. *Ward,* [21].

12. *Yorta Yorta,* [46]–[47].

13. The minority judgment disagreed that the NTA gave a particular meaning to traditional other than its ordinary meaning: *Yorta Yorta,* [101] and [117] (per Gaudron and Kirby JJ).

14. *Yorta Yorta,* [49]–[50].

15. *Bennell,* [72], affirming Mansfield J in *Risk v Northern Territory of Australia* [2006] FCA 404, [97(c)]; cf *Gumana v Northern Territory (2005)* FCA 50, 195 (Selway J).

16. *Bennell,* [163] (references omitted).

17. *Ward,* [64]. As a result 'incorporeal rights', such as the safeguarding of knowledge about sites, are outside the protection of the NTA: *Ward,* [59]–[61].

18. *De Rose (No 2),* [38].

19. *Bennell,* [146].

20. *Bennell,* [150], citing *Mabo,* 62 (per Brennan J); 109–110 (per Deane and Gaudron JJ); cf the decision of the Full Court shortly after in *Western Australia v Sebastian* [2008] FCAFC 65.

21. See P H Lane, 'The Changing Role of the High Court' (1996) 70 *Australian Law Journal* 246.

22. See, eg, Prime Minister P Keating, 'The Redfern Address' 10 December 1992. See also *Western Australia v The Commonwealth* (1995) 183 CLR 373.

23. R McClelland, 'In Defence of the Administration of Justice: Where is the Attorney-General?' [1999] *UTS Law Review* 13.

24. A Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* at 163. See generally, L Strelein, 'The 'Courts of the Conqueror': The Utility of the Courts for the Assertion of Indigenous Self-determination Claims', (2000) 5(3) *Australian Indigenous Law Reporter* 1–23.

25. See L Strelein, 'The 'Courts of the Conqueror': The Utility of the Courts for the Assertion of Indigenous Self-determination Claims', (2000) 5(3) *Australian Indigenous Law Reporter* 1–23.

26. *Federal Court of Australia Act 1976* (Cth) s 19(1).

27. See eg *Clissold v Perry* (1904) 1 CLR 363, 373; *Balog v ICAC* (1990) 169 CLR 625, 635–36; *Davis v The Commonwealth* [1988] HCA 63; *Coco v the Queen* (1994) 179 CLR 427, 436–37; *Bropho v Western Australia* (1990) 171 CLR 1, 18.

28. *Mabo* [75]. Brennan J cites cases from those jurisdictions, including *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d), 210; R v Sparrow (1990) 70 DLR (4th) 385, 401; *United States v Santa Fe Pacific Railroad Co.* (1941) 314 US 353, 354; *Lipan Apache Tribe v United States* (1967) 180 Ct Cl 487, 492; *Te Weehi v Regional Fisheries Officer* (1986) 1 NZLR 680, 691–2.

29. *Mabo,* [81].

30. See *Werribee Council v Kerr* (1928) 42 CLR 1, 33.

31. NTA s 24MD(6A) gives native title holders 'the same' procedural rights as a holder of any ordinary title.

32. For more detail, see L Strelein, 'Compulsory Acquisition powers: *Griffiths v Minister for Lands Planning and Environment* [2008] HCA (15 May 2008)' Native Title Research Unit Resource page: <ntru.aiatsis.gov.au/research/griffiths/compulsory_acquisition_griffiths.pdf> at (17 December 2008).

33. *Griffith,* [109]. Kirby J pointed to comparative treatment of Indigenous titles in Canada and New Zealand where the significance of the land to the group has an impact on the legal principles to be applied: [107]–[108].

34. *Ward,* [557]. See also *Griffith,* [107].

35. See for example, compensation contemplated under 'confirmation provisions' under the NTA, s 23J, Division 2B.

36. N Pearson (Paper presented to the Federal Court of Australia's Native Title User Group, Adelaide, 9 July 2008).

37. *Calvin's Case* (1608) 77 ER 377; *The Case of Tanistry* (1608) Davis 28; 80 ER 516. See also *Blankard v Galdy* (1693) 90 ER 1089; *Campbell v Hall* (1774) 98 ER 848, 895–6.

38. See K McNeil, *Common Law Aboriginal Title* (1989).

39. *Mabo,* [42].

40. Most recently, *Tsilhqot'in Nation v British Columbia 2007* BCSC 1700. See also *R v Adams* [1996] 3 SCR 101; *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *R v Marshall; R v Bernard,* [2005] 2 SCR 220.

41. See eg *Calder v British Columbia* (AG) [1973] SCR 313 and *Guerin v The Queen* [1984] 2 SCR 335.

42. At the forefront of Canada's approach, for example, are principles of non-discrimination and reconciliation; accordingly, the 'court must take into account the perspective of the aboriginal people claiming the right . . . while at the same time taking into account the perspective of the common law': *R v Van der Peet* [1996] 2 SCR 507, [30] (per Lamer CJ), repeated in *Delgamuukw,* [80].

43. *Mabo,* [41]–[42].

Indigenous land use agreements

A Canadian model

By Peter D Fox

Comparative public policy is a central component of any thorough law reform initiative. Australia and Canada have shared a similar legal philosophy in their recognition of Indigenous land rights, and both countries have begun to address the issues of land management and resource development in the absence of clearly reconciled claims to title. These initiatives also support larger public policy goals aimed at closing the socioeconomic gap between Indigenous and non-Indigenous people in both countries. On the subject of interim Indigenous Land Use Agreements, Canberra may draw useful lessons from the constructive environment currently fostered in British Columbia, Canada.

In contrast to other provinces in Canada, the settlement of Crown and Aboriginal (First Nation) land interests in British Columbia was only partially completed through treaty negotiations. The Douglas treaties were established in Vancouver Island, and treaties were settled with the 'Treaty 8 First Nations' in North-Eastern British Columbia, but the majority of the Province's 200 First Nations never moved beyond an era of litigation.[1] The British Columbia Treaty Commission was established in 1992 to conclude this process, and today roughly two-thirds of the Province's Aboriginal population is represented at ongoing treaty negotiations.

In reality, the treaty process may take decades to complete. Standoffs occur when the Provincial Government insists on the extinguishment of Aboriginal title and when First Nations assert full title rights to their land under *Delgamuukw v British Columbia*.[2] In the interim period of unsettled claims, British Columbia has charged its Integrated Land Management Bureau with engaging First Nations to secure access to Crown land and natural resources. Two milestone decisions in the Supreme Court of Canada—the *Haida Nation v British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* cases—guide this process with the establishment of a government duty to consult First Nations on matters that affect their interests.[3]

Strategic land and resource planning

Ninety-two per cent of British Columbia's land base is still owned by the public and administered by land managers. This ensures that land is not used without first addressing the interests of all stakeholders. Access to Crown land is vital to the Province's economy, which includes agriculture, forestry, aquaculture, mining and other activities that affect First Nations. The Integrated Land Management Bureau developed a Strategic Land and Resource Planning (SLRP) program in the early 1990s to address unresolved rights and title issues. The program's aim was to 'ease land use conflict among resource agencies, industry, First Nations and the public, and to deliver the Province's Protected Areas Strategy'.[4] It purports to engage First Nations and more efficiently address social, economic and environmental goals than previous site-by-site processes.

SLRPs and/or Strategic Land Use Agreements operate by supporting government-to-government engagements with First Nations. SLRPs may cover large regions, sub-regions, watersheds, landscapes, marine/coastal, or terrestrial geographic areas. The plans provide a forum for First Nations groups to build trust with government and other stakeholders. They define suitable land and resource use by introducing scientific and social information regarding the significance of land and resource values, biophysical capability of land and resources, human demand for accessing resources, and the impacts of alternative land and resource uses. SLRPs strive to resolve land and resource conflicts by identifying and addressing potential land and resource management issues. Lastly, SLRPs provide investment certainty through clear, structured objectives.

During the initial planning years, most First Nations invited to take part in the SLRP process chose merely to observe. Further provisions of funding, provided for in the *New Relationship Trust Act*, SBC 2006,[5] encouraged greater First Nations participation in various Land Resource Management Plans (LRMPs) and joint initiatives. In recent years there has been increased LRMP engagement with First Nations, resulting in coordinated plans that address First Nations' interests.

A government-to-government agreement in south-western British Columbia provides a recent SLRP example. In April 2008, British Columbia and the Lil'wat Nation signed a land use agreement with the Ministry of Agriculture and Lands,[6] completing the Province's Sea-to-Sky LRMP. The agreement will support the development, protection and management of nearly 800,000 hectares of land in a fast growing area of the Province. About 31,000 people reside in the plan area.

Peter Fox

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British Columbia's 'New Relationship'

Canada's landmark 'duty to consult' cases resounded deeply in British Columbia, and active engagement with First Nations was an important first step in a new Aboriginal agenda. Various government discussions with the First Nations Leadership Council culminated in a new vision of reconciliation and recognition of Aboriginal and Crown titles within the Province. Under the Transformative Change Accord of November 2005, the Provincial Government no longer acts unilaterally when accessing Crown land if the interests of Aboriginal populations are affected.[7]

Moving beyond the conventional consultation process, British Columbia's 'New Relationship' includes dialogue and written agreements that foster coordinated engagement with First Nations from the outset, joint delivery of planning processes, funding for First Nations participation, collaborative decision making, and consideration of specific First Nation interests.[8]

The Ministry of Aboriginal Relations and Reconciliation, established by the government of British Columbia, is directed to implement the 'New Relationship', in addition to negotiating treaties and other agreements with First Nations. Accordingly, First Nations entirely outside the treaty process—roughly 40%—may still engage government in negotiations about resource and land use within their traditional territories. Informal discussions build relationships, resolve conflicts, and address territorial concerns. Provincial government line agencies or government ministries take part individually.[9]

British Columbia has committed itself to a 'relationship based on respect, recognition and accommodation of aboriginal title and rights', including a constitutionally guaranteed 'inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions'.[10] Prominently outlined within this vision of sustainable land and resource development are the following goals:

1) achieving First Nations self-determination through the exercise of their Aboriginal title, including realising the economic component of Aboriginal title, and exercising jurisdiction over the use of land and resources through their own structures; and
2) ensuring that land and resources are managed in accordance with First Nations laws, knowledge and values, and that resource development is carried out in a sustainable manner, including the primary responsibility of preserving healthy land, resources and ecosystems for present and future generations.[11]

A joint management committee of senior officials identifies issues, allocates resources, directs working groups, and engages the Government of Canada.

Recent land use agreements signed by British Columbia include:

- Forest and Range Opportunity agreements with 130 First Nations, providing $165.5 million in revenue;
- A revenue-sharing framework for the development of Crown lands within traditional Osoyoos Indian Band territory to expand a ski resort area; and
- An economic benefits agreement between the Province and four Treaty 8 First Nations regarding natural resource development and land use in northeast British Columbia.[12]

Conclusion

The result of British Columbia's 'New Relationship' agenda is a collaborative environment that moves beyond the government's duty to consult. The provinces promote collective decision making with First Nations and shared benefits from the development of Crown land. Aboriginal people partake meaningfully in land and resource management and address social and economic disparities in the process.

The Australian Government is currently embarking on its own reform agenda to address structural problems affecting the interests of Aboriginal and Torres Strait Islander people. If it aspires to help close its own socioeconomic gaps through voluntary land use and management agreements with Indigenous peoples, it may benefit from consideration of the British Columbian model.

Endnotes

1. L Brownsey, Deputy Minister of British Columbia's Ministry of Aboriginal Relations and Reconciliation, 'New Relationship: Reconciling Aboriginal Rights', Networked Government (2005), at <www.networkedgovernment.ca/cp.asp?pid=135> (11 November 2008).

2. In *Delgamuukw v British Columbia* (1997) 3 S.C.R. 1010, the Supreme Court of Canada definitively recognised the survival of legal Aboriginal title, including full ownership of natural resources. Justice Antonio Lamer famously proclaimed, '[l]et us face it, we are all here to stay'.

3. *Haida Nation v. British Columbia (Minister of Forests),* (2004) 3 S.C.R. 511; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),* (2004) 3 S.C.R. 550.

4. History of Strategic Land and Resource Planning, BC Integrated Land Management Bureau, at <http://ilmbwww.gov.bc.ca/slrp/history.html> (11 November 2008).

5. The *New Relationship Trust Act* provided $100 million to fund long-term capacity-building for First Nations.

6. *Province and Lil'wat sign historic land-use agreement,* News Release, 11 April 2008, at <http://www2.news.gov.bc.ca/news_releases_2005-2009/2008AL0014-000516.htm> (11 November 2008).

7. Transformative Change Accord, 25 November 2005, at <www.ubcic.bc.ca/files/PDF/TransformativeChangeAccord_112505.pdf> (11 November 2008).

8. For an example of a recent engagement protocol, see Engagement Protocol, Her Majesty the Queen, Regional District of East Kootenay, and Ktunaxa Nation, 24 April 2008, at <http://ilmbwww.gov.bc.ca/slrp/files/ktunaxa_protocol.pdf> (11 November 2008).

9. Examples of negotiations conducted outside of the treaty process are cut-off claims by First Nations, which arise from the excision of sections of reserves that occurred after the 1913–16 McKenna-McBride Commission. Specific claims are based on the alleged failure of the government to meet either the terms of an existing agreement or a legal obligation of one party to act in the best interests of another.

10. 2005 Statement of Vision, BC Integrated Land Management Bureau, at 1, at <http://clients.tmnewmedia.com/1489/external/srmp/documents/new_relationship.pdf> (11 November 2008).

11. Ibid, 2.

12. Links to Key Agreements on Land and Resources can be found at <www.gov.bc.ca/arr/treaty/key/default.html> (11 November 2008).

Looking abroad

Models of just compensation under the *Native Title Act*

By Tracy Nau

Under the *Native Title Act 1993* (Cth) (NTA), compensation for the loss or impairment of native title must generally be provided on 'just terms'.

Tracy Nau

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In the absence of statutory criteria or benchmarks in Australia of just forms and measures of compensation, it is difficult to determine what just compensation means and whether it is being achieved through the multiple pathways for compensation under the NTA.[1] In particular, the NTA regime offers insufficient guidance in relation to restitution, while placing significant focus upon monetary compensation.

The UN *Declaration on the Rights of Indigenous Peoples* (the Declaration) provides a useful framework for assisting judges, arbitrators and negotiating parties to determine just compensation by setting out rights and remedies that are mutually considered appropriate. The remedies also carry significant weight because they are internationally recognised as the protections most likely to address Indigenous concerns.[2] In particular, the Declaration highlights the importance of land restitution as compensation for the loss or impairment of native title. Land restitution has also been emphasised in a number of international settlement agreements.

In this article, I will consider the role of land restitution in 'just terms compensation'. I will make particular reference to the guidance provided by the Declaration and other international settlement agreements.

Current understanding of 'just' compensation

The current understanding of just terms compensation for the loss or impairment of native title is shaped by the NTA, case law and negotiated agreements. However, these offer limited guidance on what constitutes just terms compensation.

The NTA specifies only a preference for monetary compensation as limited by the freehold value of the land.[3] This is subject to the compensation being on 'just terms', the meaning of which is undefined.[4] While requests for non-monetary compensation may be made, the NTA only requires these requests to be considered, not fulfilled.[5]

Case law on the issue of native title compensation is also limited, with *Jango v Northern Territory of Australia (Jango)* being the first and only instance in which the Federal Court has considered and dealt with an application for native title compensation.[6] In *Jango*, Sackville J offered some insight into the issue of compensation, but only insofar as indicating that the spiritual significance of the site 'bears on the quantum of compensation payable'.[7] Through its arbitration on compensation for future acts, the National Native Title Tribunal has also offered some insight. However, this has been limited to clarifying that compensation may exceed the freehold value by reference to just terms, with land value being—at best—a starting point 'for want of a better yardstick'.[8]

Previously negotiated agreements have the potential to provide more substantive guidance in terms of ideas on possible forms and measures of compensation. However, they are not currently useful as precedents because their full details are not generally made public, and they are not independently scrutinised for adequacy.

Parties entering into negotiations, therefore, face significant uncertainty about what forms and measures of compensation will satisfy the just terms requirement. While the lack of precedent in terms of cases or previous agreements has the advantage of facilitating flexibility in negotiations,[9] it fails to establish a robust framework within which native title holders can assert their rights. This leads to the need for benchmarks or criteria to assist parties to derive appropriate forms and measures of just terms. Such guidelines should be developed with reference to the Declaration and international examples of settlement agreements, as these provide useful insights into how just terms may be met.

Focus on monetary compensation

In Australia, there is a widespread recognition that compensation for loss or impairment of native title rights assessed only in accordance with the freehold market value of land, is not necessarily 'just'. This is because freehold market value fails to take into account the subjective cultural and spiritual based value of the land to the Indigenous people, and does not truly reflect the losses of past, current and future generations.[10] Yet the just terms entitlement suggests that native title holders should be compensated for these cultural and spiritual losses.

Much of the Australian literature on native title compensation focuses upon ways of quantifying these cultural and spiritual aspects so as to incorporate them into a monetary

compensation framework.[11] For instance, many authors have sought to import personal injury and property law concepts such as special value and solatium into the native title context, as a means of valuing these intangible losses. Such compensation would then form a special head of value that 'tops up' the freehold market value to satisfy just terms. This would appear to be contemplated by the NTA regime, as clarified by Sackville J in *Jango*.[12]

However, these valuation proposals have been criticised as 'ethnocentric and reductionist'.[13] Arguably, they have limited applicability in the native title context because they are fundamentally based on western market value propositions. Furthermore, the delineation of native title rights and interests into material and non-material aspects is rather artificial because the spiritual, economic, social and corporeal aspects of Indigenous life are indivisible and intrinsically connected with the land.[14]

In any case, there is no indication that the loss or impairment of native title can be adequately compensated for in monetary terms, even if spiritual or cultural losses are taken into account. On the contrary, monetary compensation has many limitations. For instance, it cannot directly re-establish traditional relationships with the land or redress the lost opportunity to exercise culturally important roles such as site monitoring and protection.[15] It is also unsustainable, providing little support to the critical processes of reconciliation, reconstruction and development of Indigenous communities. Indeed, Justice Woodward has argued that 'cash compensation in the pockets of this generation of Aborigines is no answer to the legitimate land claims of a people with a distinct past who want to maintain their separate identity in the future.[16]

Shifting the focus to restitution

According to Justice Woodward, 'the only appropriate direct recompense for those who have lost their traditional lands is other land—together with finance to enable that land to be used appropriately'.[17] This reflects the desire of many Indigenous people to obtain compensation in the form of land acquisition. Land acquisition is important to Indigenous people in terms of helping to rebuild stable communities and stable future generations.[18] Land acquisition also supports the process of reconciliation as the Indigenous people acquire something they can call their own which no-one can take away.

As stated above, the NTA expresses a preference for monetary compensation.[19] This fails to reflect the preference of many Indigenous people to obtain compensation in the form of access or ownership to equivalent land. While not all Indigenous people seeking native title compensation will desire land restitution, the NTA arguably shifts the focus of negotiations upon monetary compensation measures, away from consideration of alternative and perhaps more appropriate measures such as land access and acquisition.

Unlike the NTA, the Declaration expresses a preference for restitution in the form of the grant of 'comparable land' as compensation for government takings of land. Comparable land is described in terms of 'lands, territories and resources equal in quality, size and legal status'. Only if restitution is not possible, should an alternative means of compensation that is just, fair and equitable be considered.[20] The Declaration therefore provides clear recognition of the importance of land rights to sustaining Indigenous communities.[21]

Jurisdictions such as South Africa, New Zealand and Canada provide useful illustrations of how restitution can be integrated into a native title framework.[22] South Africa explicitly recognises that land rights and reconciliation go hand in hand by adopting a land reform policy that acknowledges the need to make land restitution for forced dispossessions.[23] In New Zealand and Canada, settlements have been negotiated that return land to the Indigenous people. For instance, the Ngai Tahu Settlement returned a major mountain[24] to the tribe and several lakes to Maori ownership and the Nisga'a Treaty transferred 2,000 square kilometres of Crown land to the Nisga'a Nation.[25]

Relevant considerations in awarding restitution

In negotiating land restitution, governments and Indigenous groups should work together to determine the type of land and title appropriate to enable the individual groups to maintain their cultures and meet their immediate and long term needs.[26] The type of land most needed may depend upon the major occupations currently held by group members or those which the group hopes to expand into.[27] It may also depend upon the land that is considered spiritually or culturally significant to the Indigenous people.[28]

In considering the type of title that should be granted, parties should collaborate to determine whether it is collective or individual title that is useful, as general notions of ownership may not necessarily coincide with Indigenous peoples' beliefs about possession. The grant of land will usually need to be combined with other measures including financial assistance to promote the self-sufficiency of Indigenous people so that they can rebuild their communities and develop their land to meet their long term needs. For instance, the Nisga'a Treaty established a water reservation for the Nisga'a Nation to explore hydro power opportunities on rivers and streams.[29] In New Zealand, the Waitangi Fisheries Settlement provided $150 million and granted 20% of the new species fishing quota to the Maori to promote Maori commercial fishing.[30] Such arrangements allow Indigenous people to retain traditional rights while being able to adapt their culture to participate in the broader economy.[31]

To ensure that Indigenous communities are able to promote their development in accordance with their aspirations and needs, parties should also provide a means by which they can participate in relevant decision making.[32] For instance in New Zealand, the Waitangi Fisheries Settlement secured greater Maori representation on statutory bodies responsible for fisheries management, making them more accountable to the Maori and giving the Maori greater control and input over fisheries management.[33]

Engaging continuous dialogue

A central premise of this article is that native title compensation should include a greater focus on land restitution. However, not all Indigenous groups will share the same concerns. Discussions with Indigenous groups are therefore necessary to determine what form restitution could take, and where redress can be more adequately achieved by alternative forms of compensation.[34]

For instance, granting title to mining lands will have no value to the Indigenous people if their primary concern is environmental protection of land and resources. Accordingly, an alternative agreement to involve the Indigenous people in ongoing environmental planning is likely to serve their interests better than any grant of land title.[35] This was the case for the Cree in Canada whose sustainable development concerns over Canadian forestry practices in its territory were addressed by Quebec with an amendment of its forestry regime in the Cree territory to accommodate traditional Cree lifestyles.[36]

The focus, therefore, must be upon establishing a continuous dialogue between Indigenous groups and the national government to uncover Indigenous needs and determine the appropriate remedies to redress those needs. The government and Indigenous groups should also expand their discussion to determine, on an ongoing basis, the adequacy of compensation terms and conditions.[37] This is important to ensure equity within the native title group over time.[38]

Conclusion

Statutory criteria or benchmarks need to be developed to provide greater assistance to judges, arbitrators and negotiating parties in deciding the terms of just compensation for the loss or impairment of native title. These guidelines should recognise that land restitution has an integral role to play in providing just terms compensation, particularly when offered in conjunction with financial assistance and other measures that promote the self-sufficiency of the Indigenous people. This is because land restitution can more directly redress the cultural and spiritual losses of the Indigenous people and provide critical support to the processes of reconciliation, reconstruction and development of Indigenous communities. In developing these guidelines, the government should draw upon the framework provided by the Declaration and the insights gained from settlement agreements achieved in Canada and New Zealand.[39] The Indigenous people will then be able to employ these guidelines as a commanding tool for ensuring that concerns such as land rights and self-sufficiency are given the attention they deserve.

Endnotes

1. Compensation can be provided through Indigenous Land Use Agreements, right to negotiate procedures, arbitration through the National Native Title Tribunal and determinations by Federal Court.

2. United Nations General Assembly (2007) *Declaration on the Rights of Indigenous Peoples* UN Doc A/61/L.67. See, V Prasad, 'The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations' (2008) 9 *Chicago Journal of International Law* 297, 322.

3. *Native Title Act 1993* (Cth) ss 51(5), 51A.

4. Ibid, ss 51(1), 53(1).

5. Ibid, s 51(6)(a).

6. *Jango v Northern Territory of Australia* [2006] FCA 318, See also T Jowett and K Williams, '*Jango*: Payment of Compensation for the Extinguishment of Native Title' (2007) *Land, Rights, Laws: Issues of Native Title* Vol 3 Issues Paper No 8, 2.

7. It should be noted that these comments were only obiter: *Jango v Northern Territory of Australia* [2006] FCA 318, [517].

8. *Northern Territory of Australia/Bill Risk on behalf of the Larrakia People; Tibby Quall on behalf of the Danggalaba Clan/Phillips Oil Company Australia* [1998] NNTTA 11.

9. DE Smith, 'Valuing Native Title: Aboriginal, Statutory and Policy Discourses about Compensation' (2001) *Centre for Aboriginal Economic Policy Research* Discussion Paper No 222, 30.

10. Ibid, 32.

11. Ibid, 3; J Litchfield, 'Compensation for Loss or Impairment of Native Title Rights and Interests: An Analysis of Suggested Approaches (Part 1)' (1999) 18 *Australian Mining and Petroleum Law Journal* 253, 257–63.

12. *Jango v Northern Territory of Australia* [2006] FCA 318, [517]; B Keon-Cohen, 'Compensation and Compulsory Acquisition Under the Native Title Act 1993' (2002) 28(1) *Monash University Law Review* 17, 24.

13. DE Smith, 'Valuing Native Title: Aboriginal, Statutory and Policy Discourses about Compensation' (2001) *Centre for Aboriginal Economic Policy Research* Discussion Paper No 222, 32.

14. Ibid, 32.

15. *Carriage v Duke Australia Operations Pty Ltd* [2000] NSWSC 239, [13], [15]; S Phillips, 'Enforcing Native Title Agreements: *Carriage v Duke Australia Operations Pty Ltd' (2000) 5 Indigenous Law Bulletin* 14–16.

16. DE Smith, 'Valuing Native Title: Aboriginal, Statutory and Policy Discourses about Compensation' (2001) *Centre for Aboriginal Economic Policy Research* Discussion Paper No 222, 38. Justice Woodward's comments were made in the Aboriginal Land Rights Commission inquiry which led to the enactment of the *Aboriginal Land Rights Act 1976* (NT).

17. Ibid, 38.

18. See eg, Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), Pt 4 Ch 14.

19. The *Native Title Act 1993* (Cth) states in s 51(5) that compensation should consist only of money, unless the native title claimants make a request under s 51(6) for non-monetary compensation.

20. United Nations General Assembly (2007) *Declaration on the Rights of Indigenous Peoples* UN Doc A/61/L.67, art 28(2).

21. M Ferch, 'Indian Land Rights: An International Approach to Just Compensation' (1992) 2 *Transnational Law and Contemporary Problems* 302, 321; V Prasad, 'The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations' (2008) 9 *Chicago Journal of International Law* 297, 312–13, 318.

22. It should be noted however, that the land restitution policy in South Africa provides restitution for the dispossession of a broader range of land rights than just 'customary law' interests.

23. S Dorsett, 'Making Amends for Past Injustice: Restitution of Land Rights in South Africa' (1999) 4(23) *Indigenous Law Bulletin* 67.

24. ie, Aoraki Mt Cook on the South Island. This was a symbolic gifting to the Ngai Tahu tribe who would gift the mountain back to the nation: *Ngai Tahu Claims Settlement Act 1998* (NZ), s 16.

25. The Ngai Tahu Settlement was finally reached in 1998 while the Nisga'a Treaty was reached in 1999 in Canada.

26. V Prasad, 'The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations' (2008) 9 *Chicago Journal of International Law* 297, 319–320.

27. Ibid, 319.

28. DE Smith, 'Valuing Native Title: Aboriginal, Statutory and Policy Discourses about Compensation' (2001) *Centre for Aboriginal Economic Policy Research* Discussion Paper No 222, 39.

29. *Nisga'a Final Agreement* (1999); R Glindemann and D Bursey, 'Compensation and Native Title Rights in Australia and Aboriginal Rights in Canada: An Overview' (2001) 20(3) *Australian Mining and Petroleum Law Association Journal* 286, 294–95.

30. Waitangi Tribunal, *The Fisheries Settlement Report 1992* (1992), Ch 1.

31. V Prasad, 'The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations' (2008) 9 *Chicago Journal of International Law* 297, 307.

32. United Nations General Assembly (2007) *Declaration on the Rights of Indigenous Peoples* UN Doc A/61/L.67, art 18.

33. Waitangi Tribunal, *The Fisheries Settlement Report* 1992 (1992), Ch 1.

34. V Prasad, 'The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations' (2008) 9 *Chicago Journal of International Law* 297, 316–17.

35. Ibid, 321.

36. R Glindemann and D Bursey, 'Compensation and Native Title Rights in Australia and Aboriginal Rights in Canada: An Overview' (2001) 20(3) *Australian Mining and Petroleum Law Association Journal* 286, 294–95; 'Agreement in Principle between Le Gouvernement Du Quebec and the Cree of Quebec' (2002) 7(1) *Australian Indigenous Law Reporter* 15.

37. V Prasad, 'The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations' (2008) 9 *Chicago Journal of International Law* 297, 297–98.

38. DE Smith, 'Valuing Native Title: Aboriginal, Statutory and Policy Discourses about Compensation' (2001) *Centre for Aboriginal Economic Policy Research* Discussion Paper No 222, 41.

39. The Rudd government has recently expressed its support for the Declaration and is seeking the views of the Aboriginal and Torres Strait Islander Social Justice Commissioner, among other stakeholders including Indigenous individuals and organisations, on matters relating to how Australia should formally indicate its support for the Declaration.

Commission News

Privacy Inquiry

The Privacy Inquiry was one of the largest in the Australian Law Reform Commission's 33 year history, involving a massive consultation strategy and culminating in a three volume, 2694 page final report, entitled *For Your Information: Australian Privacy Law and Practice* (ALRC 108, 2008). The ALRC received 585 submissions during the Inquiry process and the final report includes 295 recommendations for reform.

ALRC 108 was tabled in the Commonwealth Parliament on 11 August 2008 and on the same day was launched at the ALRC offices by the Hon Senator John Faulkner, Special Minister for State and Cabinet Secretary, and the Attorney-General, the Hon Robert McClelland MP. The launch was well attended by the Privacy Inquiry Advisory Committee Members, the ALRC's stakeholders and the media.

The Report received widespread coverage nationally from television, radio and print media, both in terms of the Federal Government's response to the Report, and the effect the key recommendations may have on specific industries and the community generally, if implemented.

Since the Terms of Reference were received on 31 January 2006, well over 700 articles have appeared in the media, focussing on various key areas of the Privacy Inquiry including: children; credit reporting; health; data breach notification; emerging technologies and creating a private cause of action for serious invasion of privacy.

The Federal Government will now consider the ALRC's recommendations for reform in two stages. Stage One—over the next 12 to18 months—will consider a single set of privacy principles, credit reporting and health regulations and education concerning new technology. Stage Two will look at the removal of exemptions and at data breach notifications. Harmonising of Commonwealth, state and territory privacy laws and the recommendations relating to the Office of the Privacy Commissioner will be considered concurrently.

Secrecy Inquiry

On 5 August 2008, the Attorney-General announced a new inquiry into Secrecy Laws. The Terms of Reference ask the ALRC to focus on:

- the importance of balancing the need to protect Commonwealth information and the public interest in an open and accountable system of government;
- the increased need to share information within and between governments, and with the private sector; and
- achieving more comprehensive, consistent and workable laws and practices in relation to the protection of Commonwealth information.

The ALRC released an Issues Paper *Review of Secrecy Laws* (IP 34) on 9 December 2008, posing 63 questions aimed at identifying issues of concern to stakeholders and possible approaches to reform. The Issues Paper has seven chapters examining:

- the context for secrecy provisions, relevant definitions and possible options for reform;
- the history of government secrecy in Australia, and the number and location of secrecy provisions in Commonwealth legislation;
- what kinds of activity are regulated;
- the manner in which exceptions and defences are formulated;
- the different types of penalties that apply;
- the manner in which breaches are handled and investigated, and the role of bodies responsible for overseeing and monitoring the information-protection strategies of Australian Government agencies; and
- the relationship between federal secrecy laws and other federal laws that deal with handling of information, such as privacy, freedom of information and archives legislation.

The Secrecy team began preliminary consultations with key stakeholders in September 2008 for the release of IP 34 and further consultations are planned for February 2009.

The consultation strategy for the Secrecy Inquiry incorporates a talking secrecy phone-in, in early February and the establishment of a Talking Secrecy online discussion forum (http://talk.alrc.gov.au) that will run for the course of the Inquiry.

The objective of the website is to generate discussion and elicit ideas and feedback about the issues raised during the course of the Inquiry—and to provide information about the Inquiry in an accessible manner.

Formal submissions in response to IP 34 closed on 19 February 2009. A more detailed Discussion Paper—which will contain preliminary proposals for reform for community consideration and discussion—is planned for release in May 2009.

Welcome Sabina Wynn– new ALRC Executive Director

In July, the ALRC farewelled Alan Kirkland, who, after almost four years at the ALRC, has taken up the position of Chief Executive Officer, Legal Aid (NSW). Sabina Wynn joined the ALRC as its new Executive Director. Sabina has worked for most of her career in the Australian film industry, most recently as the Director of Industry and Cultural Development at the Australian Film Commission. She has a strong interest in governance, management and communications, with particular focus on using online strategies for increasing access and building relationships.

Kirby Cup 2009

The Kirby Cup is a competition for Australian law students designed to encourage them to engage in the process of law reform. The Kirby Cup is sponsored by the ALRC and the Australian Law Students Association (ALSA). To enter, teams of two students are required to provide a written submission (maximum 15 pages) on a topic of law reform decided upon each year by the ALRC. Based on these submissions, up to three teams are chosen as finalists and are asked to make oral presentations on their papers as part of ALSA's annual conference. A winning team is then selected and the team members' names added to the Kirby Cup trophy. Extracts from the winning submission are published in *Reform* and on the ALRC's website.

In 2009, the topic for the Kirby Cup competition is 'animal welfare law reform' and the question is:

> What are the key issues that arise from the present federal regulatory framework for animal welfare? In considering appropriate law reform recommendations, assess whether Codes of Practice for animal welfare provide a reliable and satisfactory mechanism for regulating animal welfare; or whether a national Animal Welfare Act or harmonisation of State/Territory legislation would be more appropriate.

The 2009 ALSA conference will be held in Brisbane from 13–19 July 2009. An extract from the 2008 Kirby Cup winning submission, by Barbara Townsend and Karlo Tychsen from the University of Newcastle, is published in this issue of *Reform*.

Past Reports Update

ALRC 102—Uniform Evidence Law

On 27 November 2008, the Australian Senate passed the *Evidence Amendment Act 2008* (Cth). The Act implements most of the recommendations in *Uniform Evidence Law* (ALRC 102, 2005), except for those relating to a professional confidential relationships privilege, and the application of the Act to the preliminary proceedings of courts.

One of the primary objectives of the review of the Uniform Evidence Act scheme was to further the harmonisation of the laws of evidence throughout Australia. On 15 September 2008, the *Evidence Act 2008* (Vic) received assent. The Act is based on the provisions of the Model Uniform Evidence Bill (the 'Model Bill'), which incorporates almost all of the recommendations of ALRC 102.

The *Statutes Amendment (Evidence and Procedure) Act 2008* (SA) amends the *Evidence Act 1929* (SA) in relation to the way evidence is taken in sexual offence proceedings, and from other vulnerable witnesses, including children. Some of the amendments are consistent with recommendations in ALRC 102, for example, the adoption of a provision similar to s 275A of the *Criminal Procedure Act 1986* (NSW) sets out a comprehensive and detailed list of inappropriate questions a court must disallow in civil and criminal matters (Recommendation 5–2).

ALRC 99—Genes and Ingenuity

In *Genes and Ingenuity: Gene Patenting and Human Health* (ALRC 99, 2004), the Terms of Reference directed the ALRC to consider—with a particular focus on human health issues—the impact of current patenting laws and practices related to genes and genetic and related technologies on: research and its subsequent application and commercialisation; the Australian biotechnology sector; and the cost-effective provision of healthcare in Australia.

In *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, 2003), the ALRC and the National Health and Medical Research Council (NHMRC) suggested that gene patenting would be a suitable topic for a fresh inquiry under dedicated Terms of Reference. Around the same time, health officials in Australia and overseas were expressing growing concern about the implications of gene patents and licences for the cost of and access to healthcare—especially in relation to tests commonly used to isolate and detect mutations in two genes (BRCA1 and BRCA2) that may indicate a predisposition to breast and ovarian cancer.

In Australia, Genetic Technologies Limited (GTG) claims the rights to these patents and associated methods through its licence arrangements with the US company Myriad Genetics. With public attention focused on the ALRC inquiry, GTG announced in 2004 that it would not enforce its licence rights in Australia as 'a gift to the Australian people'. However, on 11 July 2008, GTG (under new management) made an announcement to the Australian Stock Exchange that it now intends to enforce its licence rights to the BRCA1 and BRCA2 patents. This has caused considerable consternation in DNA testing laboratories located in public hospitals across Australia—and their parent state and territory health departments—which now believe that

their activities may come under legal challenge. On 12 November 2008, Senator Bill Heffernan, Liberal Senator for NSW, announced the establishment of an Australian Parliament Senate Inquiry into human gene patents. The Senate Standing Committee on Community Affairs will inquire into the granting of patent monopolies in Australia over human and microbial genes and non-coding sequences, proteins and their derivatives. Senator Heffernan first raised this issue in the Senate on 16 October 2008 where he questioned the commercialisation and monopolisation of cancer susceptibility genes like BRCA1 and BRCA2.

On 24 November 2008 the new Board of Directors of GTG, which largely replaced the previous Board, announced a formal review of the company's approach to enforcement of its BRCA testing rights. On 2 December 2008, the company announced that it was reverting immediately to 'its original decision to allow other laboratories in Australia to freely perform BRCA testing'.

ALRC 96—Essentially Yours

Recommendation 12 of *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, 2003) stated:

> The Standing Committee of Attorneys-General (SCAG) should develop a model criminal offence relating to non-consensual genetic testing, for enactment into Commonwealth, state and territory law. Criminal liability should attach to any individual or corporation that, without lawful authority, submits a sample for genetic testing, or conducts genetic testing on a sample, knowing (or recklessly indifferent to the fact) that the individual from whom the sample has been taken did not consent to such testing.

In April 2007, the SCAG requested that the Model Criminal Law Officers Committee (MCLOC) consider the merits of a draft model offence to criminalise non-consensual genetic testing. On 7 November 2008, the Minister for Home Affairs, the Hon Bob Debus MP, released a Discussion Paper for public consultation which examines the issue of non-consensual genetic testing and proposes draft model offences.

In July 2004, the Productivity Commission completed a review of the *Disability Discrimination Act 1992* (Cth). As a part of the review, the Productivity Commission supported Recommendation 9–3 from ALRC 96—to amend the definition of 'disability' in the Act to clarify that the legislation applies to discrimination based on genetic status. The Australian Government has accepted the recommendations of the ALRC and the Productivity Commission on this issue. On 18 July 2008, the Government announced that it will introduce legislative amendments to the *Disability Discrimination Act* accordingly.

ALRC 85—Australia's Federal Record

The *Archives Amendment Act 2008* (Cth) will implement a number of recommendations in *Australia's Federal Record: A Review of the Archives Act 1983* (ALRC 85, 1998), including:

- the insertion of an objects clause (Recommendation 1);
- amendment of the definition of 'record' to include 'recorded information in any form' (that is, to include electronic form) (Recommendation 24); and
- amendments that introduce the concept of 'in the care of Archives'. Central to the concept is the recognition that National Archives of Australia will not always be the best repository for particular resources. A number of recommendations in ALRC 85 supported this regime.

ALRC 64—Personal Property Securities

In May 2008, the Australian Government released for public comment an exposure draft Personal Property Securities Bill to establish a single national law government security interests in personal property, as recommended in *Personal Property Securities* (ALRC 64, 1993). On 12 November 2008, the Australian Parliament Senate referred the exposure draft of the Personal Property Securities Bill 2008 to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report by 24 February 2009.

ALRC 37—Spent Convictions

In *Spent Convictions* (ALRC 37, 1987) the ALRC recommended that a Commonwealth statute should be enacted making it unlawful to discriminate on the basis of spent convictions in areas relating to employment, in the provision of goods, services, and in the availability of facilities. Although the focus of the reference was on Commonwealth laws and practices, the Commission recommended that the states and territories be encouraged to adopt a similar approach. On 8 November 2008, it was announced that the Commonwealth and State Attorneys-General have agreed to release a model Bill and discussion paper detailing options for national laws to spent minor criminal convictions.

For Your Information: Australian Privacy Law and Practice

By Professor Les McCrimmon

The ALRC's final report in its Privacy Inquiry was sent to the Attorney-General of Australia, the Hon Robert McClelland MP, on Thursday 29 May 2008. The report, entitled *For Your Information: Australian Privacy Law and Practice* (ALRC 108), consists of 11 parts, 74 chapters and 295 recommendations for reform. The three volume, 2,694 page report is the largest ever produced by the ALRC. It also is the product of the largest consultation program ever undertaken by the ALRC.

During the course of the 28-month Inquiry, the ALRC held approximately 250 meetings with individuals, public sector agencies, privacy commissioners in Australia and overseas, private organisations, privacy and consumer groups and peak industry associations. The ALRC also undertook six youth workshops, three public meetings (in Melbourne, Sydney and Coffs Harbour), a two day 'Privacy Phone-in' and numerous roundtables with key stakeholders. Finally, the ALRC received 585 submissions during the course of the Inquiry.

The following outlines some of the key recommendations contained in the Report:

- Eleven Privacy Principles should replace the existing Information Privacy Principles and the National Privacy Principles. The new principles, referred to in the Report as the Unified Privacy Principles (UPPs), will apply to the Commonwealth public sector and the private sector. Existing state and territory laws currently applying to private sector organisations will be excluded by the operation of the *Privacy Act 1988* (Cth).

- There should be greater harmonisation of Australian privacy law, through the adoption of the UPPs by state and territory privacy laws applying to the state and territory public sector. Such laws also should replicate key provisions in the federal *Privacy Act*—for example, in relation to health privacy regulations and key definitions.

- The number of exemptions in the *Privacy Act* should be reduced. In particular, the small business, employee records, registered political parties and political acts and practices exemptions should be removed.

- To foster compliance with the provisions of the *Privacy Act*, the enforcement powers of the Privacy Commissioner should be increased, for example, to allow the Commissioner to:

  - » require a Privacy Impact Assessment to be carried out if a new Australian Government initiative has a significant impact on the handling of personal information;
  - » decline to investigate a complaint if the Privacy Commissioner deems the complaint to be frivolous, or the complaint is being handled by an approved External Dispute Resolution scheme;
  - » audit organisations for compliance with the privacy principles and other provisions of the *Privacy Act*;
  - » issue a notice to comply to an agency or organisation following an own motion investigation, where the Privacy Commissioner determines that the agency or organisation has engaged in conduct constituting an interference with the privacy of an individual; and
  - » commence proceedings in the Federal Court or the Federal Magistrates Court for an order to enforce the notice to comply.

- The *Privacy Act* should be amended to include a new Part on data breach notification. If an agency or organisation becomes aware that specified personal information has been acquired by an unauthorised person and the agency, organisation or the Privacy Commissioner believes that such acquisition may give rise to a real risk of serious harm to an individual, the agency or organisation should be required to notify the affected individual of the unauthorised acquisition.

- The credit reporting provisions in the *Privacy Act* should permit the inclusion of the following items of personal information, in addition to those currently allowed to be held in credit information files:

Professor Les McCrimmon is a full-time Commissioner at the Australian Law Reform Commission and was Commissioner-in-charge of the Privacy Inquiry

    - » the type of credit account opened (for example, mortgage, personal loan, credit card);
    - » the date on which each credit account was opened;
    - » the current limit of each open credit account;
    - » the date on which each credit account was closed; and
    - » after the Australian Government is satisfied that there is an adequate framework imposing responsible lending obligations in Commonwealth, state and territory legislation, an individual's repayment performance history.

- A statutory cause of action for a serious invasion of privacy should be provided for in federal legislation. To establish liability under such a cause of action, the claimant must show that, in the circumstances, he or she had a reasonable expectation of privacy and the act or conduct complained of is highly offensive. In determining whether an individual's privacy has been invaded, the court also would have to take into account whether the public interest in maintaining the claimant's privacy outweighs other matters of public interest—including the interest of the public to be informed about matters of public concern and the public interest in allowing freedom of expression.

For Your Information was tabled in the Australian Parliament on 11 August 2008. On the same day it was launched publically at the ALRC offices by the Hon Senator John Faulkner, Special Minister for State and Cabinet Secretary, and by the Attorney-General of Australia. The launch, which was well attended by media representatives, Privacy Advisory Committee members and others who had been involved in the Inquiry, received widespread television, radio and print media coverage.

When launching the report, Senator Faulkner indicated that the Australian Government would consider the ALRC's recommendations in two stages:

- Stage 1 – legislation within 12 to 18 months (from 11 August 2008) addressing:
    - » one set of privacy principles;
    - » credit reporting and health regulations; and
    - » new technology.
- Stage 2:
    - » removal of exemptions;
    - » statutory cause of action for a serious invasion of privacy; and
    - » mandatory data breach notification.
- Concurrent:
    - » harmonisation of Commonwealth, state and territory privacy laws;
    - » recommendations relating to the Office of the Privacy Commissioner; and
    - » public education concerning the implications on privacy of developing technology.

The Privacy Inquiry was a mammoth undertaking. Through the dedication and hard work of the ALRC Commissioners and staff, and the Privacy Inquiry team in particular, the Australian Government and other interested stakeholders have a blueprint for the reform of privacy law. *For Your Information* is a report of global significance, and addresses in detail the challenging privacy issues facing Australians.

Balancing secrecy and openness

Plugging leaks and allowing flows

By Isabella Cosenza

That there is an inherent tension between the principles of open and accountable government, and the operation of secrecy laws, is not a startling or new observation. How such a tension should be reconciled, however, presents immediate and novel challenges.

It is axiomatic that Commonwealth information needs to flow within and between governments and to the private sector, but it is undesirable and detrimental for certain information to be leaked. How to prevent simultaneously the under- and over-flow of Commonwealth information, requires a nuanced grip on the information tap. The challenge of regulating the flow is intensified by the flood of information collected, generated and held by government that is also subject to laws regulating privacy, freedom of information, archiving, and duties of fidelity and loyalty.

Sir Anthony Mason, when a Justice of the High Court of Australia, stated nearly three decades ago that 'it is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action'.[1] The information tap should not be closed so tightly as to deprive individuals of their implied constitutional freedom to communicate about political matters, or to allow the benefits of 'whole-of-government' approaches to policy making, integrated service delivery, and cross-agency investigations to go unquenched. Equally, the information pipeline needs to be plugged to preclude leaks which will, for example, compromise the defence of Australia, endanger the lives of intelligence operatives or protected witnesses, or result in the disclosure of information considered sacred by Indigenous people.

The Australian Law Reform Commission (ALRC) is currently considering the types of information that should be protected by secrecy laws, the circumstances in which it is appropriate for secrecy laws to apply, the defences that should be available, and the consequences of breaching such laws. This follows receipt by the ALRC of Terms of Reference from the Attorney-General of Australia to review options for ensuring a consistent approach across government to the protection of Commonwealth information, balanced against the need to maintain an open and accountable government through providing appropriate access to information. The ALRC is directed to consider relevant laws and practices relating to the protection of Commonwealth information, including the scope and appropriateness of legislative provisions regarding secrecy and confidentiality.

There is a plethora of secrecy provisions in the Commonwealth statute book—the ALRC has so far identified over 500 provisions scattered throughout 173 pieces of primary and subordinate legislation, the majority of which create criminal offences. These provisions protect diverse types of information from unauthorised disclosure in varying circumstances. They often carry inconsistent maximum penalties. For example, the unauthorised disclosure of information relating to the affairs of a person in some cases attracts a low-level fine of $550,[2] and in others a term of imprisonment for two years and a fine of $13,200.[3] Disclosing information about the identity of a person in the national witness protection program carries a maximum penalty of 10 years imprisonment,[4] while publishing information that discloses the identity of an agent or officer of the Australian Security Intelligence Organisation carries a maximum penalty of imprisonment for one year—even in circumstances where such publication could endanger the life of that agent or officer.[5] Commonwealth officers may also face administrative action for breach of secrecy provision, ranging from reprimands to dismissal.

The earliest secrecy provisions, inserted shortly after federation, were principally about protecting information concerning Australia's defence and security. However, the Commonwealth's expanded role in other areas such as taxation, health, regulation and welfare after the mid-1940s led to a proliferation of secrecy provisions.[6] In 1979, the Senate Standing Committee on Constitutional and Legal Affairs observed that it appeared to have become a 'fashionable contemporary drafting practice to insert in every new statute a standard provision

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making it an offence for an official governed by a statute to disclose without authorisation any information of which he has gained knowledge officially'.[7]

The sheer breadth and consequent ambiguity of some secrecy provisions has been criticised. Paul Finn (before he became a Federal Court judge) remarked that it is 'particularly obnoxious' that 'secrecy obligations imposed by public service legislation are so all encompassing and unreasonable in their information coverage that strict compliance with them is practically impossible'.[8] Most secrecy provisions criminalise unauthorised disclosures regardless of whether such disclosures are likely to have any detrimental impact on an identifiable public interest. John McGinness has noted that many provisions expose officials to penal sanctions for disclosing information, no matter how innocuous, or for disclosing information that already may be public knowledge.[9]

Leaks may be described as the 'black market of official communication'.[10] Recent media complaints about allegedly heavy-handed investigations into the leaking of Commonwealth information have brought the operation of secrecy laws into sharp focus. In September 2008, the Australian Federal Police executed search warrants at the premises of Philip Dorling, a journalist with *The Canberra Times*. Dorling had written an article, quoting material from classified briefing papers prepared for the Defence Minister, the Hon Joel Fitzgibbon MP. The article suggested that China, North Korea, South Korea and Australia's close ally Japan, are priority targets for Australian intelligence.[11] The execution of the search warrants attracted strident criticisms from media groups who said it was an attack on the freedom of the press, and sent 'a loud message to public servants and people in general to warn them off speaking to the press'.[12]

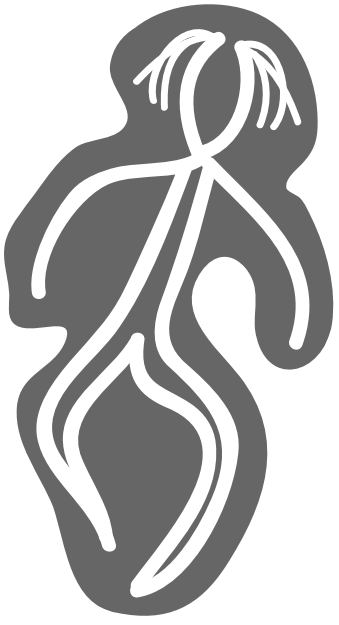
In October 2008, Tjanara Goreng Goreng was convicted for a breach of secrecy laws. She leaked confidential emails, which had come into her possession as a public servant, to a Mutijulu council member about the Government's plans to combat sexual abuse and petrol sniffing in Northern Territory communities. Justice Refshauge accepted that the emails sent were intended for 'likely dissemination' more widely among Mutijulu community members to assist them in their dealings with the Commonwealth.[13] Goreng Goreng reportedly said that she forwarded the emails to help the Mutijulu community because its members were being 'seriously oppressed'.[14] Justice Refshauge acknowledged that while there are 'proper pressures to prevent undue secrecy in government', there are a number of legitimate reasons to limit the disclosure of information. These include that it is the prerogative of the government to decide policy and not unauthorised members of the public service, and that dissemination of publicly uncorroborated allegations can destroy the reputation of innocent individuals.[15] Goreng Goreng was released pursuant to s 20(1)(a) of the *Crimes Act 1914* (Cth) without passing sentence upon entering in a recognisance in the sum of $2,000, to be of good behaviour for three years and to pay a fine in the sum of $2,000.[16]

In 2007, Allan Kessing, a former officer of the Australian Customs Service, was convicted and sentenced for breach of secrecy laws for providing to journalists 'protected' reports dealing with security at Sydney Kingsford Smith Airport. The disclosure of the reports was held to have had the potential to compromise operational security and methodology.[17] In mitigation, Kessing submitted that his disclosures benefited the public interest. In particular, he submitted that they led to the appointment of Sir John Wheeler to conduct a review examining threats from organised crime at airports and the adequacy of existing security requirements, and to the government taking action following that review.[18] Kessing's actions and the subsequent events focused attention on issues concerning the proper role and methods of whistleblowers in exposing malpractice or corruption.[19]

Do secrecy laws remain a relevant and appropriate mechanism for regulating disclosures of Commonwealth information? Do information blockages hinder collaborative arrangements between the public and private sectors in addressing significant challenges of our times, such as terrorism? Do they prevent the ship of state from sinking due to leaking, or inhibit that ship and its passenger citizens from arriving at the destination port of open government? The ALRC will consult widely with stakeholders and encourages those with an interest in the Inquiry to contact it. The ALRC's Issue Paper was released on 2 December 2008, and its final Report is due to be presented to the Attorney-General by 31 October 2009.

Endnotes

1. *Commonwealth v Fairfax* (1980) 147 CLR 39, [27].
2. *Health Insurance Act 1973* (Cth) s 130(1).
3. For example, *A New Tax System (Bonuses for Older Australians) Act 1999* (Cth) s 55 (with application of *Crimes Act 1914* (Cth) s 4B).
4. See *Witness Protection Act 1994* (Cth) s 22(1).
5. *Australian Security Intelligence Organisation Act 1979* (Cth) s 92.
6. J McGinness, 'Secrecy Provisions in Commonwealth Legislation' (1990) 19 *Federal Law Review* 49, 49.
7. Parliament of Australia—Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978* (1979), 233.
8. P Finn, *Official Information*, Integrity in Government Project: Interim Report 1 (1991), 43–44.
9. J McGinness, 'Secrecy Provisions in Commonwealth Legislation' (1990) 19 *Federal Law Review* 49, 72.
10. G Terrill, *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond* (2000), 211.
11. P Dorling 'Revealed: Our Spy Targets' *The Canberra Times* (Canberra) 14 June 2008, 1; J Waterford, 'A Very Leaky Case', *The Canberra Times* (Canberra), 27 September 2008, 1.
12. N Towell 'Press Freedom Under Siege', *The Canberra Times* (Canberra) 24 September 2008, 1.
13. *R v Goreng Goreng* [2008] ACTSC 74.
14. S Pryor, 'Ex-Public Servant "Doing Fabulous Job" Escapes Jail Over Emails', *The Canberra Times* (Canberra), 15 October 2008, 3.
15. *R v Goreng Goreng* [2008] ACTSC 74.
16. *R v Goreng Goreng* (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 14 October 2008).
17. *R v Kessing* [2007] NSWDC 138, [43].
18. Ibid, [49].
19. In July 2008, the Australian Government referred the issue of whistleblower protection in the Australian Government public sector to the House of Representatives Standing Committee on Legal and Constitutional Affairs.



Goldilocks' dilemma

'Just right' consultation in law reform

By C Hunter Loewen

In 2008, law reform initiatives resulted in proposals to change the rules of civil litigation for more than one quarter of all Canadians.

Cheryl Hunter Loewen

Cheryl Hunter Loewen, Counsel,
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The Alberta Law Reform Institute (ALRI) proposed revised rules of civil practice and procedure as did reformers in Nova Scotia and British Columbia.[1] All three reform efforts set out to solve similar problems and came up with rules that are better suited to modern litigation. This said, reformers went about the business of rule review and revision differently in each province, and this may affect implementation time lines and the success of the reforms.

Public perceptions

A major problem with the civil rules of court in each jurisdiction is the age old issue of access to justice. Courts play a key role as places where disputes can be resolved fairly, provided that people have access and perceive the civil justice process to be a good use of time and money. Many Albertans state that the court system is difficult to use, costly and takes too much time. Nova Scotians are concerned with the delays, expense and needless complexity of litigation. British Columbia reformers observe that, although citizens need the civil court to solve real life problems, the high cost of going to court is putting the justice system beyond the means of most people. Legal professionals in modern times have the same duty as those who worked in the justice systems of previous centuries to revise civil rules of court to facilitate the conduct of 'trials ... in a more expeditious manner' and to 'redress the grievances felt from the intolerable expense and delays at law'.[2]

Litigation practice changes

Another problem driving reform efforts is that the rules of court are out of date. Responsibility for setting procedural rules in Canada rests both within the inherent jurisdiction of superior courts and with the provincial legislatures.[3] This can create a situation in which the courts lack resources and legislatures lack the procedural expertise and political will to update rules on a regular basis. For example, the last enactment of Alberta's civil rules of court took place in 1968—before the establishment of a modern court system—and many of the rules remain the same as when first implemented in 1914. Civil litigation practice in Alberta changed significantly during the past 40 years. Rules were added or adjusted on an *ad hoc* basis to try to keep pace and the resulting combination of original, special purpose and amended rules is confusing, not enforced in a consistent manner and ill-suited to modern civil justice needs.

Modern rules

The structure of civil rules proposed for each jurisdiction is similar in that the rules are shorter, written in plain language and often include a purpose statement along with the procedural requirements. All three reform proposals put guiding principles in the first part and group similar rules together. The revised rules proposed for Alberta and British Columbia are numbered with a first digit that corresponds to a part number and consolidate definitions in a single place. Alberta's proposed rules are the most modern in terms of ease of use. In addition to being clearly written, they are logically arranged to generally follow the sequence of steps in a legal action and contain information notes, references to related rules (hyperlinks in the electronic versions) and part summaries to help rule users to understand court procedures.

Rule reform processes

The process used by reformers to assess litigation issues and create revised rules was different in each province. The following outlines of the reform process in each jurisdiction highlight the differences in project mandate, management approach and the extent of public consultation.

Alberta

In Alberta, rule reform started in 2001 when the Rules of Court Committee asked the ALRI—a professional, independent law reform organisation—to review the rules and make recommendations. The ALRI's Board agreed to manage the initiative as a law reform project, with additional funding provided by the provincial law society, Alberta Law Foundation and the Department of Justice. The ALRI organised the Rules of Court project like every other law reform project as an open, inclusive, consultative effort.

The ALRI established a 10-member project Steering Committee, which included judges with experience at all three levels of court, a representative of the justice department and senior civil litigators. The Steering Committee set the project objectives and mandated a rethinking, as opposed to mere restatement, of the rules of court.

The ALRI prepared two issues papers on the topic of civil justice and procedures. One paper was designed for the legal community and the other tailored for the public and included a returnable questionnaire. ALRI conducted more than 40 open meetings, hosted two public forums and processed approximately 800 responses based on the two papers. These initial consultations revealed the specific problems with Alberta's civil justice system and litigation procedures urgently in need of reform and helped determine a working structure for the rules revision effort.

The Steering Committee established 10 working committees, including eight focused on specific litigation issues, one general rewrite committee to review every other aspect of civil procedure and one to address critical matters of criminal procedure. Each working committee included, on average, nine volunteers from the Bench and Bar and was supported by two ALRI lawyers. The working committee lawyers prepared research materials, coordinated document production, consolidated comments and assisted the working committee's policy development efforts.

Altogether, the working committees engaged the time and talents of more than 200 judges, lawyers and other legal professionals who contributed more than 30,000 hours, published 21 consultation memoranda, reviewed more than 300 sets of response comments and recommended the procedural policies that form the basis of Alberta's proposed rules of court.

The policy recommendations of the working committees were reviewed and approved by the Steering Committee and the ALRI Board. A small drafting committee comprised of lawyers with legislative expertise and a professional drafter was established to turn the policy recommendations into proposed rules of court and court forms. The drafting team effort resulted in a comprehensive draft that was widely distributed, posted for download on the ALRI's website, open for comment for approximately 15 months and formed the basis of 11 presentations to legal groups and more than a dozen detailed discussions with the Rules of Court Committee.

Alberta's rule reformers:

- set out to rethink civil litigation practices and procedures;
- engaged in a collaborative effort that was managed by an independent, full-time law reform agency; and
- used iterative consultation techniques with the public and legal community at the issue identification, policy development and rule production stages.

Nova Scotia

In 2004, the Supreme Court of Nova Scotia established a Rules Revision project to study and reform the civil rules of court under the guidance of a nine-member project Steering Committee. The Steering Committee included four justices of the Supreme Court and representatives of the barristers' society, the Department of Justice and the Law Reform Commission of Nova Scotia (LRCNS). The LRCNS published a short consultation memorandum which described the reform effort, suggested areas in need of revised rules and requested input from the legal community. The objectives of the Nova Scotia reform project and procedural reform issues were adapted from those identified in Alberta's consultations.
The Steering Committee conducted approximately 13 meetings with members of the Bar and set up eight working groups, each chaired by a justice of the Supreme Court, to investigate reform of an area of civil litigation or appeal procedure. The working groups reported to the Steering Committee and the reports are posted on the court website, with a notice that, although the Steering Committee welcomed the comments of the working groups and others, it was not bound to adopt any particular recommendation.

The LRCNS provided research and administrative support to the Steering Committee and working groups. Nova Scotia's revision project generated approximately 100 comments, which were posted on the court website. The Steering Committee considered the working groups' and public comments, and directed a professional drafter to prepare revised civil litigation and appeal rules. The revised rules were approved by all the judges of the Court of Appeal and Supreme Court in June 2008.

Nova Scotia's rule reformers:

- resolved specific procedural issues identified in other rule reform projects;
- participated in a court defined and directed reform effort; and
- consulted with the legal community on procedural areas in need of reform.

British Columbia

In British Columbia, reform started in 2002 with a suggestion from the law society to the government that civil justice system issues should be reviewed. The Department of Justice created a five-member Justice Review Task Force (JRTF), consisting of two chief judges, the presidents of the Law Society and the regional branch of the Canadian Bar Association and a representative of the Attorney General's office. The JRTF set up three working committees, including a 12-member Civil Justice Reform working group (CJRWG) to review access to civil justice issues. The members of the CJRWG included four judges and two masters of court, three senior government representatives, two officers of professional legal associations and two lawyers at large. The JRTF released six discussion papers—two on legal culture, two on themes of civil justice reform and one each on proportionality and defensive practice. A managing lawyer was hired to coordinate the efforts of the CJRWG. Research support was provided by government counsel.

The CJRWG split into three subgroups to investigate more fully certain topics. The CJRWG published a consultation report, which included the recommendation that there should be a new set of civil rules of court based on principles identified in the report. Shortly after the publication of this report, the government established a five-member drafting team, which produced a concept draft of proposed rules of civil procedure.

British Columbia's Deputy Attorney General and Chief Justice presented and discussed the concept draft rules in more than 55 meetings, including five with lawyer focus groups. An online forum was used to receive comments. After these meetings, the drafting team released a revised concept draft. The Rules Revision Committee and all judges of the Supreme Court reviewed, endorsed and, in May 2008, recommended that the revised concept draft rules be adopted.

British Columbia's rule reformers:

- created revised rules to change the litigation culture;
- engaged in a government and court led reform of the justice system; and
- focused consultation efforts on the proposed rules.

Implementing rule reforms

The final report on Alberta's rule reform project contains a comprehensive set of proposed rules and court forms that create a modern code of civil procedure that will facilitate access to a fair, efficient and effective civil justice system. It also includes a short overview of the revised rules, a table to help transition from existing to revised rules and a draft of legislation proposed for enacting and ongoing maintenance of the civil rules of court. In addition, the ALRI submitted a separate report to the government on consequential amendments to help ensure a smooth implementation of the revised rules. The proposed rules and draft legislation are under review by the Rules of Court Committee and the government. It is anticipated that revised rules of court will take effect on 1 January 2010.

In Nova Scotia, the proposed rules are in force as of 1 January 2009. There is opposition from some members of the Bar, and a regional association of lawyers requested that implementation be delayed by three months so that written comments can be sent to the Supreme Court.[4]

The due date for comments on the revised draft concept version of British Columbia's rules was 31 December 2008 and the proposed rules take effect on 1 January 2010. Public comments of note concerning the revised rules include those of the British Columbia Law Society. In September 2008 the society overwhelmingly passed a motion at the annual general meeting expressing disapproval of the CJRWG report and revised concept draft rules. The motion also called for additional study with full public consultation on rule changes that are needed to improve the civil justice system.[5]

It remains to be seen if the extensive consultation done in Alberta results in wider acceptance and a smoother implementation of revised rules of civil procedure than the more narrowly focused discussions in Nova Scotia and British Columbia.

Questions for law reform

The three approaches to revising the civil rules of court raise a number of questions. Law reform bodies or governments contemplating updated, modified or new laws may, like Goldilocks, wonder if the amount of consultation is too little, too much or just right. Reformers also may consider whether getting the consultation 'just right' depends mainly on the scope, magnitude or impact of the proposed changes.

Governments charged with implementing and enforcing revised laws may ask if it is a good strategy to adopt a reform process that, although legally sound, seems to disenfranchise a stakeholder group that will be affected by the reform. A related question is whether the full benefit of reforms might be precluded by ongoing opposition to the process by which the reforms were developed.

Finally, does an inclusive, iterative consultation process add value in terms of ease and speed of reform implementation? More importantly, does it foster broad public support for revised laws that are perceived to be better than the old ones?

Endnotes

1. Alberta Law Reform Institute, *Rules of Court Project*, Final Report No. 95 (October 2008), <www.law.ualberta.ca/alri>; The Courts of Nova Scotia, <www.courts.ns.ca/rules_revision>; British Columbia Justice Review Task Force, Civil Justice Review Working Group, <www.bcjusticereview.org>. Unattributed information about proposed rules and reform processes in Alberta, Nova Scotia and British Columbia is found in publications accessed via these websites.

2. W Stewart, *Digest of the Practice of the Exchequer of Pleas in Ireland*, Vol I, Part I, (1823), 3.

3. *Constitution Act 1867* (Canada), s 92.

4. C Guly, 'Bar–bench spar in NS over new court rules' *The Lawyers Weekly*, (18 July 2008), <www.lawyersweekly.ca/>.

5. L Duhaime, 'It's War: British Columbia Lawyers Take on the Judges and the AG' (23 September 2008), <http://duhaime.org/LawMag/>.Text of the Law Society's motion available at: <www.lawsociety.bc.ca/publications_forms/notic es/08-08-27agm.html>.

2008 Kirby Cup

Extract from the winning submission

The Kirby Cup Law Reform Competition is a unique opportunity for Australian law students to participate in law reform debate and to gain recognition for their vision for law reform. The Kirby Cup is organised and sponsored by the Australian Law Reform Commission (ALRC), in collaboration with the Australian Law Students Association (ALSA). It commemorates the life long commitment of the Hon Justice Michael Kirby AC CMG to law reform and his stewardship of the ALRC from 1975 to 1984.

Entries to the Kirby Cup Competition consist of a written submission on an area of law reform currently under review by the ALRC. After careful consideration of these submissions, three finalists are selected and asked to make an oral presentation on their submissions as part of the competition at the ALSA annual conference. In 2008, the competition took place at the ALSA conference held in July at the University of Tasmania. The judges of the 2008 Kirby Cup were Mr Simon Allston, Ombudsman Tasmania; the Hon Justice Pierre Slicer of the Supreme Court of Tasmania; and ALRC Commissioner, Professor Rosalind Croucher.

The winners of the 2008 Kirby Cup were Barbara Townsend and Karlo Tychsen from the University of Newcastle, with a submission on the freedom of information laws. The authors address the role that public interest plays in achieving a balance between the interest in open and transparent government decision making and the need to protect information that may affect interests such as the economy, the privacy of individuals and the ability of public servants to provide frank and fearless advice. For more details on the 2009 Kirby Cup please visit the ALRC's website www.alrc.gov.au.

What follows is an extract of the submission by the 2008 winners of the Kirby Cup, Barbara Townsend and Karlo Tychsen:

Public Interest

The very definition of 'public interest' changes over time, and has been considered judicially throughout the years. But a standout in its interpretation is that when something is done in the interest of the public, it is being seen to be *serving* the public. It is an unworkable situation where a Freedom of Information agent, working for a particular agency, is asked to weigh up the interests of the public versus the interests of the people who pay his/her salary. How can an agent be seen to be serving the public, when they are answerable to a particular governmental agency? An independent body for requests is the only workable solution. It removes doubt in the process, and by having a body that reviews all initial requests and has unlimited access to information (even that which is currently exempt) the legitimacy of documents which would otherwise be exempt is independently tested.

The public interest in having the information must outweigh the harm that would be created if it was released. While the phrase 'public interest' is not defined in the Act, due to the difficulty in undertaking such a task, it is still something that needs to be clarified. There needs to be a schedule with elements or points that articulate what agencies are looking for in regards to potential harm. The very definition of public interest takes into consideration many factors[1] in order for these interests to be tested, and is difficult to define because there is no one homogenous, undivided concept.[2] There are however some clear-cut elements in its judicial consideration. It embraces standards of human conduct and government functions and instrumentalities which work for the good order of society and its members.[3] On top of this, public interest involves serving the advancement of the public's welfare.[4] A statutory recognition of these elements, meaning the standards to be expected of human behaviour, could be placed within the wording of the framework of exemption.

In *McKinnon v Department of Treasury*,[5] the three public interest tests are as follows:

1) public interest outweighs exemption;[6]
2) the information is from a deliberative process and disclosure outweighs the public interest;[7] and
3) implicit personal/private and business affairs are disclosed when deemed reasonable.[8]

All exemptions must stand up to the public interest tests, rather than only small, specific sections of the Act applying to the public interest tests. Thus, any exemption made will maintain credibility and strengthen the integrity of the government in office, which goes back to the original purpose of the Act. A public interest focus on exemptions shows the legislation to be serving the public, rather than the legislation serving to protect ministers or other officials. A simple restructuring of the legislation is what is needed. It is a cultural question as much as it is a legislative one. Any exemption must make clear that the public interest is not served by disclosure of this exempted information.[9]

Consideration is given in *McKinnon* to public interest as often being used in achieving the balance between public interest or in the notions of individual or private interest.[10] Contrast the *McKinnon* public interest consideration against *The Howard Factors*[11] (which protect senior official individuals from disclosing delicate information) which are diametrically opposed to each other. Particularly, it denies the fundamental aim of the *Freedom of Information Act*, providing the public with information that concerns them and serves their interests.[12]

Endnotes

1. *Open Government: A Review of the Federal Freedom of Information Act 1982*, (ALRC 77, 1995) [8.14], which talks about the factors that might be relevant to determining public interest. Clearly, this determination requires analysis of individual circumstances.

2. *McKinnon v Department of Treasury* [2005] FCAFC 142.

3. *DPP v Smith* [1991] 1 VR 63.

4. *McKinnon v Department of Treasury* [2005] FCAFC 142. However, even this element is dependent on 'each particular set of circumstances'.

5. *McKinnon v Department of Treasury* [2005] FCAFC 142.

6. *Freedom of Information Act 1982* (Cth) s 33A – Commonwealth and state relations; s 39 – Commonwealth financial and property interests; s 40 – certain operations of agencies.

7. *Freedom of Information Act 1982* (Cth) s 36 – internal working documents.

8. *Freedom of Information Act 1982* (Cth) s 41 – personal private affairs; s 43 – business affairs.

9. Matthew Moore, 'Not Just the Law that Needs Fixing', *Sydney Morning Herald*, (Sydney, 30 November 2007).

10. *McKinnon v Department of Treasury* [2005] FCAFC 142.

11. *Re Howard and Treasury of Commonwealth* (1985) 7 ALD 626, 634-5.

12. *Re Eccleston and Department of Community and Family Services and Aboriginal and Indigenous Affairs* (1993) 1 QAR 60.

Sir Ronald Wilson: A Matter of Conscience

By Antonio Buti
Reviewed by Jonathan Dobinson, ALRC

***A Matter of Conscience*—Anotonio Buti's detailed biography of Sir Ronald Wilson—comes at a time when non-Indigenous Australia continues to struggle with its past and present treatment of Australia's Indigenous peoples. This biography is timely because it presents a portrait of a man, who at times appeared unaware or unmoved by social justice issues, but who later became a passionate advocate for the truth about the stolen generations and the reconciliation process.**

Although a modest and frugal man, Wilson lived a very public life. His various appointments included Crown prosecutor, solicitor general, High Court of Australia justice, president of the Uniting Church, president of the Human Rights and Equal Opportunity Commission (HREOC), Royal Commissioner and university chancellor. Wilson always undertook whatever role he had seriously and gave it all his attention. The author suggests, however, that such an attitude opened him up to criticism and created some perceived or actual tensions in his various roles and tasks during a long period of professional, community and religious service.

The first half of the book details Wilson's childhood, service during the war, law student days, family life, and his role as a prosecutor with the Western Australian Crown Law Department. Wilson has been credited with changing the nature of criminal prosecution in Western Australia, bringing a new level of professionalism and confidence to the role. Others, however, have noted his 'fearsome reputation' as a prosecutor, and criticised his 'win at all costs' attitude. Buti focuses on Wilson's role as a prosecutor in the sensational Darryl Beamish and John Button murder trials, which makes for interesting reading.

Buti spends less time examining Wilson's time on the High Court of Australia. Wilson has said that his time on the High Court was the most unsatisfying time for him professionally. He preferred the role of advocate (he refused his first invitation to join the High Court bench) and often felt like an outsider, being the first High Court justice from Western Australia in an institution filled with judges from the eastern states.

While many of the High Court justices at that time were considered to be centralists, Wilson was clearly perceived to be a states' righter and a legal positivist (or black letter lawyer). Buti examines Wilson's approach in a number of cases, including his dissenting judgments in the *Koowarta* and *Mabo (No 1)* cases. In both these decisions, Wilson's overriding concern was the maintenance of the Australian federal system. This was despite his concern, for example in *Mabo (No 1)*, that 'a deep sense of injustice may remain'. Wilson always defended these decisions as being correct as a matter of law, although he wished he could have decided differently. Wilson left the High Court before the decision in *Mabo (No 2)*, which he welcomed.

A central theme in Wilson's life was his Christian faith and church. Wilson helped found the Uniting Church, over which he presided while also serving as a High Court judge. He maintained that his religious faith did not influence his decisions as a lawyer or judge. Buti suggests, however, that while not consciously influencing his judgments, Wilson's belief system would have shaped his interpretation of the law.

As a leader of the Presbyterian Church, Wilson was responsible for overseeing Sister Kate's Home for Children, a church home used to house and raise Aboriginal children. During the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children (the 'stolen generations inquiry'), allegations emerged of cruelty, and the sexual abuse of children at the home. Wilson was not responsible for the day-to-day management of Sister Kate's, and was unaware of the bad treatment of Aboriginal children there. However, he was always open about his involvement with the home during the stolen generations inquiry. Despite this, it would become a matter of controversy, and would give him cause for deep reflection.

Sir Ronald Wilson: A Matter of Conscience

By Antonio Buti
University of Western Australia Press, 2007

RRP: $39.95

Buti argues that it is the stolen generations inquiry for which Wilson will be best remembered. It was also a defining point in Wilson's life. Mick Dodson, Wilson's co-chair of the inquiry, notes that you could almost photograph the change in Wilson as a result of the inquiry hearings. Wilson opened his heart to the members of the stolen generations, who trusted him with their stories, and became determined to share these stories with other Australians and to advocate for compensation. Wilson continued to do this until his death in 2005.

Many will remember the furore over the inquiry report, *Bringing Them Home*. Some of the loudest criticism came from the Howard Government which refuted the report's view of history, and refused to say 'sorry' for the great injustice done to the stolen generations. Despite this criticism, *Bringing Them Home* continues to be widely praised both in Australia and internationally. The report launched a major political and community debate in Australia, and remains a key document in the debate over justice, reconciliation and public policy in relation to the first Australians.

Some commentators have claimed that *A Matter of Conscience* distorts the complexity of Wilson by using an overly simplistic narrative. While the narrative is simple, the biography is ultimately successful. It is well researched and suggests the complexity of the man—Buti notes that after his death, even Wilson's wife questioned whether she ever knew him. Ultimately, the Sir Ronald Wilson the reader gets to know is a man to be admired, not only because of his capacity to change, but because of the lesson he taught us as a nation—listening is the key to understanding, understanding is the key to acknowledgement, and acknowledgement is the key to reparation.

It is heartbreaking that Wilson did not live to hear the Australian Government's apology to the stolen generations on 13 February 2008.

Jonathan Dobinson, ALRC Research Manager

Crime, Aboriginality and the Decolonisation of Justice

By Harry Blagg
Reviewed by Kate Connors, ALRC

Dr Harry Blagg is a Western Australian academic who has worked extensively in the fields of criminology, restorative justice, young offenders and interactions between Aboriginal people and the criminal justice system. For four years he was also Research Director on the West Australian Law Reform Commission's project on Aboriginal Customary Laws. Blagg's breadth of experience in both Aboriginal customary law and recent trends in criminology is evident throughout *Crime, Aboriginality and the Decolonisation of Justice.*

Aboriginal people are among the most imprisoned people in the world. In Western Australia, around 42% of the adult prison population and over 70% of young people in detention are Aboriginal. Arrests for assaults and other offences against the person are 24 times higher for Aboriginal men and almost 45 times higher for Aboriginal women. In many cases, these assaults are against other Aboriginal people.

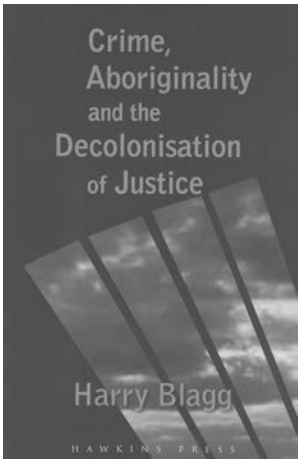
Aboriginal people therefore interact with the criminal justice system as both offenders and victims. Despite implementation of a number innovative policies following the 1991 Royal Commission into Aboriginal Deaths in Custody and numerous more recent inquiries into violence in Aboriginal communities, these figures have not reduced. This book asks whether non-Aboriginal systems of law and justice will ever be able to deal with the needs of Aboriginal offenders and victims of violence, and how Australian governments could find new ways of working with Aboriginal people, and within Aboriginal law, to reduce levels of violence.

Blagg examines the relationship between the criminal justice system and Aboriginal people from a number of different perspectives. Chapters deal with Aboriginal youth, experiences in court, and of family violence. Blagg also considers a number of initiatives such as alternative sentencing, restorative justice, and Aboriginal self-policing, and their impact (or lack of impact) on Indigenous offenders.

His central thesis is that a full understanding of the appallingly high over-representation of Aboriginal people in the criminal justice system can only come through acknowledgment of the history of colonial dispossession, genocide and assimilation, and how Aboriginal people have sought to resist these processes. In looking at the role of courts, prisons and police in the lives of Aboriginal people today, Blagg argues that criminologists must take account of the fact that all these institutions were, and still may be, part of the colonial system of controls 'designed to formalise white power and privilege'. In Blagg's view, colonialism is what separates Aboriginal justice issues from other established categories of disadvantage such as class, gender or other ethnicities.

The chapter on restorative justice is extremely interesting. On first glance, it would seem that restorative justice models—whereby all parties in an offence come together to 'repair harms caused by the crime'—would enhance active Aboriginal participation in the justice process and be consistent with the (perceived) cultural practices of Indigenous peoples. However, restorative justice often centres on the premise that a crime is a violation of people and personal relationships, and that offenders should be made accountable for their actions by focusing on the harm caused, rather than the more abstract notion that a 'rule' was broken. This is at odds with the way Aboriginal people conceive justice in customary law. Blagg argues that while Aboriginal customary law is concerned with re-establishing relationships, it is also very much concerned with the rules that are broken. In particular, there are very strict rules governing avoidance relationships, ceremony, access to ceremonial spaces and men's and women's business. Rather than trying to fit Aboriginal people within yet another legal framework that does not accommodate their narratives, Blagg sees greater worth in pursuing initiatives that promote and renew Aboriginal customary law and resourcing Aboriginal-owned community justice mechanisms.

In attempting to shed light on some of the cultural factors that may differentiate violence in Aboriginal families from common understandings of domestic violence, Blagg is quick to argue that 'feminist theory' and 'feminist middle class white women' have done little to help Aboriginal organisations involved in the fight against family violence. The chapter puts forward the view that Aboriginal women do not see family violence in gendered terms, but rather as part of a 'collective Indigenous experience of powerlessness'. While this view is certainly one that has been expressed before, in my



Crime, Aboriginality and the Decolonisation of Justice

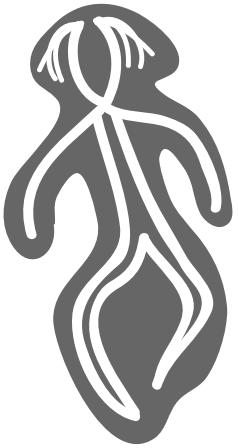
by Harry Blagg,
Hawkins Press, 2008

RRP: $49.95.

view it is unhelpful (and incorrect) to pit feminists and Aboriginal women against each other, thus implying that only white women are ever feminists, or that feminists cannot also understand the dynamics of race and racism. Marcia Langton has written extensively about violence in Aboriginal communities—particularly since the controversial 2007 'intervention'—and her essay 'The End of Big Men Politics' published recently in the *Griffith Review* (2008:22) is a far more nuanced analysis of how gender, race and power operate in Aboriginal communities than Blagg's.

Crime, Aboriginality and the Decolonisation of Justice concludes with a chapter on 'Moving Forward'. Blagg advocates an approach that accepts the cultural differences of Aboriginal people and does not try to push them into structures and processes developed by non-Aboriginal people. He supports the development of community-owned justice mechanisms providing crime prevention, rehabilitative and diversionary programs. These groups would liaise with the broader justice system, for example by supervising offenders while on bail, but would also allow Aboriginal people to develop their own processes for dealing with justice issues in their locality and recognise Aboriginal customary law. In this way, *Crime, Aboriginality and the Decolonisation of Justice* provides both a detailed exploration of the many complex issues involved in the interaction between Aboriginal people and the justice system and a very practical blueprint for change.

Kate Connors, ALRC Senior Legal Officer

Articles in Reform Roundup are contributed by the law reform agencies concerned.

Contents

Entries to Reform Roundup are welcome. Please contact the Editor at

reform@alrc.gov.au

Administrative Review Council

The Council plays an important role in monitoring and advising the Government on matters relating to the Commonwealth administrative law system primarily through the publication of reports and best practice guidelines.

Report on Administrative Decisions in areas of Complex and Specific Business Regulation

On 28 November 2008, the Attorney-General launched the Council's latest report which focuses on accountability and transparency in the development and application of business rules, and covers regulation by government agencies, as well as self regulation by industry bodies and other non-government entities. As noted by the Attorney in his speech, the report provides a useful framework for those involved in drafting and making decisions on the basis of business rules. While focusing on business regulation, the report is relevant to other complex regulatory areas. The report concludes with a framework of guideline principles, consistent with administrative law values, which the Council believes will promote efficient, effective and accountable business regulation.

Updating Reports on the ARC website

The President of the Council was also pleased to announce at the launch the publication of all of the Council's older reports dating back to 1978. These reports are now available for download from the Council's website (see below). These reports cover a wide range of topics including: government business enterprises; rule making by Commonwealth agencies; environmental decisions and the AAT; and merits review tribunals.

Report on Government Agency Coercive Information-Gathering Powers

In May 2008, the Council published report no. 48 which focuses on the coercive information-gathering powers of six agencies: the Australian Competition and Consumer Commission; the Australian Prudential Regulation Authority; the Australian Securities and Investments Commission; the Australian Taxation Office; Medicare Australia; and Centrelink.

The report identifies 20 best practice principles covering a range of important practical issues including who should exercise the powers, the conduct of hearings and the content of notices. These principles seek to strike a balance between agencies' objectives in using coercive information-gathering powers and the rights of individuals in relation to whom the powers are exercisable. The principles provide valuable guidance to all government agencies in their use of these important powers.

Best Practice Guides

In late 2007 the Council launched a series of best practice publications for administrative decision makers. The five guides, which reflect key stages in the decision-making process, have been incredibly popular. The generic Guides are a general training resource and reference for Commonwealth agencies, which can be supplemented with agency-specific material regarding policies, practices and legislative frameworks. Since the release of the guides, a number of government agencies have worked with the Council to finalise annotated versions of the Guides specific to their own requirements.

Copies of Council publications can be obtained by contacting the Council Secretariat on (02) 6250 5800, by e-mail at arc.can@ag.gov.au or from the Council's website at www.ag.gov.au/arc.

Alberta Law Reform Institute

Enforcement of Judgments

The Alberta Law Reform Institute (ALRI) has released Final Report No. 94 on *Enforcement of Judgments*, recommending the adoption of uniform legislation developed by the Uniform Law Conference of Canada (ULCC). The ULCC assembled government policy lawyers and analysts, private lawyers and law reformers to consider areas in which provincial and territorial laws would benefit from harmonisation across Canada. The ULCC's work is reflected in 'uniform statutes', which the ULCC recommends for enactment by member jurisdictions in Canada.

Uniform legislation providing for the reciprocal enforcement of judgments has been a focus for the ULCC almost from the ULCC's inception in 1918. The ULCC adopted and recommended the first *Uniform Reciprocal Enforcement of Judgments Act* in 1924, and a revised version was released in 1958. The Act was intended to create a summary method of bringing the judgment to the attention of local courts and provide a quicker and less expensive alternative to enforcing the judgment by action.

In 1990, the Canadian Ministers of Justice and Attorneys General requested that the ULCC develop uniform legislation to provide a modern legal framework for the enforcement of judgments across Canada and the harmonisation of the rules of jurisdiction. The work of the ULCC was bolstered by the Supreme Court of Canada's decision in *Morguard Investments Ltd v De Savoye,* [1990] 3 S.C.R. 1077. *Morguard* held that in a federal state, such as Canada, the courts of one province should not question the assumption of jurisdiction by the courts of another province.

The ULCC's work produced three uniform acts:

- *Uniform Enforcement of Canadian Judgments and Decrees Act* makes a judgment from anywhere in Canada enforceable in the same manner as if it were from a local court.
- *Uniform Enforcement of Foreign Judgments Act* applies similar principles to judgments obtained outside Canada, subject to a local court's scrutiny of the procedural fairness, rational assumption of jurisdiction, and reasonable quantification of damages in the original court.
- *Uniform Court Jurisdiction and Proceedings Transfer Act* gives a local court a clear, uniform framework to decide when it should or should not hear a case. It also empowers a local court to direct transfers of proceedings to and from that court.

ALRI has reviewed the Uniform Acts, their impact on existing Alberta laws, and whether they should be adopted in Alberta and has made the following recommendations:

- Adopt all three Uniform Acts together as a package. The Uniform Acts should include all amendments and local adaptations recommended by ULCC and should incorporate the improvements enacted in other Canadian jurisdictions.
- Leave Alberta's reciprocal enforcement legislation in force for situations not dealt with by the Uniform Acts.

The three Uniform Acts together create a legislative enforcement regime which responds to the needs within the Canadian economy—that a legislative framework be predictable, responsive and efficient. The implementation of the enforcement scheme in Alberta will encourage businesses operating elsewhere in Canada or the world, to conduct their business within Alberta due to the certainty that almost any judgment appropriately obtained outside Alberta will be recognised by the Alberta courts and enforceable in Alberta. The implementation of the enforcement scheme across Canada will provide businesses operating across provincial boundaries with more certainty that, if difficulties arise in their transactions, their rights and ultimately their judgments will be enforceable. To date, British Columbia, Manitoba, Nova Scotia, Saskatchewan, and the Yukon have taken steps to implement the uniform enforcement scheme.

British Columbia Law Institute

Boughton / British Columbia Law Institute (BCLI) Great Debate

The first annual Boughton / BCLI Great Debate was held in Vancouver on October 29, 2008 and was a great success. Participants at the event included members of the judiciary, lawyers, law professors, key friends and their partners and guests. The fun-filled and scholarly debate featured debate teams representing UBC Law professors and graduates on one side and their counterparts from University of Victoria Law on the other. The debate topic was: *RESOLVED that copyright law has no place in the modern world.* CBC Early Edition host, Rick Cluff performed masterfully as Moderator. In the end Mr Justice Brenner, Chief Justice of the Supreme Court, ruled that the University of Victoria team of Professor Robert Howell and Tony Wilson had won the trophy. Net proceeds of the evening will be shared equally between BCLI for its operations and the UBC Faculty of Law in support of its planned new law faculty building. Plans are underway for a second Great Debate in October 2009.

Commercial Tenancy Act Reform Project

British Columbia's *Commercial Tenancy Act* is badly out of date. Enacted in the late 1890s, the Act largely restates English legislation from the eighteenth and nineteenth centuries. The *Commercial Tenancy Act* Reform Project examines the creation of a new and relevant legal framework for an important area of the British Columbia economy. The goal of the project is to publish a final report, including draft legislation and commentary. The project, managed by staff lawyer, Kevin Zakreski, is being carried out by a project committee chaired by Richard Olson, associate

counsel with McKechnie & Co and author of a textbook on commercial leasing law. A consultation paper has been approved by the BLCI Directors and has been distributed for public response. The project is scheduled to complete by 30 June 2009.

Enduring Powers of Attorney

The project was a joint project of the Western Canada Law Reform Agencies (WCLRA), which includes the Manitoba, Saskatchewan, Alberta and British Columbia law reform agencies and received final approval from the BCLI Board in April 2008. The Final Report *Enduring Powers of Attorney* has been released.

2009 FOLRAC Symposium

The Federation of Law Reform Agencies of Canada (FOLRAC), is a federation of the provincial law reform agencies in Canada whose membership includes: Alberta Law Reform Institute (ALRI); British Columbia Law Institute (BCLI); Law Commission of Ontario (LCO); Law Reform Commission of Nova Scotia (LRCNS); Law Reform Commission of Saskatchewan (LRCS); and Manitoba Law Reform Commission (MLRC). Through FOLRAC the various law reform agencies collaborate to improve understanding of practices relating to law reform work and explore avenues for cooperation in law reform projects. From 8-10 March 2009 BLCI will host members of FOLRAC, invitees from Ministries of Attorney General, law foundations and guests at the 2009 FOLRAC Symposium in Victoria British Columbia, with a theme of continuous improvement in law reform work.

Law Reform Material Online Project

For some years, an informal group in British Columbia has been developing a Public Legal Education and Information (PLEI) Portal project to create a web portal through which to facilitate access to public legal education and information materials in British Columbia. In conjunction with that initiative, the Law Foundation provided funding to BCLI for two projects, one relating to technical upgrades consistent with participating in the PLEI Portal and a second relating to developing BCLI's law reform materials into formats that could be accessed through the PLEI Portal.

This is, in effect, the next phase of the second project relating to developing BCLI's law reform materials into formats that will be accessed through the BCLI website, and the PLEI Portal. The project, funded by the Law Foundation of BC, commenced in November 2008 and is expected to be completed in about two years.

Legally Defective Contracts Relief Project

This project examined outstanding issues connected with implementation in British Columbia of the Uniform Law Conference of Canada's *Uniform Illegal Contracts Act* and generated a version of the Uniform Act appropriate for enactment here. The *Uniform Illegal Contracts Act* deals with alleviation of hardship resulting from the rigidity of the common law rule that a contract affected by illegality gives rise to neither rights nor liabilities. The project was funded by the Ministry of Attorney General and the final Report was approved by the BCLI Board in September 2008.

Privacy Act 1968 Project

This short term project to update the British Columbia *Privacy Act,* dealt with tortious aspects of violation of privacy, in light of developments in privacy law since the Act was originally passed in 1968. The Final Report was delivered to the Ministry of Attorney General in February 2008.

PLEI Portal Project

In conjunction with that initiative, the Law Foundation provided funding to BCLI for two projects, one relating to technical upgrades consistent with participating in the PLEI Portal and a second relating to developing BCLI's law reform materials into formats that could be accessed through the PLEI Portal. The two projects were completed in October 2008, including redeveloping the BCLI website and the summarising and cataloguing of BCLI and Law Reform Commission of British Columbia publications for the content development component. As noted above, the second of these projects is in effect continued in the Law Reform Materials Online Project.

Probate Rules Reform Project

This is a large project for reform of the rules of court governing contentious and non-contentious probate procedures (Rules 61 and 62), is a sequel to the Succession Law Reform Project and is funded by the Ministry of Attorney General. The Project is managed by senior staff lawyer, Greg Blue, and has an 11-member Project Committee with Chair, D. Peter Ramsay, QC. The Project Committee held its first meeting in December 2007 and is holding regular meetings toward the preparation of a consultation paper which will be issued for public comment. Completion of the Project originally scheduled for 2009 has been deferred.

Real Property Review Project—Phase 2

This is a large project on reform of areas of British Columbia real property law identified in the Phase 1 report, namely:

(a) the effect of section 29 of the *Land Title Act* and notice of an unregistered interest;
(b) section 35 of the *Property Law Act* and judicial extinguishment of incorporeal interests;
(c) severance of joint tenancy and other issues of co-ownership, including the four unities rule, and the *Partition of Property Act;*
(d) restrictive covenants; and,
(e) the doctrine of implied grant.

The Project is managed by senior staff lawyer Greg Blue with a project committee chaired

by Dr. A.J. McClean, QC. The Project is expected to require two to three years to complete.

Society Act Reform Project

The *Society Act* provides for the incorporation, organisation, governance, amalgamation, and termination of not-for-profit bodies in British Columbia. The *Society Act* Reform Project published a Final Report in September 2008 containing a draft of a new *Society Act* and commentary. The project was managed by staff lawyer Kevin Zakreski and carried out by a project committee chaired by Margaret Mason, a partner with Bull, Housser & Tupper LLP.

Uniform Law Conference of Canada (ULCC): Unincorporated Nonprofit Associations

The unincorporated nonprofit association is the default mode of nonprofit activity, namely when such organisations do not take advantage of a not-for-profit incorporation statute such as the British Columbia *Society Act*. This uniform law project, whose Canadian common law portion was managed by Kevin Zakreski, provides unincorporated nonprofit associations with a modern legal framework, to harmonise rules found in North America's two legal traditions and three national jurisdictions.

This project was carried out as an international joint project involving the Uniform Law Conference of Canada, the National Conference of Commissioners on Uniform State Laws, and the Mexican Conference of Commissioners on Uniform State Laws led by BCLI director Arthur Close as ULCC team leader.

Canadian Conference of Elder Law Projects: Assisted Living Project

As part of the contract that the Canadian Conference of Elder Law (CCEL) entered into for the Good Samaritan Society of Canada (GSS), Laura Watts, staff lawyer and national director of CCEL, produced a Consultation Paper and a Final Report in October 2008 on issues raised by Assisted Living and Supportive Housing in Canada. Issues relating to assisted living and supportive housing may be the topic of one or more further law reports.

Bill 29 Practice Guidelines Working Group

As part of the contract that the BCLI entered into for the Vanguard Project, the BCLI agreed to assist with analysis and critique of amendments to the *Patients Property Act, Adult Guardianship Act, Representation Agreement Act* and *Power of Attorney Act* (Bill 29). As such, BCLI staff attended meetings of the Bill 29 working group. For the last few months of 2008 the working group focused on the Regulations and the accompanying Practice Guidelines for Assessment of Incapability for Guardianship Applications. The timeline for the Practice Guidelines was extended and BCLI has continued to participate in assisting the development of the Practice Guidelines.

Canadian Conference on Elder Law

The fourth annual Canadian Conference on Elder Law (CCEL) was held in Vancouver on (13–15) November 2008. The Conference was jointly held with the International Guardianship Network with the theme: 'Aging Citizens: Evolving Practices'. The conference was again very successful in bringing together experts, academics and practitioners in Elder Law from across Canada, the United States and several countries in Europe, Africa and Asia. Presentations and discussions reflected the significant expertise and experience of presenters and participants and again made a substantial contribution toward the advancement of Elder Law issues. Plans for the next Elder Law Conference are under consideration.

Elder Law Clinic—BC CEAS Support

A successful Grand Opening of British Columbia's first, (and Canada's second) Elder Law Clinic was held on 29 September 2008 in Vancouver. National Director of CCEL, Laura Watts, provided substantial assistance to BC CEAS on a seconded basis, to develop and open the Elder Law Clinic. This project continues our 'outreach' strategy and demonstrates the value of working collaboratively in our community.

Elder Law Journal

The CCEL is continuing progress toward the first-ever issue of a new Canadian *Journal of Elder Law.* The Journal will mainly comprise a selection of papers from experts who have presented their work at our past Elder Law Conferences. It will be a typical printed academic publication.

Elder and Guardianship Mediation Project

BCLI has begun a two year legal research project relating to Elder and Guardianship Mediation funded by The Law Foundation. The Project managed by National Director, CCEL, Laura Watts, will be carried out with an Advisory Committee and will address legal, ethical, social and practice issues raised by both mandatory and voluntary elder and guardianship mediation.

Family Caregiving Leave Project

This is a two year legal research project begun in the fall 2007 funded by the Law Foundation to research family caregiving employment leave and other entitlements (such as employment insurance and tax credits provided for employed persons in British Columbia who need to attend to adult caregiving duties).

NICE Network

NICE is an international network of researchers, practitioners and students dedicated to improving the care of older adults, both in Canada and abroad. It is a federally funded NCE Centre of Excellence. Theme Teams review evidenced-based literature to develop user-friendly, interdisciplinary, team-based tools for gerontology work. They then work to disseminate these tools into practice, thus moving research into practice. On behalf of

CCEL, Laura Watts participates in the work of the Committees and assists with research and presentations.

Vanguard Project

This was a two year legal research project to examine issues relating to abuse and neglect of vulnerable adults who fall anywhere along the capacity continuum and particularly vulnerable adults with capacity concerns. The project was funded by a Law Foundation to British Columbia CEAS and the BC Adult Abuse and Neglect Prevention Collaborative [the 'Collaborative']. BC CEAS and the Collaborative contracted with BCLI and others to conduct portions of the research. The research has been completed and BLCI has written the final report.

Hong Kong Law Reform Commission

Interim Proposals on a Sexual Offender Register

On 29 July 2008, the Hong Kong Law Reform Commission's (HKLRC) Review of Sexual Offences Sub-Committee published a consultation paper containing interim proposals on a sexual offender register. The HKLRC had been asked in April 2006 to review the common and statute law governing sexual and related offences in Hong Kong. The Terms of Reference of the review were expanded in October 2006 to include consideration of whether a scheme for the registration of offenders convicted of such offences should be established.

Having examined the sex offender registration and vetting schemes in a number of other jurisdictions, the sub-committee concluded that a scheme should be introduced which would allow checks to be carried out on the previous conviction records for sexual offences of those engaged in child-related work.

The sub-committee describes the proposals in the consultation paper as 'modest' and does not pretend that they cover every situation. The sub-committee believes, however, that they offer a real measure of enhanced protection to children and mentally incapacitated persons. A key consideration for the sub-committee in formulating its interim proposals was that they could be implemented speedily by administrative, rather than legislative, means.

With some limited exceptions, there is no system currently in place in Hong Kong which allows employers to check relevant past convictions of a prospective employee, even with his consent. The police will not generally assist employers to check whether their existing or prospective employees have any criminal record. The main exception is where there are express statutory provisions which provide that the existence of previous convictions is a ground for refusing the registration or approval of persons working in a particular profession or field. In those circumstances, the police will carry out a criminal record check at the request of the approving authorities or bodies in order to help them discharge their statutory functions. Such statutory provisions cover, for instance, school managers and teachers registered under the Education Ordinance (Cap 279), childminders under the Child Care Services Ordinance (Cap 243), and social workers registered under the Social Workers Registration Ordinance (Cap 505). But there are numerous categories of persons who have close contact with children during their work in respect of whom criminal record checks are currently not available.

In putting forward its interim proposals, the sub-committee has rejected the idea of a register of sex offenders to which the general public has access, along the lines of those found in US jurisdictions. In the sub-committee's view, a public register could adversely affect an offender's family, risk vigilantism in the community and jeopardise rehabilitation.

Instead, the sub-committee recommends the establishment of an administrative scheme to enable employers of persons engaged in child-related work and work relating to mentally incapacitated persons to check the criminal conviction records for sexual offences of prospective employees. The check would be carried out by the police at the request of the job applicant himself, rather than the prospective employer, and would reveal only convictions for a specified list of sexual offences. Convictions that are regarded as 'spent' under the Rehabilitation of Offenders Ordinance (Cap 297) would not be disclosed. The job applicant's consent would be necessary to allow the result to be revealed to the prospective employer. A 'clean' check result would not be recorded in writing, but would be communicated verbally to the job applicant and his prospective employer.

What amounts to 'child-related work' for the purposes of the scheme is work where the usual duties involve, or are likely to involve, contact with a child. It is not the sub-committee's intention, however, that this should extend to work situations where there is occasional contact with children or where the customers may be children, such as cinemas or fast-food outlets.

The proposed recommendations are intended for speedy implementation by administrative measures, rather than by legislation. Employers will not be compelled to carry out checks for previous convictions, but it will clearly be in their interests to do so. Parents will want to know that employers are taking proper precautions to check their staff and they are likely to shun employers who do not do so. In addition, an employer who fails to check prospective employees' records may risk claims for negligence.

An issue on which the sub-committee particularly sought views was whether the proposed scheme should apply only to prospective employees, or should also include existing employees. Applying the proposed scheme to existing employees may raise issues which would have to be resolved between employers and their employees or by the courts. On the other hand, if the proposed scheme applies only to prospective employees, persons with

previous convictions for sexual offences who have already obtained employment in child-related work before the scheme's implementation will escape the net of the sexual conviction records check.

In practical terms, the sub-committee envisages that the scheme now operated by the police for providing Certificates of No Criminal Conviction should be modified and adapted to enable the proposed checks to be conducted. The intention is that criminal records held by the police should be used for the purposes of screening job applicants for positions that give them access to children and mentally incapacitated persons.

The consultation period concluded on 31 October 2008, with close to 200 responses from organisations and individuals received. The sub-committee is now in the process of reviewing these responses before finalising its proposals.

Law Reform Commission of Mauritius

The Law Reform Commission of Mauritius (LRCM) released a Review Paper *The Criminal Justice System and the Constitutional Rights of an Accused Person* in September 2008; recently released an Issues Paper on the Equal Opportunities Bill.

The LRCM released two final reports, *Disclosure in Criminal Proceedings*; and *Review and Reform of Bail Act* and a report *Divorce by Mutual Consent* in December 2008. A Consultation paper *Review and Reform of Local Government Legislation* was also released in December 2008, with a Final Report for the Inquiry scheduled for completion in April 2009.

The first Consultation Paper to be issued in 2009 will be *Implementation of Hague Conventions on Private International Law*. An Information Paper on Forensic Use of DNA is expected to be delivered by February 2009.

The Commission is currently working on a Consultation Paper *Securing Human Rights*, due for completion by 12 March 2009; a Consultation Paper *Tax Law Reform* due by the end of March 2009; a Final Report *Reform of Law relating to Admissibility of Confessions* for release in May 2009; and *Facilitating Business: Registration of Property*, a Final Report scheduled for release by the end of June 2009.

Law Reform Commission of Western Australia

Compensation for Injurious Affection

The Law Reform Commission of Western Australia (LRCWA) published its Discussion Paper on *Compensation for Injurious Affection* in October 2007. The reference required the Commission to inquire into and report upon whether the principles, practices and procedures pertaining to the issues of compensation for injurious affection to land in Western Australia require reform.

The release of the Discussion Paper stimulated much debate and after a lengthy submissions period resulted in twenty responses being received. Recently the LRCWA published its Final Report, the release of which was delayed due to the change of government in Western Australia.

The Final Report makes 31 recommendations for reform, based upon the following policy and philosophical priorities:

- Compensation for compulsorily taking a person's land, including for damage to adjacent land, should be in an amount that is just.
- Compensation should be effected in a timely and efficient manner.
- Clarity and consistency of legislation are important to each of those two goals.
- Consistency across the State's legislation is desirable on the grounds that it is inherently unjust to treat in different fashion those who are in materially similar circumstances.
- Where dissimilar treatment of essentially similar cases appears, the Commission has endeavoured to recommend a just standard, not necessarily an existing standard.

Readers who have an interest in this specialised subject area can download a copy of the Final Report from the Commission's website at www.lrc.justice.wa.gov.au.

Problem-Oriented Courts and Judicial Case Management

In July 2008 the LRCWA published a thorough and in-depth Consultation Paper entitled *Court Intervention Programs* which examined court intervention programs operating in Western Australia and Australia with a particular focus on programs addressing drug and alcohol dependency, family and domestic violence, and mental impairment. The Commission examined a cross-section of different programs in order to determine appropriate reforms. The Consultation Paper posed 31 consultation questions and 29 proposals designed to elicit critical response. The submission period closed in November 2008 and resulted in 20 detailed responses being received. The Commission is now in the process of compiling a Final Report, setting out its final recommendations. It is expected the report will be published in March 2009.

Selection, Eligibility and Exemption of Jurors

In September 2007 the LRCWA received a reference to examine and report upon the operation and effectiveness of the system of jury selection. The matter was referred to the Commission as a result of concerns raised about the growing number of people who apply for and are granted exemptions from jury service, or who are disqualified or ineligible to participate on a jury. The consequent effect of these exemptions and disqualifications from jury service is that juries become less representative of the community. In addition to this those who remain eligible for jury service then carry a greater burden to fulfil this important civic duty. The Commission anticipates that following on from a detailed Discussion

Paper, a Final Report outlining its recommendations will be published in early 2009.

A Review of Coronial Practice in Western Australia

In November 2007 the LRCWA was asked to carry out a Review of Coronial Practice in Western Australia. The Commission has a panel of experts available to provide advice through out the life of the reference and has engaged the specialised skills of Dr Ian Freckelton and Dr Tatum Hands to undertake the project. The Terms of Reference are very broad and cover such areas as improvements to the Act; changes to jurisdiction, practices and procedures of the Coroner and the office; improvements to be made in the provision of support for families, friends and others; the provision of investigative, forensic and other services in support of the coronial function; and any other related matter. It is envisaged the project will take several years to complete with detailed consultations already underway and the release of a lengthy Discussion Paper expected in late 2009.

E-news

The LRCWA has an e-news subscription service which informs subscribers when reports and papers are released as well as keeping subscribers up-to-date with the Commission's activities. The Commission invites reform readers to subscribe to this service. Subscription is free and you can unsubscribe at any time—just follow the prompts on the website: www.lrc.justice.wa.gov.au.

Manitoba Law Reform Commission

The Manitoba Law Reform Commission (MLRC) released a report on Franchise Law in December 2008. The MLRC is currently finalising a report on Waiver and Personal Liability and a report on Limitations of Actions, both due for release in early 2009.

The Commission is in the research phase for the Divorced Spouses and Survivors' Pension Benefits project. A Draft Report has been prepared on Private International Law. This project deals with two matters arising out of the Supreme Court of Canada decision in *Tolofson v Jensen* and *Lucas v Gagnon*. The Defamation Project is currently in abeyance.

New South Wales Law Reform Commission

Jury Directions in Criminal Trials

In February 2007, the Attorney General requested that the New South Wales Law Reform Commission (NSWLRC) inquire into the directions and warnings given by a judge to a jury in a criminal trial. The NSWLRC is required to have regard to:

- The increasing number and complexity of the directions, warnings and comments required to be given by a judge to a jury
- the timing, manner and methodology adopted by judges in summing up to juries (including the use of model or pattern instructions)
- the ability of jurors to comprehend and apply the instructions given to them by a judge
- whether other assistance should be provided to jurors to supplement the oral summing up
- any other related matter.

The NSWLRC has published a Consultation Paper (CP 4) which looks at the instructions that judges currently give. It poses the question of whether the instructions are necessary for a fair trial and, if so, whether they can be presented to jurors in a more effective way. Consideration is also given to the ways in which judges' oral directions can be supplemented by other materials, such as computer technology, written summaries, and flow charts setting out pathways to a verdict.

The Commission is inviting submissions from the public (submissions to be received by 13 March, 2009) on all aspects of jury directions, including the ways in which they are delivered and expects to publish a Report in June 2009.

Young People and Consent to Health Care

In June 2004, the NSWLRC published Issues Paper 24, *Minors' Consent to Medical Treatment*, as part of a review which is considering when young people, below the age of 18, should be able to make decisions about their own medical care. The Paper examines who should be able to make medical decisions for minors on their behalf, and what the legal liability of medical practitioners should be who treat minors without valid legal consent.

The Commission conducted consultations in the second half of 2006, and conducted a full-day seminar in November 2006, jointly organised with the Law School at Macquarie University. The Final Report has now been completed and will be available following tabling in Parliament.
Visit www.lawlink.nsw.gov.au/lrc for details.

Privacy

The NSWLRC published Consultation Paper 1 (CP 1), entitled *Invasion of Privacy*, in May 2007. The Paper considers the question whether a new cause of action based on invasion of privacy should be enacted in New South Wales; and the elements of such a cause of action, the defences and the remedies.

Consultation Paper 3 (CP 3, *Privacy Legislation in NSW*) was published in June 2008, examining aspects of New South Wales privacy legislation (primarily the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*).

The Commission will publish a report in March 2009 dealing with the issue of whether there should be a new cause of action.

People with Cognitive or Mental Health Impairments

The NSWLRC commenced two projects in early 2007 under its Community Law Reform Program relating to people with cognitive or mental health impairments coming into contact with the criminal justice system.

The first was to review section 32 of the *Mental Health (Criminal Procedure) Act 1990*. This provision gives a magistrate very broad powers (including diversion from the criminal justice system) when dealing with a defendant who is developmentally disabled, or suffering from a mental illness, or suffering from a mental condition for which treatment is available in a public hospital (but is not mentally ill within the meaning of Chapter 3 of the *Mental Health Act 1990*).

The second project was to review the principles of sentencing offenders with cognitive or mental health impairments.

In September 2007, the Attorney General issued the Commission with new, expanded terms of reference. As well as the matters already being considered, the NSWLRC is now also required to consider 'fitness to be tried' and the 'defence of mental illness'. The Commission will publish a Consultation Paper in March 2009. The Final Report is scheduled for December 2009.

Complicity

In January 2008, the NSWLRC published a Consultation Paper on the Law of Complicity. Complicity refers to rules that widen criminal liability beyond the main perpetrator of a criminal act to another person or persons who may have assisted the main perpetrator to commit an offence. The secondary participant can be held equally guilty of the crime committed. The concept is often referred to as derivative or secondary liability. The law of complicity in NSW is still based on the common law, unlike most States, Territories and the Commonwealth, which have codified the relevant principles.

The Commission's Paper focuses on two types of complicity:

- extended common purpose, and
- accessorial liability.

The third type, which is not considered in any detail, is concerned with joint criminal enterprise.

The Paper outlines the criticisms which have been directed at these aspects of the law of complicity, particularly by Justice Kirby in a number of High Court cases. The Commission will complete a Report on complicity in the early part of 2009.

Workplace Deaths

The NSWLRC is conducting a statutory review of provisions inserted in 2005 into the *Occupational Health and Safety Act 2000,* which created a new offence relating to workplace deaths. The Commission will be publishing a report in 2009.

Emergency Medical Care and the Restricted Right to Practise

In November 2008, the Attorney General asked the NSWLRC to review the *Medical Practice Act 1992* (NSW) to determine whether individuals whose legal right to practise medicine is restricted ought to be under any, and if so what, obligation to provide emergency medical care contrary to the restriction on their right to practise.

Practitioners whose right to practise is restricted may only be able to provide 'urgent' services if they act in breach of the restrictions imposed on their right to practise. If they abide by those restrictions, their conduct amounts to 'unsatisfactory professional conduct'. On the other hand, if they ignore the restrictions and provide the urgent treatment required, they are likewise guilty of unsatisfactory professional conduct under the Act for ignoring a condition attached to their registration (*Medical Practice Act* s 36(1)(c)). The Act does not resolve this difficulty.

The Commission is calling for preliminary submissions and will carry out consultations in early 2009, with a view to reporting by mid-2009.

Review of Penalty Notice Offences in NSW

The Attorney General, in December 2008, has asked the NSWLRC to inquire into the laws relating to the use of penalty notices in NSW and, in particular, in relation to the level of penalties available, the methods by which offences are selected which attract penalties, and the methods by which penalties are set, as well as the categories of persons in relation to whom they should be available. Planning for this reference is in the preliminary stages and a timetable has not yet been established.

Northern Territory Law Reform Committee

Current Projects

The Northern Territory Law Reform Committee (the Committee) is a non-statutory committee established to advise the Attorney-General of the Northern Territory, the Hon Chris Burns MLA, on the reform of law in the Northern Territory. The Committee is independent of the Department of Justice and reports directly to the Minister for Justice and Attorney-General.

The Committee consists of the Chair, currently the Hon Austin Asche AC QC, and 12 other members including the Chief Magistrate, the Ombudsman, the Executive Officer of the Law Society, members of the legal profession, academic staff of the Northern Territory University including at least one member from the Faculty of Law, a representative of the Police Force and a member from an Aboriginal body. The Committee considers matters referred to it from time to time by the Attorney-General.

The Committee is currently considering two separate issues:

1. the need for and whether it is considered appropriate to amend the *Powers of Attorney Act* to accommodate and provide for Medical Enduring Powers of Attorney; and

2. investigate the implementation of the proposal of the NTLRC *Oaths Act* Report of 1983, namely that the oath requirements be abolished and replaced by a simpler form of affirmation.

Queensland Law Reform Commission

A review of the Peace and Good Behaviour Act 1982 (Qld)

In August 2008, the Attorney-General tabled the Queensland Law Reform Commission's (QLRC) Report, A review of the *Peace and Good Behaviour Act* 1982 (R 63). This Act permits a magistrate to make an order requiring another person to 'keep the peace and be of good behaviour' for a period of time.

In its Final Report, the QLRC formed the view that the current Act is seriously deficient in many important respects. Among other things, the Commission found that the existing grounds for obtaining an order are too restrictive, that the procedure for seeking an order is too complex, that the existing mechanism for referral to mediation is inadequate in resolving disputes, and that there is inadequate provision for the prosecution of breaches. Consequently, the Commission recommended the development of a new and comprehensive legislative scheme, rather than the amendment of the current Act. The Commission's Report includes draft legislation—the Personal Protection Bill 2007—to give effect to its recommendations.

In contrast to the current Act, which is of general application, the draft Bill covers people who fall outside the coverage of the Queensland domestic violence legislation, such as neighbours and people who share a residence but who are not in a domestic relationship. The Commission envisages that the draft Bill, in conjunction with the domestic violence legislation, will provide people who are in need of protection with a more uniform framework for obtaining a protective order, regardless of their particular relationship with the person against whom the order is sought.

A review of the provisions of the Criminal Code (Qld) relating to the excuse of accident and the defences of provocation

In April 2008, the QLRC received a reference to review the excuse of accident under section 23(1)(b) of the Criminal Code (Qld) and the partial defence of provocation under section 304 of the Code. The main focus of the review was the operation of these provisions in murder and manslaughter trials.

The Commission was also asked to review the defence of provocation under sections 268 and 269 of the Code, which operates as a complete defence to any offence of which assault is an element.

In June 2008, the Commission released a Discussion Paper examining the excuse of accident. This was followed in August 2008 by a further Discussion Paper examining the partial defence of provocation under section 304 of the Code and the complete defence of provocation under sections 268 and 269 of the Code.

The Commission's Final Report was tabled on 1 October 2008 (R 64). The main recommendations were in relation to the defence of provocation under section 304. The Commission recommended that the section be amended to provide that, other than in circumstances of an extreme and exceptional character, provocation cannot be based on:

- words alone or conduct that consists substantially of words; or
- the deceased's choice about a relationship.

The Commission also recommended that section 304 should be amended to provide that the defendant bears the onus of proof of the partial defence of provocation on the balance of probabilities.

Finally, the Commission recommended that consideration should be given, as a matter of priority, to the development of a separate defence for battered persons, which reflects the best current knowledge about the effects of a seriously abusive relationship on a battered person, ensuring that the defence is available to an adult or a child and is not gender-specific.

Scottish Law Commission

Consumer remedies

On 10 November 2008, the Commission published a joint Consultation Paper (LCCP 188/ SLCDP 139) on Consumer Remedies for Faulty Goods. The consultation is in response to a reference from the Department for Business, Enterprise and Regulatory Reform which asked the Scottish Law Commission and the Law Commission to look at simplifying the remedies which are available to consumers when they purchase goods which do not conform to contract because, for example, they are faulty. This is part of a wider review of the eight existing European

Commission consumer directives. In October 2008, the European Commission published a proposal for a new directive which would (among other things) reform the law on consumer remedies. It is based on 'full harmonisation', which means that member states could not provide fewer or more rights than the reformed directive requires. BERR is currently conducting its own consultation on the European Commission's proposal (available at www.berr.gov.uk).

The law is complex as there are two legal regimes:

1. Under traditional UK law, consumers are entitled to reject the goods and receive a full refund ('the right to reject'), provided they act within 'a reasonable time'. However, the court cases give little guidance on how long a reasonable time lasts.
2. This has been supplemented by the European 1999 Consumer Sales Directive, which states that consumers are entitled to a repair or replacement. If the retailer is unable to repair or replace the goods in a reasonable time or without significant inconvenience, the consumer may then ask for a refund ('rescission') or a reduction in price.

There has been little attempt to integrate these regimes. Consumers may use either, leading to confusion and complexity. The Scottish Law Commission's aim is to propose a law which is easily understood and fair to both consumers and retailers, proposing a more harmonised regime, incorporating both European remedies and the right to reject.

Criminal law

The majority of the recommendations made in the Scottish Law Commission's Report on *Rape and Other Sexual Offences* (No 209) (available from the Commission's website) are to be implemented in the Sexual Offences (Scotland) Bill, which was introduced in the Scottish Parliament on 17 June 2008. The Bill and accompanying documents are available at www.scottish.parliament.uk/s3/bills/11-sexualOffences/index.htm.

The Scottish Law Commission Report *Crown Appeals* (Scot Law Com No 212) was published on 31 July 2008. The Report recommends a number of changes to solemn criminal procedure, including:

- the broadening of the existing submission of no case to answer at the end of the prosecution evidence to allow a submission to be made that, on the evidence led by the Crown, no reasonable jury, properly directed, could convict;
- introducing a statutory submission at the close of all of the evidence relating to insuffiency of evidence to support a charge or part of a charge, or contending that no reasonable jury, properly directed, could convict; and
- introducing a prosecution right of appeal against the judge's ruling on either of these submissions, or against an evidential ruling made in the course of the trial.

The Report, and the earlier Discussion Paper (No 137), are available on the Commission's website.

The Commission has commenced work on a Discussion Paper on Double Jeopardy, exploring the current Scots law and asking whether this should be re-stated in statute and whether exceptions should be introduced. The Discussion Paper is scheduled for publication in January 2009.

Damages for wrongful death

The Scottish Law Commission received a reference from Scottish Ministers at the end of September 2006 inviting us to review the provisions of the *Damages (Scotland) Act 1976* relating to damages recoverable in respect of deaths caused by personal injury and the damages recoverable by relatives of an injured person.

The Report was published on 30 September 2008. It takes into account the responses which we received to our Discussion Paper *Damages for Wrongful Death* (DP No 135), which was published on 1 August 2007. It recommends a number of changes to the law of damages in cases where a person dies as a result of personal injuries. The main recommendation is that the *Damages (Scotland) Act 1976*, which has been heavily amended, should be repealed and replaced by a new Act which restates the current law in a clearer and simpler form. It also recommends a number of substantive changes to the existing law, including:

- a new method of calculating the damages payable to a victim's family which recognises that the traditional family model of a single breadwinner is declining and that families must be considered as a whole;
- limiting the classes of relative who have a claim for damages as a result of a victim's death in order to focus more clearly on the victim's immediate family;
- in addition, we recommend several technical changes in relation to the calculation of damages by the courts.

Insurance law

In July 2007, the Scottish Law Commission and the Law Commission published a joint Consultation Paper *Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured* (LCCP 182/SLCDP 134). The proposals largely focus on misrepresentation and non-disclosure and explore the issues around what happens when claimants make mistakes in application forms or when they fail to mention facts which the insurer would regard as relevant. Summaries of the responses which we received

in relation to the consumer insurance and the business insurance proposals are now available on our website. The summaries do not set out the views of the Commissions and are issued purely for the purpose of reporting the points of view which have been put to us.

As there is a wide consensus that consumer insurance law is in urgent need of reform we intend to give priority to drafting new legislation dealing with consumers' obligations to give pre-contractual information to insurers and insurers' remedies where they fail to do so. We expect to publish our recommendations and draft legislation on consumer insurance in summer 2009.

There is also support for reform of business insurance law. We would, however, like to consult further on this and, accordingly, we will be publishing an issues paper in due course. We are also working towards our second formal consultation paper. Its main topics will comprise insurable interest, fraud, post-contractual good faith and damages for late payment of claims.

Level crossings

This project is being undertaken jointly with the Law Commission for England and Wales. The project is included in the Law Commission's Tenth Programme following a suggestion by the Department for Transport. We are assisting the Commission with the Scottish aspects of the project.

Level crossings present the largest single risk of catastrophic train accident on Britain's railways, but the current legal framework is complex and outdated. The aim of this project is to make recommendations to modernise and simplify the legal framework. The aim is to publish a joint consultation paper in mid-2009.

Property

The Commission continues to work on the review of the *Land Registration (Scotland) Act 1979*. This project looks at the difficulties that have arisen in practice with the 1979 Act and considers the need for a conceptual framework to underpin its provisions. A Discussion Paper (No 125) on Void and Voidable Titles, dealing with the policy objectives of a system of registration of title, was published in February 2004. A second Discussion Paper, (No 128) was published in August 2005. This paper looks at the three core issues of registration, rectification and indemnity against the background of the conceptual framework set out in the first paper. A third Discussion Paper (No 130) was published in December 2005. It considers various miscellaneous issues such as servitudes, overriding interests and the powers of the Keeper of the Register. The Commission is now working on the report.

The Commission's Report (No 208) on *Sharp v Thomson* was published in December 2007. At present someone buying property can, in certain circumstances, lose the property if a corporate seller becomes insolvent before the purchaser registers title to it. While the current law is satisfactory at protecting someone who purchases property against the risk that an individual seller might become insolvent, it is less satisfactory in the case of a corporate seller. With the aim of reducing the risk where a company sells property, the Report recommends that the rules be tightened: (1) to ensure that buyers can readily find out whether winding-up proceedings against a corporate seller have been initiated; and (2) to ensure that floating charges cannot attach to the property without the attachment having been publicly registered—the 'no attachment without registration' principle.

Succession

The Commission last reviewed this area 15 years ago although its recommendations have not been implemented. We are now coming to the end of a new project in this area. In our view the law does not reflect current social attitudes nor does it cater adequately for the range of family relationships that are common today. A public attitude survey was commissioned and a Report of the results *Attitudes Towards Succession Law: Finding of a Scottish Omnibus Survey* was published by the Scottish Executive in July 2005. The Commission's Discussion Paper *Succession* (No 136) was published on 16 August 2007. It contained many proposals for reform on: intestacy where there was a surviving spouse or civil partner, stepchildren's rights on intestacy, and whether and if so how spouses and civil partners, cohabitants, children (including stepchildren) and others should be protected from disinheritance. The consultation period ended on 31 December 2007 and, after considering the responses, we are in the process of drawing up a report and draft bill. We are aiming at a publication date early in 2009.

Trusts and judicial factors

The Commission is undertaking a wide-ranging review of the law of trusts. The project is being tackled in two phases. The first concentrates on trustees and their powers and duties. Two Discussion Papers were published in September 2003 as part of this phase—*Breach of Trust* (No 123) and *Apportionment of Trust Receipts and Outgoings* (No 124). A third paper dealing with the assumption, resignation and removal of trustees, their powers to administer the trust estate and the role of the courts (No 126) was published in December 2004. The final Phase 1 Discussion Paper, the *Nature and the Constitution of Trusts* (No 133), was published in October 2006. It considered the dual patrimony theory, the possibility of conferring legal personality on trusts and what juridical acts are required to constitute a trust as between the truster and the trustees/beneficiaries and as between the truster and third parties. It dealt also with latent trusts of heritable property.

The second phase of the project will cover the variation and termination of trusts, the restraints on accumulation of income, and long-term private trusts. It also looks at trustees' liability to third parties, on which we published a Discussion Paper (No 138) in May 2008, and enforcement of beneficiaries' rights. The Commission published a Report (No 206)

Variation and Termination of Trusts in March 2007 following a Discussion Paper in December 2005. The Report makes several recommendations for removing current obstacles to variations of private trusts and for providing a uniform process for reorganising public trusts.

The Commission's recommendations regarding the investment powers of trustees contained in the Report *Trustees' Powers and Duties* (1999, jointly with the Law Commission for England and Wales) have been implemented by the *Charities and Trustee Investment (Scotland) Act 2005*. Trustees can now invest in any kind of property and also buy land for any purpose.

Work on a Report on the outstanding issues on which we have consulted will be undertaken throughout 2009, when we also aim to publish a further Discussion Paper (on the rules on accumulations of income and on the lifetime of private trusts).

The Commission also has a project concerning the law relating to judicial factors. A judicial factor is an officer appointed by the court to collect, hold and administer property in certain circumstances, for example, there may be a dispute regarding the property, there may be no one else to administer it or there may be alleged maladministration of it. The Commission believes that a radical overhaul of this area of law is necessary because judicial factory is a cumbersome procedure involving disproportionate expense. We have carried out empirical research into the current use of judicial factory and have consulted practitioners experienced in this field. Unfortunately, the project is currently suspended due to the need to give priority to other work.

Unincorporated associations

We are currently examining the law relating to unincorporated associations. Such bodies exist for a wide variety of purposes and in a wide range of sizes and structures. At one end of the scale they may be substantial organisations with property, employees and contractual commitments. At the other end, they may be informal groupings of individuals joining together for temporary and specific purposes.

In Scots law, such associations are not recognised as having a separate legal personality. It is this absence of personality which can create difficulties and injustices. For example, problems have arisen in the following areas:

- The extent of liability of association members, and of association officials, under contracts with third parties, including staff, is uncertain;
- The extent of liability of association members, and of association officials, under the law of delict is uncertain;
- Title to heritable property must be held in the name of individuals who may cease to be members of the association's governing body, or of the association itself.

Under the present law, a non-profit making organisation which wishes to escape the consequences of the absence of legal personality has little choice but to incorporate. In many jurisdictions whose common law of associations was based upon English law, there have been statutory interventions by virtue of which clubs and associations have ceased to be treated as legal non-entities. The jurisdictions of the United Kingdom have been left behind in this respect. We think that it may be time to propose legislative change for Scotland which would accord some form of legal status to clubs and associations. We will look at various options and put some forward for consideration in a Discussion Paper.

Further information about the Scottish Law Commission's work and its publications may be found on its website at www.scotlawcom.gov.uk.

South African Law Reform Commission

Statutory Law Revision

In 2004 the South African Law Reform Commission (SALRC) included in its law reform programme an investigation into statutory law revision, which entails a revision of all statutes from 1910 to date. The purpose of this investigation is to modernise and simplify the statute book, thereby reducing its size and saving the time of legal professionals and others who make use of it. In turn this helps to avoid unnecessary costs. It also ensures that people are not misled by obsolete laws masquerading as 'living' law.

The focus of the investigation at this stage is the constitutionality of legislation and repeal of outdated provisions. The constitutional inquiry is limited to statutory provisions that blatantly violate the provisions of section 9 (the equality clause) of the Constitution. With the advent of constitutional democracy in 1994, the legislation enacted prior to that year remained in force. This has led to a situation where some pre-1994 provisions are constitutionally non-compliant. A 2004 provisional audit (by the SALRC in consultation with national government departments) of national legislation remaining on the statute book since 1910, established that there are in the region of 2, 800 individual statutes. It is envisaged that some of these statutes serve no useful purpose anymore, while others may contain unconstitutional provisions that have already given rise to expensive and sometimes protracted litigation.

The methodology adopted for the statutory revision project is to evaluate the statute book per Department. A Department is identified, all its national legislation is considered for constitutionality and redundancy, preliminary findings and proposals are included in a consultation document and consultations with that Department are conducted to verify the findings and proposals on redundancy and constitutionality. This process commenced in September 2006 by the evaluation of national legislation, particularly in respect of redundancy, administered by the Department of Transport. A Discussion Paper on the legislation administered by the Department of Transport containing provisional proposals for amendment and repeal

of statutes was published for general information and comment in June 2008. In 2007 the evaluation of the legislation administered by the Department of Housing commenced. The SALRC published its Discussion Paper on the legislation administered by the Department of Housing for general information and comment end 2008.

The national statutes administered by the Departments of Public Works, Arts and Culture, Foreign Affairs, and National Treasury (excluding tax legislation which will be evaluated separately) are being evaluated with a view to determining redundancy, obsoleteness or unconstitutionality. The SALRC is presently consulting with the Departments of Public Works, Arts and Culture and National Treasury (excluding tax legislation) on its preliminary findings on repeal and amendment. The SALRC will consult with the Department of Foreign Affairs on its preliminary findings once the consultation paper on the legislation administered by that Department has been finalised.

With a view to increasing research capacity, the SALRC identified advisory committee members for appointment by the Minister of Justice and Constitutional Development to review the legislation administered by the following thirteen Departments: Agriculture; Communications; Defence; Education; Environmental Affairs and Tourism; Health; Home Affairs; Justice and Constitutional Development; Labour; Land Affairs; Minerals and Energy Affairs; Provincial and Local Government; and Trade and Industry. The SALRC also recommended that advisory committee members be appointed to advise the SALRC on the tax legislation administered by National Treasury. The proposed appointments were considered by the previous Minister of Justice and Constitutional Development and she appointed 112 advisory committee members to 14 advisory committees on 31 July 2008.

In October 2008 the advisory committees met to decide on the way forward, agree on a division of the statutes to be reviewed, time-frames of the first stage of the review, and the development of consultation papers by the end of February 2009.

Review of Family Law and the Law of Persons: Custody (Care) and Access (Contact) to Minor Children

The SALRC was requested to investigate problems surrounding access to children after divorce. After the collation of questionnaires distributed to members of the public on problems experienced with access to children after divorce, it soon became clear that this problem is not limited to divorced parents. The legal position of unmarried fathers also changed after the enactment of section 21 of the *Children's Act* 38 of 2005, as unmarried fathers of children in some instances now have the same parental rights and responsibilities as the mothers of those children. Some parents of children born as a result of a relationship outside of a legally recognised marriage and who are living separately, are therefore now in a similar position as divorced parents living separately from each other. For this reason it was decided to expand the investigation to review aspects related to the custody of and access to all minor children.

To glean the opinions of professionals in this field, four different questionnaires for professionals were developed. The questionnaires were aimed at legal practitioners, family advocates, family counsellors and psychologists. A questionnaire was also developed which was administered to parents involved in custody and access disputes. Focus group discussions were held with nine offices of the Family Advocate in the nine provinces to obtain their views on the procedures involved in determining custody and access of minor children. Subsequent to the focus groups with the offices of the Family Advocate, a national focus group forum was held with the senior and principal family advocates and Family Counsellors to reach consensus on controversial issues. Subsequently, two national focus group forums were held in Cape Town and Gauteng involving lawyers, psychologists, family advocates, social workers, parents, academics, government officials, FAMSA, practicing mediators and a judge. The data obtained from all five questionnaires and the various focus group discussions and forums have been collated and a discussion paper will be published shortly.

Sexual offences: adult prostitution

The investigation into the legal position relating to adult prostitution constitutes the third leg of the SALRC's Project 107: Sexual Offences. The scope of this leg of the investigation is to review the existing law relating to adult prostitution to present the Department of Justice and Constitutional Development with the implications of retaining the current position, further criminalisation, legalisation and regulation or decriminalisation.

Due to the contentious nature of the topic and in order not to hamper the progress of less contentious reforms proposed in the substantive and procedural arena of sexual offences, the project committee on sexual offences decided to de-link this aspect of the investigation from the larger project. The Report and a draft Bill on Sexual Offences addressing substantive and procedural issues relating to sexual offences (representing a combination of the first and second leg of the investigation) was published in 2002. The Bill addressed child prostitution with a child being defined as a person under the age of 18, but did not address adult prostitution.

To date an issue paper (Issue Paper 19) has been published and a Discussion Paper is being developed. Once the SALRC has approved the Discussion Paper for publication it will be broadly workshopped to obtain the views of citizens in this regard. The input from the public will inform the drafting of a Final Report on adult prostitution.

Assisted decision making

This investigation was undertaken as a result of attention being drawn to the declining decision-making ability of persons with Alzheimer's disease, in particular, and the outdated and inappropriate ways in which the South African law deals with this situation. The SALRC's investigation, however, has a broader focus and attempts to deal with the shared problems faced by persons with diminished decision-making capacity regardless of the cause (as a result of for example mental illness, intellectual disability, brain injury, stroke, dementia or incapacity related to ageing in general).

The primary objective of the investigation is to make provision for a truly comprehensive system of assisted decision making that is affordable and accessible to all South Africans with decision-making impairment, which will also protect such persons from abuse, neglect and exploitation.

The publication of discussion documents and extensive public and expert consultation preceded the Report with final recommendations and draft legislation currently being prepared.

Privacy and data protection

The Commission will be finalising its investigation into the protection of personal information of individuals shortly. Opportunities for collecting personal information have increased in recent years due to the expansion of high-speed communications technology. Key users of personal information include telephone companies, retailers, credit bureaux, the health and medical profession, banks and financial institutions, the insurance industry, the direct marketing industry and public bodies such as government departments and agencies, local authorities and the police.

An individual's personal information needs protection since important decisions regarding the person are often taken on the strength of information collected about the individual. However, unbeknown to such a person, the information used may be inaccurate, incomplete or irrelevant. South Africa currently lacks an information security culture which results in high instances of identity theft, compromises data banks and leads to the proliferation of spam. Information may also be accessed and distributed without authorisation and used for purposes that are incompatible with the purpose for which it was collected. On a global, economic level South Africa has to comply with international trade imperatives. Without adequate privacy legislation the free flow of information across international borders has become very problematic if not impossible. Global companies, banks and the newly developing call centre industry, which has huge potential for job creation, are some examples of industries that are negatively affected.

The proposed Protection of Personal Information Bill gives effect to eight internationally accepted information protection principles that provide for the regulation of the flow of personal information. This regulatory framework will ensure a system of good business practice which will provide a safe environment for the processing of personal information both in the public and in the private sector.

Prescription periods

The purpose of prescription periods is to bring about legal certainty. Failure to enforce a claim for a number of years might create the impression that it never existed or that it had already been paid. To promote legal certainty the law provides that a debtor may after the expiry of prescribed period simply refuse to acknowledge the existence of a debt.

The Prescription Act of 1969 provides that, except where a statute provides otherwise, the prescription period for all actions is three years, and there is no provision for condonation where there is late filing of the claim irrespective of the valid reasons that may be provided by the creditor. The result is that there are about 18 statues providing for different prescription periods. When a creditor wants to institute an action s/he would have to ascertain which statute governs the prescription period. This raises the question whether the different prescription periods may lead to confusion and thus prejudice the enforceability of claims.

The purpose of the investigation is the harmonisation of all prescription periods and to replace them by a single uniform standard of prescription. A discussion paper is being prepared which will be published for general information and comment.

Media conference

On 25 November 2008 at Pretoria, the Chairperson of the SALRC, Madam Justice Yvonne Mokgoro of the Constitutional Court of South Africa submitted the following reports to the Minister of Justice and Constitutional Development, Mr ME Surty, MP: *Trafficking in Persons; Protected Disclosures; Stalking;* and *Administration of Estates*. All reports are made available at: http://salawreform.justice.gov.za/

1. Report on Trafficking in Persons

The investigation forms part of the South African Government's response to the phenomenon of trafficking in persons. The SALRC investigated the issue of trafficking in persons for purposes of law reform. More specifically, the initiative seeks to enhance Government's compliance with international obligations as a signatory to the United Nations *Protocol on Trafficking in Persons*.

The Protocol provides that States Parties must adopt legislative measures to criminalise the trafficking of persons. The Report addresses the prevention of trafficking in persons, the prosecution of traffickers and other role-players, and the protection of victims of trafficking. In summary, the Report provides for: (a) The establishment of public awareness programmes or other measures for the prevention of trafficking in persons; (b) The criminalisation of trafficking in persons and related acts; (c) Protective measures, such as avenues for reporting trafficking and the referral of child and adult victims of trafficking; (d) Protective measures in terms of the *Children's Act,* 2005 apply to all child victims of trafficking.

Recommendations also cover the right of trafficked victims to apply for a recovery and reflection period. Victims of trafficking who agree to co-operate with law enforcement and prosecuting authorities may be issued with a temporary residence permit.

2. Report on Protected Disclosures

'Protected disclosures' is commonly referred to as 'whistleblowing'. The Report contains a draft Amendment Bill which embodies proposed amendments to the *Protected Disclosures* Act 26 of 2000 (PDA). The remedies presently provided for in the PDA are confined to the relationship between an employer and employee in the public and private sectors. With the notable increase in the use of part-time and temporary workers coupled with the trend of outsourcing the restricted definition of employee in the PDA excludes a growing number of people from protection if they should make a disclosure regarding improprieties in the work arena. This and a number of related matters have received the attention of the Commission in the course of this investigation.

3. Report on Stalking

The Report contains the final recommendations of the SALRC regarding its investigation into stalking and a draft Bill which embodies a civil remedy to address stalking behaviour. The proposed Bill, with the exception of domestic violence specific provisions, largely mirrors the *Domestic Violence Act,* 1998. The aim of this remedy is to enable victims of stalking, who fall outside the protection of the *Domestic Violence Act,* with the option of obtaining a protection order which is coupled to a suspended warrant of arrest. The primary focus of the Bill is to interrupt stalking behaviour before physical harm ensues. Internationally the legal understanding of stalking has evolved to the point where it now resides under what is broadly termed harassment.

In order to provide greater protection the SALRC recommends that, as has been done in the United Kingdom and Canada, the broader term harassment should be used. The proposed Bill defines harassment as engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused. The SALRC has found that although stalking is not recognised by name as a crime in South Africa, stalking or harassing behaviour is addressed by a number of existing offences, such as assault, *crimen injuria*, trespassing and malicious damage to property. Therefore the SALRC does not recommend the enactment of a specific offence of stalking. The SALRC is of the opinion that an improved understanding of and application of the existing law would acknowledge the rights of certain victims of stalking to redress in terms of the criminal law and provide immediate intervention.

4. Interim Report on Administration of Estates

The Interim Report focuses on the administration of small estates. The Commission's investigation (Project 131) revealed several challenges with regard to the administration of small estates. These cause or contribute to unnecessary suffering for many poor and middle class families, including children. The administration of 'small' estates is currently regulated by section 18(3) of the *Administration of Estates Act* 66 of 1965, which is the focus of the Interim Report.

The Commission's view is that resources should be devoted to safeguarding the interests of minors and incapacitated or other vulnerable persons without undue delays or costs for the beneficiaries. One of the recommendations is that the practice to assist beneficiaries in small estates should be continued. The *Administration of Estates Act* grants the Master of the High Court wide powers to act against executors, but not to act against persons given directions in terms of section 18(3).

The interim report recommends that an executor should be appointed in all cases, but that the Master may dispense with compliance with requirements where circumstances warrant it. A Chief Master's directive for dispensing with requirements must strike a balance between the protection of beneficiaries and the speedy and cost-effective finalisation of estates. The size of the estate remains a factor, but factors such as accounting by the executor and the sophistication of the beneficiaries should also be taken into account.

The Interim Report recommends the streamlining of the examination of accounts by the Master; the follow-up of requirements after an account has been advertised free of objections; and the removal of executors. A draft Bill is included.

SALRC Chairperson honoured

Justice Yvonne Mokgoro, Constitutional Court justice and Chairperson of the South African Law Reform Commission was recently honored with an honorary doctorate in law. The University of Pretoria awarded Justice Mokgoro the LLD (*honoris causa*) degree in recognition of her visible contribution to human rights, jurisprudence and the rule of law.

SALRC Commissioner appointed as Dean of Law

In October 2008, Professor PJ Schwikkard was appointed as Dean of the Law faculty at the University of Cape Town (UCT). The first woman to occupy this position at UCT, Professor Schwikkard is the Project Leader of the Commission's Project on Review of the Law of Evidence (Project 126) and has supervised several other projects. As well as being a member of the South African Law Reform Commission, Professor Schwikkard is also on the Editorial Board of the *International Journal of Evidence and Proof*. She has written numerous articles in the fields of criminal procedure and evidence and was an editor of the *South African Journal of Criminal Justice* until 2008.

Commission secretary appointed

With effect from 1 June 2008, Mr Michael Palumbo who acted as Commission Secretary has been appointed as Secretary of the SALRC. Mr Palumbo began his legal career 1982 with a BJuris from the University of Pretoria and began working for the Department of Justice in 1983. He also received his LLB from the University of South Africa in 1985, a Diploma in Advanced Public Administration in 1990 and was admitted as an Advocate of the High Court of South Africa. From 1989 until 1996 he worked as a researcher at the SALRC and became Assistant Secretary in 1997. During this time he was engaged in investigations into bribery and corruption which led to the *Corruption Act* 94 of 1992. He also co-researched an investigation into group and human rights. This investigation was the catalyst which ultimately led to the inclusion of the Bill of Rights in the Constitution.

Mr Palumbo was also co-researcher in an investigation into Constitutional Models for which the SALRC was awarded a Humanitas Prize from the Human Sciences Research Council. This prestigious award was in recognition of the SALRC's outstanding research, as the aforesaid investigation has had a proven practical effect on the enhancement of the quality of life in South Africa. While working as a researcher for the SALCR, Mr Palumbo also co-researched the review of the law of insolvency. He also investigated law pertaining to domestic violence which led to the *Domestic Violence Act* 116 of 1998.

Tasmania Law Reform Institute

Sentencing

In June 2008, the Institute released final report no 11 containing 96 recommendations that are directed to improving the operation of the sentencing system in Tasmania. The key recommendation was for an independent statutory Sentencing Advisory Council to be established. The primary role of the Council would be to bridge the gap between the community, courts and government by informing, educating and advising on sentencing matters. Its functions would include conducting research on sentencing issues, consulting with government bodies, stakeholders and members of the public on sentencing matters, and advising the Attorney-General on sentencing. The Council would also be responsible for gauging public opinion on sentencing matters and co-ordinating strategies to educate the public on crime and sentencing issues.

Other recommendations from the Report included:

- directing resources to evidence-based rehabilitative programs for prisoners in the areas of cognitive behavioural therapy, sex offender treatment and drug treatment programs to improve the potential for rehabilitation during custody;
- obtaining information about recidivism rates, program rates and completion and breach rates in relation to conditional orders, such as suspended sentences and community service orders;
- reviewing procedures for breach of conditional orders;
- conducting a feasibility study of day fines;
- researching the value of victim impact statements in Tasmania;
- developing a community conferencing pilot for young adults; and
- reviewing the administrative procedures for compensation orders.

Easements and analogous rights

The project reviews the current laws of easements and analogous rights to determine whether they meet community expectations and needs. Disputes about easements can have a significant emotional and financial cost to Tasmanians. This was highlighted in the way in which this project came to the attention of the Institute. In suggesting a review of the law of easements, a member of the public detailed the emotional, personal and financial costs involved in a dispute about the use of a right of way. Underlying this dispute is a reminder of the need for rights attaching to land to be easily identifiable and clearly understood.

An Issues Paper has been approved by the Board and will be released in January 2009. The paper provides a report of the current law of easements and outlines possible areas for reform, considers the current legislative requirements for the creation, variation and termination of easements, and considers the interaction of the legislation with the current common law requirements. It invites comment

on several issues, including whether the law on access to an easement by the dominant owner should be clarified and whether an inexpensive dispute resolution mechanism should be formalised within the legislation. In addition, the paper addresses issues in relation to novel easements and easements in gross.

Evidence Act 2001 Sections 97, 98 & 101 and Hoch's case: Admissibility of 'Tendency' and 'Coincidence' Evidence in Sexual Assault Cases

This project is concerned with the conduct of trials in sexual offences cases where an accused is charged with offences against several complainants. It addresses two issues: (1) the rules of joinder/severance; and (2) where counts are joined, whether the evidence of one complainant can be used to convict the accused of an offence against another complainant. This concerns the operation of the rules relating to tendency and coincidence evidence set out in Part 3.6 of the *Evidence Act 2001* (Tas), and particularly ss 97, 98 and 101. Consideration is given to the need for changes to the law in order to lessen the exposure of complainant's to repeated cross-examination, and to avoid repeated voir dires, appeals and retrials. An Issues Paper is close to finalisation and it is anticipated that this will be released in January 2009.

Western Canada Law Reform Agencies

Enduring Powers of Attorney: Areas for Reform

The Western Canada Law Reform Agencies (WCLRA) is a consortium consisting of the British Columbia Law Institute, the Alberta Law Reform Institute, the Law Reform Commission of Saskatchewan and the Manitoba Law Reform Commission.

In its report *Enduring Powers of Attorney: Areas for Reform*, WCLRA recommends uniformity of certain key provisions in each western province's statute governing enduring powers of attorney (EPAs). Apart from these proposed uniform provisions, it is intended that each province's statute will remain unique. The recommendations are designed to make it easier to use EPAs in cross-border situations, to promote wider understanding and knowledge of attorney duties, and to provide some additional safeguards against attorney misuse of an EPA.

To make it easier to use EPAs in cross-border situations, WCLRA proposes reforms to promote greater recognition of EPAs made and used in the four western provinces. These reforms include:

- standard formal requirements for making EPAs;
- uniform legislative changes to facilitate recognition of EPAs made in other provinces. Recognition should be extended to a foreign EPA if it meets the formal requirements of the recognising province's statute, or if the EPA was made under and meets the formal requirements of the jurisdiction where it was made or where the donor was habitually resident at the date of its making;
- a simple standard form EPA for those who wish to use it.

WCLRA recommends that each province enact a uniform statutory list of attorney duties. If everyone knows how an attorney is supposed to act, there is less chance that an attorney will misuse the power of an EPA through ignorance. Public education about these duties is also urged. WCLRA recommends a list of seven attorney duties. When the donor becomes mentally incapable, an attorney under an EPA must:

- act honestly, in good faith, and in the best interests of the donor;
- take into consideration the known wishes of the donor and the manner in which the donor managed the donor's affairs while competent;
- use assets for the benefit of the donor;
- keep the donor's property and funds separate, except as permitted by statute (co-mingling will be allowed only where there existed before the donor's mental incapacity an established pattern of co-mingling involving that asset);
- keep records of financial transactions;
- provide details of financial transactions on request; and
- give a formal Notice of Attorney Acting to certain people when the attorney starts to act under the EPA.

To safeguard against misuse, it is important to bring an attorney's conduct out into the open where others can notice if something seems wrong. Greater transparency and scrutiny will allow action to be taken when misuse is suspected. Proposed safeguards in this area include:

- an attorney must give a Notice of Attorney Acting;
- persons who suspect misuse can contact a public official, who has the discretion to investigate. Investigation should occur where the public official has grounds to believe that an attorney has breached any of the attorney duties;
- statutory protection is recommended for those who, in good faith, report misuse or participate in an investigation;
- the public official would have the power to freeze accounts for up to 30 days, obtain information from financial institutions, examine records and obtain warrants for search and seizure;
- financial institutions who suspect misuse would also be empowered to temporarily freeze accounts for up to 5 days while reporting their suspicions.

Copies of the Report are available to view or download on the individual websites of the WCLRA member agencies.

Clearing House

Recent law reform publications and areas of law under review

Clearing House is compiled by the Australian Law Reform Commission. Entries can be made by emailing details of law under review to reform@alrc.gov.au. A list of abbreviations is available at the end of this document.
This edition of Clearing House covers ongoing inquiries and publications released from June 2008 to November 2008.

Administrative Law

AJTC
Options for the Future Administration and Supervision of Tribunals in Scotland: A Report by the Administrative Justice Group, October 2008 (R).

ALRC
Review of secrecy laws—WIH on IP.

ALRI
Draft Model Code of Procedures for Administrative Tribunals, October 2008 (CP).

ARC
The Coercive Information-gathering Powers of Government Agencies, June 2008 (R 48).
Administrative Accountability in Business Areas Subject to Complex Regulation, June 2008 (WDR).

HoRLCA
Inquiry into whistleblowing protections within the Australian Government public sector—WIH on inquiry.

NCCUSL
Revised Model State Administrative Procedure Act—new draft November 2008.
Administrative procedures for interstate compact entities—WIH by study committee.

NSWLRC
Privacy Legislation in New South Wales, June 2008 (CP 3).

NZLC
Review of Prerogative Writs, August 2008 (IP 9).

WALC
Jurisdiction and operation of the State Administrative Tribunal—WIH on new inquiry.

Agriculture

ACIP
Enforcement of plant breeder's rights—final report expected late 2008.

Animals

VLRC
Legal status of assistance animals—report expected early 2009.

Assault

AGD
Drink and Food Spiking, July 2008 (R).

Assisted Reproduction

NSWLCLJ
Inquiry into legislation on altruistic surrogacy in New South Wales—report expected 2008.

VPSARC
Assisted reproductive treatment legislation—WIH on inquiry.

Associations

BCLI
Proposals for a new Society Act, August 2008 (R).

HKLRC
Charities—WIH on inquiry.

NCCUSL
Uniform Unincorporated Non-Profit Association Act, July 2008.

Scot Law Com
Unincorporated associations—WIH on DP.

Bankruptcy & Insolvency

CAMAC
Issues in external administration—WIH on inquiry.
Long-tail Liabilities: The Treatment of Unascertained Future Personal Injury Claims, May 2008 (R). Shareholder claims against insolvent companies—WIH on inquiry.

HMT(UK)
Proposals to amend Part 7 of the Companies Act 1989, July 2008 (CP).

Children and Young People

ALRC
For Your Information: Review of Australian Privacy Law and Practice, May 2008 [released August 2008] (R 108).

DoFP(NI)
Contact with children—WIH on inquiry.

HKLRC
Causing or allowing the death of a child—WIH on inquiry.

NCCUSL
Hague Convention on the Protection of Children—WIH by study committee.
Relocation of Children Act—new draft October 2008.

NSWLRC
Minors' consent to medical treatment—WIH on inquiry.

NSWLCLJ
Inquiry into legislation on altruistic surrogacy in New South Wales—report expected 2008.

TLRI
Male circumcision—WIH on IP.

VSAC
Sexual offences against children—WIH on inquiry.

Civil Partnerships

DoFP(NI)
Cohabitation—WIH on inquiry.

Commercial Law

Man LRC
Franchise law—report expected December 2008.

NCCUSL
Record Owners of Business Act—new draft July 2008.

Commissions of Inquiry

NZLC
A New Inquiries Act, May 2008 (R 102).

Compensation

ALRI
Workers' compensation—WIH on inquiry.

Law Com
Administrative Redress: Public Bodies and the Citizen, July 2008 (CP 187).

LRCWA
Compensation for Injurious Affection, July 2008 (R).

NZLC
Compensating Crime Victims, October 2008 (IP 11).

Computers

AGD
E-Security Review, July 2008 (DP).

Constitutional Law

HoRLCA
Inquiry into Constitutional Reform, June 2008 (R).

LRC Maur
The Criminal Justice System and the Constitutional Rights of an Accused Person, September 2008 (CP).

NZLC
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Law Com; Scot Law Com
Consumer Remedies for Faulty Goods, November 2008 (CP 188).

Treasury
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AGD
United Nations Convention on the Use of Electronic Communications in International Contracts 2005, November 2008 (CP).

BCLI
Defective contracts relief—WIH on final report.

Man LRC
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CAMAC
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NCCUSL
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PJCCFS
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VPSARC
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MoJ(UK)
Titan Prisons, June 2008 (CP).

LJFNSW
Taking Justice into Custody: The Legal Needs of Prisoners, July 2008 (R).

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ALRI
Rules of Court Project, October 2008 (R 95). Draft Rules of Court, October 2008. Enforcement of Judgments, September 2008 (R 94). Criminal appeals—CP expected early 2009.

HKLRC
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HMCS(UK)
Crown Court Means Testing, November 2008 (CP).

ILRC
Limitation of actions—WIH on inquiry.

Law Com
The High Court's jurisdiction in relation to criminal proceedings—WIH on report.

LRCWA
Court Intervention Programs, July 2008 (CP).
Review of coronial practice—WIH on new inquiry.

Man LRC
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NCCUSL
Uniform Unsworn Foreign Declarations Act, July 2008.

NTLRC
Oaths Act and affirmations—WIH on inquiry into implementation of NTLRC proposals.

NZLC
Criminal procedure simplification—WIH on inquiry.

SALRC
Prescription periods—WIH on DP.
Review of administration orders—WIH on inquiry. Use of electronic equipment in court proceedings—WIH on inquiry.

Scot Law Com
Crown Appeals, July 2008 (R 212).
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TLRI
Contempt of court—WIH on IP.

VLRC
Jury Directions, September 2008 (CP).

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HMCS(UK)
Crown Court Means Testing, November 2008 (CP).

ILRC
Consolidation and reform of the Courts Act—WIH on inquiry.

Law Com
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LRCWA
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NCCUSL
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VPLRC
Vexatious Litigants—Judicial Officers and VCAT Members, October 2008 (R).
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ARC
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LRC Maur
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MoJ (UK)
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NCCUSL
Electronic recording of custodial interrogations—WIH by study committee.

NSW Omb
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NZMJ
Regulating Private Investigators: Review of Private Investigators and Security Guards Act 1974, September 2008 (DP).

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AGD
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Model Spent Convictions Bill, November 2008 (CP).

AGD(NSW)
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ALRI
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ILRC
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Defences in criminal law—WIH on report.

Law Com
Conspiracy and attempts—WIH on inquiry.
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Non-consensual Genetic Testing, November 2008 (DP).

MoJ(UK)
Bail and Murder, June 2008 (CP).
Murder, Manslaughter and Infanticide, July 2008 (CP).

NSWLRC
Complicity—WIH on report.
Jury directions in criminal trials—WIH on inquiry.
Penalty notice offences—WIH on new inquiry.
People with cognitive and mental health impairments in the criminal justice system—WIH on inquiry.

NSWSC
Penalties Relating to Sexual Assault Offences in New South Wales, August 2008 (R). Reduction in penalties at sentencing—WIH on inquiry. Sentencing of alcohol-related violent crime—WIH on inquiry.

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Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character, June 2008 (R 103). Compensating Crime Victims, October 2008 (IP 11). Criminal defences, insanity and infanticide—WIH on inquiry. Review of Part 8 of the Crimes Act 1961—WIH on inquiry. Criminal procedure simplification—WIH on inquiry. Public safety and security—WIH on inquiry.

NZMJ
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QLRC
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SALRC
Stalking, November 2008 (R).
Trafficking in Persons, November 2008 (R).

Scot Law Com
Crown Appeals, July 2008 (R 212).
Double jeopardy—WIH on report.

TLRI
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Criminal liability of drivers who fall asleep causing motor vehicle crashes resulting in death or serious injury—WIH on inquiry.

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AHRC
Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues, August 2008 (R).

MoJ(UK)
Reducing Reoffending in London, October 2008 (CP).

NZLC
Compensating Crime Victims, October 2008 (IP 11).

De Facto Relationships

DoFP (NI)
Cohabitation—WIH on inquiry.

Senate LCC
Evidence Amendment Bill 2008, September 2008 (R). Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, August 2008 (R). Same Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008, October 2008 (R). Same Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008, October 2008 (R).

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HKLRC
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ILC
Humanization and Decriminalization of Attempt to Suicide, October 2008 (R).
Proposal for Enactment of a New Coroners Act, June 2008 (R).

JCS(ACT)
Review of the Coroners Act 1997, September 2008 (DP).

LRCWA
Review of coronial practice—WIH on new inquiry.

Scot Law Com
Damages for Wrongful Death, September 2008 (R 213).

Senate LCC
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ALRC
For Your Information: Review of Australian Privacy Law and Practice, May 2008 [released August 2008] (R 108).

BCLI
Predatory lending issues in Canada—WIH on inquiry.

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ACIP
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Senate LCC
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VLRC
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AJTC
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ILRC
Alternative Dispute Resolution, July 2008 (CP 50).

NCCUSL
Interstate Family Support Act—new draft July 2008.

SALRC
Arbitration: family mediation—WIH on inquiry.

VPLRC
Alternative dispute resolution—WIH on inquiry.

Domestic Violence

FLC
Family violence—WIH on report.

HKLRC
Causing or allowing the death of a child—WIH on inquiry.

Drugs

NCCUSL
Model Drug Dependence Treatment and Rehabilitation Act—WIH by study committee.

NSWSC
Sentencing of alcohol-related violent crime—WIH on inquiry.

NZLC
Review of Regulatory Framework for the Sale and Supply of Liquor—WIH on new inquiry.
Review of the Misuse of Drugs Act 1975—WIH on new inquiry.

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NZLC
Review of the law relating to private schools—WIH on inquiry.

Elder Law

BCLI
Assisted Living in Canada: Past, Present and Future Issues, October 2008 (DP).

Electoral System

MoJ(UK)
Old Enough to Make a Mark? Should the Voting Age Be Lowered to 16?, October 2008 (CP).

QLCARC
Electoral reform in Queensland—WIH on inquiry.

Electronic Commerce

AGD
United Nations Convention on the Use of Electronic Communications in International Contracts 2005, November 2008 (CP).

Employment

NCCUSL
Misuse of Genetic Information in Employment and Insurance Act—new draft July 2008.

NSWLRC
Workplace deaths—WIH on report.

SALRC
Protected Disclosures, November 2008 (R).

Environment

IREPBC
Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, October 2008 (DP).

Sask LRC
Light pollution abatement legislation—WIH on inquiry.
Solar access legislation—WIH on inquiry.

Evidence

HO(UK)
PACE review: government proposals in response to the review of the Police and Criminal Evidence Act 1984, August 2008 (CP).

ILRC
Documentary evidence and technology—WIH on new inquiry.
Hearsay in civil and criminal cases—WIH on new inquiry.
Law of expert evidence in criminal and civil matters—WIH on inquiry.

Law Com
Expert evidence in criminal trials—WIH on inquiry.

LRC Maur
Reform of law relating to admissibility of confessions—WIH on report.

NZLC
Monitoring of the Evidence Act—WIH on inquiry.
Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character, June 2008 (R 103).

SALRC
Review of the Law of Evidence—WIH on inquiry.

Senate LCC
Evidence Amendment Bill 2008, September 2008 (R).

TLRI
Tendency and coincidence evidence in sexual assault cases—WIH on IP.

Family Law

DoFP(NI)
Cohabitation—WIH on inquiry.
Contact with children—WIH on inquiry.

FLC
Family violence—WIH on report.

ILC
Laws of Civil Marriages in India, October 2008 (R). Laws on Registration of Marriage and Divorce, October 2008 (R).

Law Com
Marital property agreements—inquiry due to commence in 2009.

LRC Maur
Divorce by Mutual Consent—WIH on report.

Man LRC
Divorced spouses survivors' pension benefits—WIH on inquiry.

NCCUSL
Interstate Family Support Act—new draft July 2008. Collaborative Law Act—interim draft June 2008. Hague Convention on the Protection of Children—WIH by study committee. Relocation of Children Act—new draft October 2008.

SALRC
Arbitration: family mediation—WIH on inquiry.
Custody (care) and access (contact) to minor children—WIH on DP.
Divorce—WIH on inquiry.
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Evidence Amendment Bill 2008, September 2008 (R). Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, August 2008 (R).
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Federalism

PC
Review of Mutual Recognition Schemes, November 2008 (DR).

Financial Services

BCLI
Predatory Lending Issues in Canada—WIH on inquiry.

HMT(UK)
Building Societies (Funding) and Mutual Societies (Transfers) Act 2007, September 2008 (CP) Financial Stability and Depositor Protection, July 2008 (CP). Implementation of the Acquisitions Directive, September 2008 (CP). Lloyd's Accounting Regulations: Implementation of the Audit Directive (2006/43/EC) and the Reporting Directive (2006/46/EC), October 2008 (CP).
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ALRC
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LRC Maur
Forensic Use of DNA—WIH on IP.

MCLOC
Non-consensual Genetic Testing, November 2008 (DP).

NCCUSL
Misuse of Genetic Information in Employment and Insurance Act—new draft July 2008.

Government

ARC
The Coercive Information-gathering Powers of Government Agencies, June 2008 (R 48).

Law Com
Administrative Redress: Public Bodies and the Citizen, July 2008 (CP 187).

LRC Maur
Access to Justice and Limitation of Actions against Public Officers and the State, May 2008 (R). Review and Reform of Local Government legislation—WIH on report.

NCCUSL
Administrative procedures for interstate compact entities—WIH by study committee.

NZLC
A New Inquiries Act, May 2008 (R 102).
Review of the Civil List Act 1979, July 2008 (IP 8). Review of Prerogative Writs, August 2008 (IP 9).

Senate LCC
Independent Reviewer of Terrorism Laws Bill 2008 [No 2], October 2008 (R).

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WCLRA (ALRI; BCLI; Man LRC; Sask LRC)
Enduring Powers of Attorney: Areas for Reform, June 2008 (joint report).

Law Com
Adult Social Care—WIH on inquiry.

QLRC
Guardianship laws: general principles—report expected late 2008.

SALRC
Adults with impaired decision-making capacity—WIH on inquiry.

Health Care

ALRC
For Your Information: Review of Australian Privacy Law and Practice, May 2008 [released August 2008] (R 108).

ILRC
Bioethics: Advance Care Directives, October 2008 (CP 51).

MoJ(UK)
Pleural Plaques, July 2008 (CP).

NCCUSL
Health care information interoperability—WIH by study committee.

NSWLRC
Emergency medical care and the restricted right to practise—WIH on new inquiry.

Sask LRC
Vaccination and the law—WIH on inquiry.

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Law Com
Housing: Encouraging Responsible Letting (R 312).

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AHRC
Freedom of Religion and Belief in the 21st Century, August 2008 (DP).

LRC Maur
Securing Human Rights—WIH on CP.

SALRC
Trafficking in Persons, November 2008 (R).

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HO(UK)
The Path to Citizenship: Next Steps in Reforming the Immigration System, February 2008 (R).

MoJ(UK)
Section 57 of the Criminal Justice and Immigration Act—Draft Regulations, August 2008 (CP).

Senate LCC
Migration Legislation Amendment (Worker Protection) Bill 2008, November 2008 (R).

Indigenous People

AHRC
Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues, August 2008 (R).
A National Indigenous Representative Body, July 2008 (IP).

NZLC
Maori legal entities—WIH on inquiry.

Senate LCC
Stolen Generation Compensation Bill 2008, June 2008 (R).

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Law Com; Scot Law Com
Insurance Contract Law: Insurable Interest—WIH on inquiry.

NCCUSL
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ACIP
Enforcement of plant breeder's rights—final report expected late 2008. Post-grant patent enforcement strategies—DP expected late-2008.
Patentable Subject Matter, July 2008 (IP).

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AGD
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LRC Maur
Implementation of Hague Conventions on Private International Law—WIH on CP.

Man LRC
Private International Law—WIH on inquiry.

PC
Review of Mutual Recognition Schemes, November 2008 (DR).

Juries

HKLRC
Criteria for service as jurors—WIH on inquiry.

ILRC
Consolidation and reform of the Courts Act—WIH on inquiry.

LRCWA
Selection, eligibility and exemption of jurors—WIH on inquiry.

NSWLRC
Jury directions in criminal trials—WIH on inquiry.

QLRC
Jury directions—WIH on inquiry.
Selection of juries—WIH on inquiry.

VLRC
Jury Directions, September 2008 (CP).

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NCCUSL
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BCLI
Proposals for a new Commercial Tenancy Act, September 2008 (CP 17).

Law Com
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Law Enforcement

ARC
The Coercive Information-gathering Powers of Government Agencies, June 2008 (R 48).

NCCUSL
Electronic recording of custodial interrogations—WIH by study committee.

TLRI
Consolidating powers of arrest—WIH on report.

VPSARC
Inquiry into Police Regulation Amendment Bill 2008—WIH on inquiry.

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MoJ(UK)
Civil Procedure Rules: Costs Capping Orders, September 2008 (CP).
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Legal Services

NCCUSL
Hague Convention on Choice of Court Agreements—WIH by study committee.

Legislation

ILRC
Statute Law Restatement, July 2008 (R 91).
The Legislation Directory: Towards a Best Practice Model, July 2008 (CP 49).

NCCUSL
Authentication of online state legal materials—WIH by new study committee.

NZLC
Presentation of New Zealand statute law—WIH on inquiry.
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ALRC
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ILRC
Bioethics: Advance Care Directives, October 2008 (CP 51).

NSWLRC
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Sask LRC
Vaccination and the law—WIH on inquiry.

TLRI
Male circumcision—WIH on IP.

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AHRC
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Law Com
Adult social care—WIH on inquiry.
Unfitness to plead—WIH on inquiry.

MoJ(UK)
Reviewing the Mental Capacity Act 2005: Forms, Supervision and Fees, October 2008 (CP).

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People with cognitive and mental health impairments in the criminal justice system—WIH on inquiry.

SALRC
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CAMAC
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ILRC
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Law Com
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Man LRC
Waiver and personal liability—report expected early 2009.

Scot Law Com
Damages for Wrongful Death, September 2008 (R 213).

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WCLRA
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NTLRC
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QLRC
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Sask LRC
Corporate fiduciary services—WIH on inquiry.

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AGD
Model Spent Convictions Bill, November 2008 (CP).

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BCLI
Report on the Privacy Act of British Columbia, February 2008 (R).

MoJ (UK)
Inspection Powers and Funding Arrangements of the Information Commissioner, July 2008 (CP).

NCCUSL
Health care information interoperability—WIH by study committee.

NSWLRC
Privacy Legislation in New South Wales, June 2008 (CP 3).

NZLC
Review of Privacy—WIH on Stage 3 of Inquiry.

SALRC
Privacy and data protection—WIH on inquiry.

SCAG
Model Spent Convictions Bill—WIH on inquiry.

VLRC
Surveillance in public places—WIH on CP.

Public Order

NZLC
Public safety and security—WIH on inquiry.

QLRC
A Review of the Peace and Good Behaviour Act 1982 (Qld), August 2008 (R).

SALRC
Adult prostitution—WIH on inquiry.
A specific civil action in respect of consequential damages from hoaxes—WIH on inquiry.

Real Property

BCLI
Real property review—WIH on inquiry.

HKLRC
Adverse possession—WIH on inquiry.

ILRC
Multi-unit Developments, June 2008 (R 90).

LRC Maur
Facilitating Business: Registration of Property—WIH on report.

NCCUSL
Amendments to Uniform Common Interest Ownership Act—new draft July 2008.
Draft Partition of Tenancy-in-Common Real Property Act—new draft November 2008.
Transfer on Death of Real Property Act—new draft December 2008.

NZLC
Review of the Land Transfer Act 1952, October 2008 (IP 10).

Scot Law Com
Land registration—WIH on report.

TLRI
Easements and analagous rights—WIH on IP.

Regulatory law

ARC
The Coercive Information-gathering Powers of Government Agencies, June 2008 (R 48).
Administrative Accountability in Business Areas Subject to Complex Regulation, June 2008 (WDR).

PJCCFS
Inquiry into the Franchising Code of Conduct—WIH on inquiry.

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AHRC
Freedom of Religion and Belief in the 21st Century, August 2008 (DP).

Same Sex Relationships

Senate LCC
Evidence Amendment Bill 2008, September 2008 (R). Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, August 2008 (R). Same Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008, October 2008 (R).
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AGD
Regulations to be made under the Personal Property Securities Act, August 2008 (DP).

HMT (UK)
Statutory Regime for Issuer Liability, July 2008 (CP).

NCCUSL
Certificate of title system for boats—WIH by study committee.Revised Uniform Federal Lien Registration Act—WIH by study committee.

Senate LCC
Personal Property Securities Bill 2008—WIH on inquiry.

Security

AGD
E-Security Review, July 2008 (DP).

NZLC
Public safety and security—WIH on inquiry.

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AGD (NSW)
An Intensive Corrections Order for NSW, October 2008 (CP).

JCS (ACT)
Review of the Victims of Crime Act 1994, June 2008 (IP).

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Best Value in Probation, April 2008 (CP).
Community Sentencing—Reducing Reoffending, Changing Lives, June 2008 (R).
Sentencing Commission Working Group Final Report—Sentencing Guidelines in England and Wales: An Evolutionary Approach, July 2008 (R).

NCCUSL
Uniform Collateral Consequences of Conviction Act—new draft July 2008.

NSWSC
Penalties Relating to Sexual Assault Offences in New South Wales, August 2008 (R).
Reduction in penalties at sentencing—WIH on inquiry. Sentencing of alcohol-related violent crime—WIH on inquiry.

NZLC
Compensating Crime Victims, October 2008 (IP 11). Review of maximum penalties—WIH on inquiry.

SCAG
Model Spent Convictions Bill—WIH on inquiry.

TLRI
Sentencing, June 2008 (R 11).

VSAC
Breach of Intervention Orders, June 2008 (R).
Driving While Disqualified or Suspended, June 2008 (DP).

Sexual offences

HKLRC
Interim Proposals on a Sex Offender Register, July 2008 (CP).

MoJ (UK)
Rules for Mandatory Polygraph Tests for Sex Offenders, September 2008 (CP).

NSWSC
Penalties Relating to Sexual Assault Offences in New South Wales, August 2008 (R).

NZMJ
Improvements to Sexual Violence Legislation in New Zealand, August 2008 (DP).

SALRC
Adult prostitution—WIH on DP.

VSAC
Sexual offences against children—WIH on inquiry.

Superannuation

Man LRC
Divorced spouses survivors' pension benefits—WIH on inquiry.

Senate LCC
Same Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008, October 2008 (R).

Taxation

LRC Maur
Tax law reform—WIH on CP.

NCCUSL
Uniform Division of Income for Tax Purposes Act—WIH on revision.

Treasury
Abolishing the Capital Gains Tax Trust Cloning Exception, November 2008 (CP). Australia's Future Tax System, WIH on inquiry.
Review of Film Tax Offsets, October 2008 (CP).

Telecommunications

ALRC
For Your Information: Review of Australian Privacy Law and Practice, May 2008 [released August 2008] (R 108).

Terrorism

Senate LCC
Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No 2], October 2008 (R).

Torts

Man LRC
Private international law—WIH on inquiry.

SALRC
A specific civil action in respect of consequential damages from hoaxes—WIH on inquiry.

Tourism

DoJ (NT)
Caravan Parks and Mobile Homes Legislation, June 2008 (IP).

Traffic Law

HO(UK)
Proposal to Increase the Fixed Penalties for Two Types of Driving Offences, September 2008 (CP).

ILC
Legal Reforms to Combat Road Accidents, July 2008 (CP).

Law Com and Scot Law Com
Level crossings—WIH on inquiry.

TLRI
Criminal liability of drivers who fall asleep causing motor vehicle crashes resulting in death or serious injury—WIH on inquiry.

Transportation

SALRC
Legislation administered by the Department of Transport—WIH on inquiry.

Senate LCC
Passenger Movement Charge Amendment Bill 2008, June 2008 (R).

Tribunals

AJTC
Options for the Future Administration and Supervision of Tribunals in Scotland: A Report by the Administrative Justice Group, October 2008 (R).

ALRI
Draft Model Code of Procedures for Administrative Tribunals, October 2008 (CP).

NZLC
Unified tribunal framework—WIH on inquiry.

WALC
Jurisdiction and operation of the State Administrative Tribunal—WIH on new inquiry.

Trusts and Trustees

NCCUSL
Insurable Interests Relating to Trusts Act—WIH on draft. Uniform Statutory Trust Entity Act—new draft July 2008.

Sask LRC
Corporate fiduciary services—WIH on inquiry.

Scot Law Com
Trusts—WIH on inquiry.

Veterans

NZLC
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Victims of Crime

JCS(ACT)
Review of the Victims of Crime Act 1994, June 2008 (IP).

NZLC
Compensating Crime Victims, October 2008 (IP 11).

Whistleblowing

HoRLCA
Inquiry into whistleblowing protections within the Australian Government public sector—WIH on inquiry.

SALRC
Protected Disclosures, November 2008 (R).

Wills and Estates

ALRI
Revocation, revival and alteration of wills—WIH on inquiry. Designation of beneficiaries in non-testamentary instruments—WIH on inquiry.

BCLI
Probate rules—WIH on inquiry.

ILC
Section 213 from the Indian Succession Act 1925, July 2008 (R). Section 6 of the Hindu Succession Act 1956, July 2008 (R). Section 15 of the Hindu Succession Act 1956, June 2008 (R).

Man LRC
Divorced spouses survivors' pension benefits—WIH on inquiry.

NCCUSL
Uniform Probate Code—new draft July 2008. Transfer on Death of Real Property Act—new draft December 2008.

SALRC
Administration of Estates, August 2008 (R).

Scot Law Com
Succession—WIH on report.

Abbreviations

ACIP	Australia. Advisory Committee on Intellectual Property
AGD	Australia. Attorney-General's Department
AGD(NSW)	New South Wales. Attorney General's Department
AHRC	Australian Human Rights Commission
AJTC	United Kingdom. Administrative Justice and Tribunals Council
ALRC	Australian Law Reform Commission
ALRI	Alberta Law Reform Institute
ARC	Australia. Administrative Review Council
BCLI	British Columbia Law Institute
CAMAC	Australia. Corporations and Markets Advisory Committee
CP	Consultation Paper
DoFP(NI)	Northern Ireland. Department of Finance and Personnel
DoJ(NT)	Northern Territory. Department of Justice
DP	Discussion Paper
DR	Draft Report
FLC	Australia. Family Law Council
HKLRC	Law Reform Commission of Hong Kong
HMCS(UK)	United Kingdom. Her Majesty's Court Service
HMT(UK)	United Kingdom. Her Majesty's Treasury
HO(UK)	United Kingdom. Home Office
HoRLCA	Australia. House of Representatives Standing Committee on Legal and Constitutional Affairs
ILC	Law Commission of India
ILRC	Ireland. Law Reform Commission
IP	Issues Paper
IREPBC	Australia. Independent Review of the Environment Protection and Biodiversity Conservation Act 1999
JCS(ACT)	Australian Capital Territory. Department of Justice and Community Safety
Law Com	England and Wales. Law Commission
LJFNSW	Law and Justice Foundation of New South Wales
LRC Maur	Law Reform Commission of Mauritius
LRCWA	Law Reform Commission of Western Australia
Man LRC	Manitoba Law Reform Commission
MCLOC	Australia. Model Criminal Law Officers' Committee
MoJ(UK)	United Kingdom. Ministry of Justice
NCCUSL	United States. National Conference of Commissioners on Uniform State Laws
NSW Omb	New South Wales Ombudsman
NSWLRC	New South Wales Law Reform Commission
NSWLCLJ	New South Wales. Legislative Council Standing Committee on Law and Justice
NSWSC	New South Wales Sentencing Council
NTLRC	Northern Territory Law Reform Committe
NZLC	New Zealand Law Commission
NZMJ	New Zealand Ministry of Justice
PC	Australia. Productivity Commission
PJCCFS	Australia. Parliamentary Joint Committee on Corporations and Financial Services
QLCARC	Queensland. Parliament. Legal, Constitutional and Administrative Review Committee
QLRC	Queensland Law Reform Commission
R	Report
SALRC	South African Law Reform Commission
Sask LRC	Saskatchewan Law Reform Commission
SCAG	Australia. Standing Committee of Attorneys-General
Scot Law Com	Scottish Law Commission
Senate LCC	Australia. Senate Legal and Constitutional Standing Committee
TLRI	Tasmania Law Reform Institute
Treasury	Australia. The Treasury
VLRC	Victorian Law Reform Commission
VPLRC	Victoria. Parliament. Law Reform Committee
VPSARC	Victoria. Parliament. Scrutiny of Acts and Regulations Committee
VSAC	Victoria. Sentencing Advisory Council
WALC	Western Australia. Legislative Council Legislation Committee
WCLRA	Western Canada Law Reform Agencies (Alberta Law Reform Institute, British Columbia Law Institute, Law Reform Commission of Saskatchewan and Manitoba Law reform Commission)
WDR	Working Draft Report
WIH	Work In Hand

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