

Comparing Native Title and Anglo-Australian Land Law

Two different timelines, two different cultures
and two different laws

Ed Wensing

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and two different laws¹

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¹ Mrs Margaret Iselin, Quandamooka Elder, at the signing of the Native Title Process Agreement between Redland Shire Council and the Quandamooka Land Council Aboriginal Corporation in August 1997.

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The views expressed are personal.

Ed Wensing FAPI MRAPI

Executive Summary

“There are two laws. Our covenant and white man’s covenant, and we want these two to be recognised... We are saying we do not want one on top and one underneath. We are saying that we want them to be equal.”

David Mowaljarlai, Elder, Ngarinyin people, Western Australia, 1997

Australia’s land law changed forever on 3 June 1992, the date of the High Court’s historic landmark judgment in *Mabo v. the State of Queensland* ([No. 2] (1992) 175 CLR 1). It now encompasses two sets of rights and interests: one deriving from colonisation, the other deriving from the prior traditional ownership of Australia by its Indigenous peoples. The protracted debate over the High Court’s *Wik* judgment clearly demonstrates that it is taking some time for the broader Australian community to adjust to the notion that Indigenous Australians may have continuing property rights protected by Australian law (Nettheim 1997:7).

From a land management perspective, there is an urgent need to develop new approaches to land administration and management that takes account of the two sets of rights and interests. This paper explores new approaches to understanding the interface between the two distinct sets of rights and interests in land, or as Noel Pearson (1996 and 1998) describes it, “the recognition space”. It discusses the two sets of rights and interests in land and waters and develops a framework for their comparison. The framework compares the two sets of rights and interests at three different levels.

- In relation to laws and customs generally. While there are some striking differences in the detail, the underlying elements are very similar. For example, there is a rule of law and custom that is passed on from one generation to the next, and there is a basis for some kind of societal order in managing community affairs.
- In relation to land management techniques. Both cultures have an enduring approach to land management reflecting their respective cultural values. The Anglo-Australian approach is firmly rooted in statute law, the Crown’s power to grant interests in land, and to regulate and change those rights and interests. In contrast, Indigenous Australian approaches to land management reflect their special relationship to land and waters and their sense of stewardship in the use, preservation and renewal of natural resources for present and future generations.
- In relation to the content of land rights and interests. The ways in which land and water are utilised are very similar in nature and are closely regulated in some way.

The various factors that influence or govern how these rights and interests interact with each other are examined. These include, from the Indigenous perspective, Indigenous traditional laws and customs, which we know so little about, and, from the Anglo-Australian perspective, common law, constitutional law and statute law. Each of these is examined in turn.

By comparison with other common law countries, Australia is a relative newcomer to this field and the body of common law dealing with native title matters in Australia is still evolving.

Section 51xxxii in the Constitution is pertinent to the discussion about rights and interests in land. Section 51xxxii requires the Commonwealth Government to compensate owners for the acquisition of their property ‘on just terms’. Similar constraints apply to Territory Governments, but not to State Governments, although they normally compensate owners whose property rights are resumed. ‘Just terms’ has been interpreted by the High Court as requiring the payment of compensation on the basis of special value to the owner, not the value to the acquiring authority. This will include the payment of compensation, if applicable, for damage to the remaining land due to severance, injurious affection, consequential losses, and disturbance, in addition to the value of the land or interest taken.

Kirby J in *Newcrest Mining (WA) Ltd & or v. The Commonwealth of Australia & Ors.* (High Court, unreported FC 97/036 at 146) states that s.51xxxii of the Australian Constitution was intended to recognise the principle that private property is immune from interference by government, except on fair and equitable terms, and that the High Court “should ensure that the promise is kept”. Kirby J’s comments foreshadow that claims for compensation for the loss, impairment, diminution or extinguishment of native title rights and interests will be considered in exactly the same way as for the effect on any other property rights and interests.

The paper examines three Commonwealth statutes of particular relevance. They are the *Racial Discrimination Act 1975* (Cth), the *Native Title Act 1993* (Cth), and the *Native Title Amendment Act 1998* (Cth).

While the *Racial Discrimination Act 1975* (Cth) makes it illegal to discriminate against the property rights of Aboriginal people, there is a complex interaction between the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth). The 1998 amendments to the *Native Title Act 1993* (Cth) require the *Act* to be ‘read and construed subject to the provisions of the *Racial Discrimination Act 1975* (Cth)’. This is qualified by a subsequent clause which states that the racial discrimination legislation will only apply to powers and functions conferred or authorised by the *Native Title Act 1993* (Cth). The racial discrimination legislation does not apply to the substantive provisions made under State legislation governing native title. That is, the provisions enabling States and Territories to pass complementary legislation validating ‘past acts’ and ‘intermediate period acts’ as extinguishing native title rights and interests and the provisions confirming the extinguishment of native title over a vast number of different tenure types which in many cases pre-empt the common law.

The paper notes that the rights and interests of Indigenous Australians arising from native title have been seen as being subservient to the real estate interests of non-indigenous Australians, because the *Native Title Act 1993* (Cth) “prioritises other proprietary interests ahead of native title interests” (Antonios 1999:55) and exempts such actions from the application of the *Racial Discrimination Act 1975* (Cth).

The paper examines the sequence of events following the High Court’s judgment in *The Wik Peoples v. The State of Queensland and Ors* (1996) 141 ALR 129, and the effect of the 1998 amendments to the *Native Title Act 1993* (Cth).

The paper also examines the 1999 report of the United Nations Committee on the Elimination of Racial Discrimination which concluded that the Government’s amended

Native Title Act discriminates against indigenous title holders and called for implementation of the Act to be suspended. The UN CERD Committee is the same committee that condemned the apartheid laws of South Africa as inimical to international standards. It is not in Australia's best interests to continue denying the CERD Committee's findings. Denial never works as a long-term solution. Sooner or later we will need to deal with the CERD Committee report or we may face the kind of sanctions once imposed on South Africa. If Australia continues to deny the CERD Committee findings, it could become the first western nation to be reported to the United Nations General Assembly for breaching the *International Convention on the Elimination of All Forms of Racial Discrimination*.

The final part of the paper highlights how one culture has exerted its dominance and authority over the other culture, circumventing Australia's international obligations to the *International Convention on the Elimination of All Forms of Racial Discrimination*, by selectively setting aside the *Racial Discrimination Act 1993* (Cth) to various components of the *Native Title Amendment Act 1998* (Cth). In particular, the Act's validation and confirmation of extinguishment provisions, in many cases pre-empting the common law. In addition, the validation of 'intermediate period acts' (certain acts affecting native title between 1 January 1994 and 23 December 1996) allows governments to cure retrospectively their failure or refusal to observe the future acts procedures of the *Native Title Act 1993* (Cth), at the expense of native title and without consultation or negotiation with the native title holders (Fitzgerald 1999:4).

The *Native Title Amendment Act 1998* (Cth) amounts to an extraordinary expropriation of property rights and interests for one section of the community with no compensation 'on just terms', and was an act akin to the notion of *terra nullius*.

History will one day judge the *Native Title Amendment Act 1998* (Cth) for what it really is. In the eyes of the international community, Australia's reputation as a fair and just society has already been severely tarnished.

1. Pre-colonial rights and interests in land

The High Court's 1992 decision in *Mabo v. the State of Queensland* ([No. 2] (1992) 175 CLR 1) (*Mabo* (No. 2)) is one of the most far-reaching decisions the Australian High Court has made. It removed forever the myth that Australia was '*terra nullius*' (land belonging to no one). It is now an accurate statement of fact that Indigenous rights and interests in land in Australia were ignored at law for more than 200 years. "Arbitrary, coercive and uncompensated dispossession" (Bartlett and Sheehan 1996) of Indigenous Australians occurred on the convenient assumption that the land belonged to no one.

Until the judgment of the High Court in *Mabo* (No. 2), Australian common law accorded no legal recognition to the land and water rights and interests of the Aboriginal peoples and Torres Strait Islanders. This was in stark contrast with the position in other lands settled by the British – New Zealand, Canada and the United States of America – where the rights and interests of the Indigenous inhabitants were given legal recognition.

In essence, the High Court's *Mabo* judgement found that Indigenous law and culture, specifically their interests in land and waters were a part of the Australian common law. This was a return to the position that British common law and policy had held since before colonisation of Australia in 1788. British Imperial policy by the latter part of the 18th century was to settle inhabited lands only with the consent of the inhabitants. The Admiralty's instructions to Captain Cook in 1768 were that the land was to be taken into possession "with the consent of the natives" (Bennet and Castles 1979:253-4). In 1837 the British House of Commons Select Committee into the Condition of Aborigines in the Empire reported that "The native inhabitants of any land have an incontrovertible right to their own soil; a plain and sacred right".

Indeed, for over two centuries British common law has held that:

- Indigenous people have rights and interests in relation to land and waters;
- such rights pre-date colonisation – they do not flow from an act of the Crown; and
- colonisation does not lead to an automatic disregard or extinguishment (removal) of those rights.

As Reynolds (1998:5) observes:

In International law there are only two ways in which colonies can be established in land already occupied. It has to be either by conquest or by treaty. Australia has always shied away from any suggestion that the continent was acquired by invasion or conquest and ...treaties are not thought appropriate. But the question then arises: How did Australia become British? ...In the *Mabo* case the High Court determined that it was no longer tenable that Aboriginal people were not the owners of the land on which they lived and declared that they had a form of tenure called native title which has survived unless it had been expressly extinguished. But the question of how the British acquired the sovereignty over Australia in the absence of conquest or treaty remains.

According to Solomon (1999:27), the High Court's judgment in *Mabo* (No. 2) "can be likened to the imposition of a peace treaty on the winning side in a war that lasted more than two centuries".

2. Recognising two sets of rights and interests in land and waters

The *Mabo* (No. 2) judgment requires a fundamental change in the way we view and understand interests in land. For example, the term ‘vacant’ Crown land is derived from the notion of *terra nullius* (i.e. land belonging to no one). As Lumb states, the theory of *terra nullius* is expressed in this way:

The Crown acquired a radical title to land in the territory which it had occupied by settlement from the time of settlement. It could reserve land for a public purpose or it could alienate the land in fee simple or by lease. There was no attribution of native beneficial ownership to land which had become Crown Land and was referred to as waste lands of the Crown or vacant Crown Land. Any right to occupancy of Aboriginals could be protected by way of reservation of the land for the use and enjoyment of Aboriginals. (Lumb 1993:11)

In some States and Territories the term ‘Vacant Crown Land’ or ‘VCL’ is used by the Crown to describe land that has not been ‘allocated’ by the Crown. But the term ‘vacant’ ignores any Indigenous property rights that pre-existed and may continue to exist in such lands. As a direct consequence of the High Court’s *Mabo* (No. 2) judgment, if the land

- has been held by the Crown since colonisation; and
- there have been no extinguishing events on the land; and
- Indigenous peoples continue to have connection to that land according to traditional law and custom

then that land is not ‘vacant’ because there *are* property rights and interests in the land. It is therefore both inaccurate and inappropriate to continue using the term ‘vacant Crown land’ unless it is certain that Indigenous property rights no longer exist. The term ‘Unallocated Crown Land’ or ‘UCL’ has been used in some States such as Queensland for some time, but since *Mabo* (No. 2), UCL has taken on a whole new meaning and is the more appropriate term to use.

It is only when Indigenous property rights and interests have been extinguished permanently that the Crown becomes the ‘absolute beneficial owner’ of the land (Brennan J, *Mabo* (No. 2) 69-70). The *Native Title Act 1993* (Cth) is also based on this proposition. The common law recognises that Indigenous property rights existed at the time of colonisation and continue to exist except where they have been extinguished by valid acts of government. Some Indigenous groups maintain it is important to recognise there may be an Indigenous group with continuing cultural and social interests in any part of Australia. This must be considered before embarking on any further extinguishing events (Mirimbiak 1998).

Many States and Territories are still coming to terms with this new reality, as confirmed by the High Court in *Biljabu v. The State of Western Australia* (the *Challenge* case) (1995) 128 ALR 1 (at 59). In this case Mason CJ states that the practical difficulties that arise in land use and administration with respect to native title can be attributed to the “realisation that land subject to native title is not the unburdened property of the State to use or dispose of as though it were the beneficial owner”. In other words, governments in Australia can no longer treat land as unencumbered to do with as they wish without regard to the possible

existence of an older set of Indigenous rights and interests. Indeed, as Lee J states in *Ben Ward and Ors on behalf of the Miriuwung and Gajerrong People and Ors v. the State of Western Australia and Ors* (WAG 6002 of 1995:26),

From the time sovereignty was asserted the radical title in the land of a colony thereby obtained by the Crown was burdened by any native title that existed prior to sovereignty. Formal recognition or affirmative acceptance of native title by the Crown was not required.

The extent to which these concepts remain to be worked out is illustrated in the contrast between the majority and minority views in the *The Wik Peoples v. the State of Queensland and Ors* ((1996) 141 ALR 129).

Brennan CJ, in the minority, expressed concern that “it is now too late to develop a new theory of land law that would throw the whole structure of land titles based on Crown grants into confusion” (at 158). On the other hand, the judgements in the majority of both Toohey and Gummow JJ accept that the unique political and economic circumstances of settlement of the Australian colonies led to the Crown’s wholesale dispossession of Indigenous Australians by the grant of land to settlers, and Gummow J warns of “the need to adjust ingrained habits of thought and understanding to what, since 1992, must be accepted as the common law of Australia ” (at 227). Contrary to the views of Brennan CJ, it is not too late to devise a new system of land law. One that recognises the prior occupation of Australia (and in certain circumstances protects the continuing rights and interests of the Indigenous peoples in land) and the other that recognises the rights granted by the Crown since colonisation from which freehold (fee simple) and leasehold interests in land derive.

Clearly, what Toohey and Gummow JJ are saying is that two systems of law and culture are meeting as a result of *Mabo* and as a result of the recognition at Australian common law of Indigenous rights and interests in land and waters. Their judgments indicate that there is a real need for the two systems to learn to coexist.

The High Court observed in *Western Australia v. the Commonwealth* (1995) 183 CLR 373 at 452, that the enjoyment of native title or Indigenous property rights is “precarious under the common law. It is defeasible by legislation or by the exercise of the Crown’s (or a statutory authority’s) power to grant inconsistent interests in land or to appropriate the land and use it inconsistently with enjoyment of the native title”. This does not mean that Indigenous property rights sit at the bottom of any kind of hierarchy of Anglo-Australian tenurial rights and interests. What it does mean, however, is that the Anglo-Australian system of land law and tenure is more dominant or superior than Indigenous property rights and interests and such rights and interests will in most instances be expected to yield to any other statutory rights and interests created by the Crown and to the exercise of the Crown’s executive powers.

Since the High Court’s *Mabo* (No. 2) judgment, Australia effectively has two land tenure systems. The system introduced on colonisation, from which our freehold and leasehold titles flow and a pre-existing Indigenous system, from which Indigenous rights and interests in land derive. In the aftermath of the High Court’s *Wik* judgment, there was considerable public confusion about how the two sets of rights and interests interact. The debate centred on the need to have one unambiguous tenure of land to subsume Indigenous property rights

and interests into current planning and land management regimes.

Our land law now encompasses both sets of rights and interests, and there is an urgent need to develop new approaches to land administration and management that takes account of the two sets of rights and interests.

3. The interface between post-colonial and Indigenous Australian rights and interests

A critical question for land managers, is how do the property rights and interests of Indigenous Australians interact with the property rights and interests established since colonisation? This paper seeks to address that question by comparing the two sets of rights and interests in land and waters, and by identifying the factors that influence or control their interaction.

A simple comparative table has been devised as an aid to developing an understanding of the interface between the two sets of rights and interests. Table 1 attempts to show the comparability between “two different timelines, two different cultures, and two different laws” (M Iselin, Quandamooka Elder 1997) and to identify the factors that govern or influence how these two sets of rights and interests interact. This is explained in more detail below.

The laws and customs described in Columns A and C of Table 1 are not static or frozen in time. Just as laws and customs change and evolve over time in Anglo-Australian society to suit new or emerging circumstances, so too do they change and evolve over time in Indigenous communities. There is a recognition by the High Court in *Mabo* (No. 2) (Brennan J at 58) that Indigenous property rights and interests are not static and may change over time.

Table 1 is divided into three vertical columns (A to C) and three horizontal rows (1-3). The rows do not apply to Column B.

- Column A describes Indigenous laws and customs;
- Column C describes Anglo-Australian laws and customs; and
- Column B in the middle identifies the factors that govern or influence how the two sets of rights and interests interact.

In Columns A and C:

- Row 1 identifies the essential characteristics of each of the two different sets of laws and customs;
- Row 2 identifies the elements of land management techniques in each of the different sets of laws and customs; and
- Row 3 identifies the range of uses or activities that may occur on land or waters according to the different sets of laws and customs.

The way to read the table is to contrast and compare the following boxes:

- Box C1 with Box A1;
- Box C2 with Box A2; and
- Box C3 with Box A3.

Table 1. Conceptual diagram of the interface or comparison between Anglo-Australian and Indigenous Australian laws and customs*

INTERFACE		
Recognition space		
<i>Column A</i>	<i>Column B</i>	<i>Column C</i>
<p>Box A1</p> <p>Indigenous law and custom</p>	<p>Indigenous traditional laws and customs And the Common Law</p> <p>The common law with respect to native title is informed by the following:</p> <p>High Court decisions <i>Mabo</i></p> <p><i>WA v Commonwealth</i> <i>Wik</i></p> <p><i>North Galanjanja</i> <i>Fejo</i> <i>Yanner</i></p> <p>Federal Court decisions <i>Fourmile</i> <i>Yarmirr</i></p> <p><i>Miriuwung and Gajerrong</i> <i>Yorta Yorta</i> <i>Hayes</i></p> <p>Precedent from other Common Law countries (i.e. NZ, USA, Canada, UK)</p> <p>Constitutional Law The Constitution (S.51xxxii)</p> <p><u>Statutory Law</u></p> <p><i>Racial Discrimination Act 1975 (Cth) (31 October)</i></p> <p><i>Native Title Act 1993 (Cth) (1 January 1994)</i></p> <p><i>Native Title Amendment Act 1998 (Cth) (30 September)</i></p>	<p>Box C1</p> <p>Anglo-Australian law and custom</p>
<p>Box A2</p> <p>Traditional land and water management techniques</p>	<p>Box C2</p> <p>Anglo-Australian land and water management techniques</p>	
<p>Box A3</p> <p>Content of Indigenous rights and interests in land and waters</p>	<p>Box C3</p> <p>Content of statutory land use and development controls</p>	

* Aboriginal and Torres Strait Islander communities do not view things in a hierarchical fashion. This presentation does not purport to reflect an Indigenous Australian view.

The content of the boxes in each of the rows is set out below. Following these steps, it is then appropriate to read Column B, which identifies the factors that influence or govern how the various laws and customs and rights and interests in Columns C and A interact with each other. This is what Pearson (1996:120 and 1997:150) calls “the recognition space between

the common law and the Aboriginal law”.

3.1 Comparing laws and customs

The first row of Table 1 draws together the elements of law and custom of the two different cultures that can be compared. Box A1 contains the essential elements of Indigenous law and custom, while Box C1 contains the essential elements of Anglo-Australian law and custom. The contents of these two boxes are discussed below, followed by a comparative table.

Indigenous Law and Custom - Box A1, Table 1

Blackburn J in *Milirrpum v. Nabalco Pty Ltd* ((1971) 17 FLR 141 p. 267-8) (the Gove land rights case) recognised that Aboriginal peoples observed Indigenous laws when commenting on the Yolgnu society:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in evidence before me. ...In my opinion, the arguments put to me do not justify refusal to recognise the system proved by the plaintiffs in evidence as a system of law. Great as they are, the differences between that system and our system are, for the purposes in hand, differences of degree. ...I hold that I must recognise the system revealed by the evidence as a system of law.

The distinguishing characteristics of Indigenous law and custom can be identified as follows.

- Indigenous peoples have been present in Australia for at least 40,000-50,000 years.
- Aboriginal peoples and Torres Strait Islanders are the oldest surviving culture on Earth, a fact we should be immensely proud of and perceive as a gift rather than as a burden or a hindrance.
- Aboriginal peoples and Torres Strait Islanders have an oral tradition. None of their history or ancestry is written down in the way that it is in Anglo-Australian law and custom, and most certainly not prior to colonisation in 1788. Laws, customs, traditions, practices, events, and ancestry are passed on orally between generations through songs, stories, dance, art, ceremonies and celebrations.
- Information is not freely available. It is only passed on to other members of the group when necessary or when the Elders believe that younger members of the family, clan, tribe or group need the information, are capable of using it wisely and can be trusted with it.
- Aboriginal peoples and Torres Strait Islanders have a consensual system of decision-making. Aboriginal people usually make decisions by consensus within the Aboriginal community or regional population concerned.
- Aboriginal peoples and Torres Strait Islanders have the most complex system of kinship known to humanity (Berndt 1992:46).

- Aboriginal peoples and Torres Strait Islanders have a strong sense of mutual obligation and reciprocity between members of the same family, clan, tribe or group.
- There is generally very little freedom of movement between territorial boundaries of different clans, tribes or groups. It is a long established protocol amongst Indigenous Australians to gain consent from the elders of a neighbouring clan, tribe or group before travelling over someone else's country.

These are just a summary of some of the principles of Indigenous Australian law and culture contained in publications and documented in research, and derived from observations and discussions with Indigenous Australians.

Anglo-Australian Law and Custom - Box C1, Table 1

The distinguishing characteristics of Anglo-Australian law and custom can be identified as follows.

- Anglo-Australian laws and customs have been present since 1788 when Captain Phillip established New South Wales as a colony of the British Empire. However, the common law, famous for its defence of private property rights, has been around for several centuries.
- Australian laws and customs are embedded in a system of sovereign government with hierarchical structures based on democratic principles. All Australian States and Territories and the Commonwealth have democratically elected Parliaments or Legislative Assemblies. Governments raise taxes and administer public funds to provide services to the public.
- Australia has a system of statute law based on Acts of Parliament, and common law based on English common law, which the British brought with them to Australia in 1788. However, with the passage of the *Australia Act* (Cth) in 1986, the compulsion on Australian courts to follow English law was removed, and Australian courts often cite and apply decisions from other common law countries, especially Canada, New Zealand and the United States of America.
- Anglo-Australian society is based on a written tradition. Our history and our ancestry are recorded in writing and held as public records that can be recovered and searched for details long after events have occurred.
- Information is freely available in Anglo-Australian society. For example, newspapers, books and reports are widely circulated and readily available. Radio and television broadcasts constantly to pass on news and information. Our Parliaments, Legislative Assemblies and local Council meetings are open to the public. Government decisions and activities are generally open to some form of public scrutiny. And in recent times, the development of information technology or the 'internet' has emerged as a new information medium.
- Australia is a modern industrialised nation with a market economy. Goods and services are generally traded in an open market with few restrictions. Indeed, commercial

competition is encouraged and legitimised through National Competition Policy and its supporting legislation.

- Australians enjoy freedom of movement around the country. Freedom of movement of goods and people between the States and Territories is guaranteed under our Constitution. Permission is not required in order to move from place to place, irrespective of distance or territory to be covered.

Most of these elements of our Anglo-Australian law and culture are taken for granted.

The contents of Boxes A1 and C1 in Table 1 can be summarised and compared as follows.

Table 2. Indigenous and Anglo-Australian Laws and Customs

Box A1 Indigenous Law and Custom	Box C1 Anglo-Australian Law and Custom
<ul style="list-style-type: none"> • Estimated to be 40-50,000 years old. Oldest continually surviving culture on Earth • Oral traditions through song, dance, storytelling etc. • Decision making by consensus • Information is only passed on when necessary • Mutual obligation and reciprocity • No market economy. • Most complex kinship known to humanity • Permission required to travel over others' country 	<ul style="list-style-type: none"> • Commenced in 1788 • Written tradition • Sovereign government based on democratic principles • Information is generally freely available • Statute law • Market economy • No kinship system with respect to land or waters, but automatic inheritance from one generation to the next • Freedom of movement, including public rights of way

This table shows the contrast between the two different cultures. While there are some striking differences in the detail, the underlying elements are very similar. For example, there is a rule of law and custom that is passed on from one generation to the next, and there is a basis for some kind of societal order in managing community affairs.

3.2 Comparing systems of land management

The second level of Table 1 draws together the elements of land management of the two different cultures that can be compared. Box A2 contains the elements of Indigenous land management techniques, while Box C2 contains the elements of Anglo-Australian land management techniques. The contents of these two boxes are discussed below, followed by a comparative table.

Indigenous Australian land management techniques - Box A2, Table 1

The special nature of Indigenous peoples' relationship to land has long been recognised in Australia. In his judgement in the Gove land rights case, Blackburn J in *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141 recognised that Aboriginal people have an underlying relationship with their land, as mentioned above. Justice Blackburn's judgment however, failed to accept that Indigenous laws could establish title to land.

Nevertheless, subsequent inquiries into proposals for land rights legislation (in the years before Indigenous rights and interests in land were recognised) and other major inquiries such as Justice Fox's Inquiry into the Ranger Uranium Mine in the 1970's (Fox 1977) and the Resource Assessment Commission's Inquiry into Coronation Hill (RAC 1991), all reached the same conclusion, that the relationship of Indigenous Australians to their land was special and that they should have considerable power to control developments affecting their land (ATSIC 1996:4). Aboriginal Land Commissioners in the Northern Territory have long recognised the dynamic nature of Aboriginal traditions and the special relationship they have with land (e.g. Kearney J 1985; Maurice J 1988).

As Muir (1998:3) explains:

The recognition of native title seems to focus on two general themes, they are the physical and the spiritual attachment to land. The consideration of physical connection as a separate heading to spiritual relationship with country is entirely artificial as the spiritual relationship of Aboriginal people to country permeates their entire interaction with country. Under Indigenous law there is no demarcation of these areas.

Muir (1998:6) goes on to explain how traditional activities of camping, hunting, gathering bush tucker, traveling over, cleaning out and maintaining water sources, and conducting ceremonial activities are just some of the ways in which Aboriginal people care for country.

Caring for the land occurs in two forms, one is the physical land management, including the shooting of feral cats to protect native fauna, and the second is spiritual, which includes performing increase rituals. The country is also cared for spiritually by the physical act of visiting. ... I can't reiterate enough the significance of spiritual connection to country. This spiritual connection continues to dictate the nature and conduct of activities on the land.

Muir (1998:8) warns that the method of developing a formula for calculating the value of native title is not a simple matter. "One must guard against equating rights which flow from Indigenous laws and culture in a non-indigenous manner."

There are several distinguishing elements or features of traditional approaches to land management in Indigenous communities. These have been observed in several recent Federal and High Court judgements, including *Mabo (No. 2)*, *Wik*, *Yarmirr*, and *Miriuwung and Gajerrong*. The elements include:

- Aboriginal peoples and Torres Strait Islanders have a collective or communal ‘responsibility’ for country.
- Land is generally not divided into individual parcels (although it is in the Torres Strait).
- Land is inalienable. It cannot be bought and sold between individual members of a family, clan, group or tribe.
- Aboriginal and Torres Strait Islanders have strong spiritual and physical connections to country, and their connections are an integral part of their belief system.
- There are formal territorial boundaries between particular clans, tribes or groups. These territorial boundaries normally relate to the topography or particular topographical features, and there may be a strip of common ownership between neighbouring groups.
- Decisions about land or waters are made by the Aboriginal people or Torres Strait Islander communities who have connection with the land or waters.

Anglo-Australian land management techniques - Box C2, Table 1

The term ‘title’ has two distinct senses in Anglo-Australian land law. Primarily, it denotes ‘ownership’ – to the extent that ‘ownership’ of land is possible, consistent with the notion that land is held ‘of the Crown’. When a person has ‘title’ to land, the accepted meaning is that the person ‘owns’ the land. This is discussed in more detail below. Secondly, and in a looser sense, ‘title’ denotes the various acts and events which go towards proving ownership. The instruments and events are sometimes referred to cumulatively as ‘the title’ to the land: hence the term ‘title deed’, meaning a document that evidences ownership.

The English law of real property and conveyancing, which became part of the law of the Australian colonies, was not entirely suited to the conditions of the new settlements. Its complexity soon became apparent. Proof of title necessitated tracing title back through an unbroken chain of events and documents, perhaps as far as the original Crown grant. The difficulties and uncertainties inherent in this “old system” of title were not overcome by the deeds registration system that was instituted under the English law of real property as it then was. In addition, those responsible for interpreting and applying the inherited land law lacked the necessary expertise.

In this context in the 1850’s Robert Torrens, who later became the first Registrar-General for South Australia, devised the Torrens system of conveyancing. The Torrens system of title by registration provides that the matter of title to land is a government responsibility. A ‘certificate of title’ represents ownership of each piece of land that is guaranteed by the State. Retrospective examination, which is necessary under ‘old title system’, is eliminated and thus the costs and time involved in conveyancing can be kept to a minimum. Under the Torrens system, title rests upon the act of the Registrar-General in registering an instrument,

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rather than upon the act of any party executing the instrument.

The Torrens system came into operation in South Australia in 1858 and in NSW in 1863. Despite a shaky start in SA, the Torrens system of land registration soon spread to all the Australian States and overseas to other countries, including New Zealand, Malaysia, Singapore, Hong Kong, Israel and some of the Canadian provinces.

In each State and Territory, the Registrar-General maintains a register that comprises, among other things, folios, dealings, prescribed instruments, and records. The Registrar-General creates a folio of the register by making a record of (amongst other things):

- a description of the land and of the estate or interest in the land in question;
- a description of the ‘proprietor’ of the estate or interest; and
- the particulars of any other estates or interests affecting the land.

The folio is allocated a ‘distinctive reference’, which is quoted in all transactions affecting the land. The registers can be kept manually or electronically. Under this system, all rights and interests in land, except Indigenous rights and interests, are ‘held of the Crown’.

The Registrar-General may (or, when requested by the registered proprietor or a registered mortgagee or chargee, must) issue a duplicate ‘certificate of title’ for the land. The certificate of title is, in effect, a copy of the original folio of the Register for the land concerned, and is given to the registered proprietor. Normally, the duplicate certificate of title must be produced to the Registrar-General before a dealing with the land is registered. Registration gives indefeasible title and also determines the priority between dealings. Their priority is governed by their order of lodgement or registration, not by their date of execution. Title to land is therefore a government responsibility and is guaranteed by the Crown.

Over the past 150 years the various State and Territory Parliaments have developed their own legislation governing land. As a result, across Australia there is a bewildering array of tenures (Fry 1947:158). There are eight jurisdictions in Australia, each with its own set of statutes governing rights and interests in land and waters. The number of different statutes governing rights and interests in land in Australia is, therefore, quite extraordinary.

Australian land law does not recognise absolute private ownership of land. Instead, it recognises interests in land. When Crown land is sold it is referred to as being alienated from the Crown, but it is still deemed to be held ‘of the Crown’. In a landmark case in 1847 (*Attorney-General v. Brown* (1847) 2 SCR App 30), the Full Supreme Court of NSW held that the inherited British system of land tenure was part of the law of NSW. The court held that the principle that land is held ‘of the Crown’ was part of the law of NSW. That is, people can only ‘hold’ land when it has been granted or otherwise alienated by the Crown. Even today, a person who ‘owns’ freehold land or an estate in fee simple is properly described as ‘holding’ the land ‘of the Crown in right of the State’. This means that a person who holds freehold does not have absolute control over their land. Governments still retain the power to do things on the land without the owner’s consent.

What is being alienated are the rights to occupy, enjoy and use the land, which may be translated into a commodity that can be bought and sold. The highest form of interest in land is an estate in fee simple, or 'private freehold'. Fee simple or private freehold provides the right to occupy, enjoy and use the land and is not limited by time constraints, as is, for example, a leasehold interest or a weekly tenancy.

Table 3 is a list of the different types of tenurial interests in Anglo-Australian land tenure systems. It is indicative of the hierarchy of rights and interests in land that have been created or reserved by governments in the eight States and Territories of Australia. The different types of rights and interests are grouped under Crown land, co-existing public and private rights and interests, communal rights and interests, public rights for present and future generations, and private rights and interests. Private freehold, or an estate in fee simple, is regarded as the most secure form of tenure and the closest thing to absolute ownership that exists in the Australian system of land tenure (*Commonwealth v. NSW* (1923) 33 CLR 1, 42 per Isaacs J).

Each State and Territory has enacted legislation for the purposes of managing how land may be used (Bates 1995:10). The right to enjoy land is limited by the use and development of abutting and nearby land. These controls or limits are generally imposed by State/Territory Governments and/or local Councils through planning, environment and heritage protection legislation and regulated through development and building controls. Again, it is important to note that there are eight different jurisdictions in Australia, each with their own unique sets of laws and administrative arrangements for regulating the use and enjoyment of land for present and future generations.

Table 3. Hierarchy of Anglo-Australian Tenurial Interests

Crown land
<ul style="list-style-type: none"> • Unallocated Crown land
Co-existing public and private rights and interests
<ul style="list-style-type: none"> • Crown-to-Crown tenures (e.g. railways, educational institutions, health facilities) • Roads • Stock routes • Public access, rights of way • Parks (e.g. town parks and gardens, botanical gardens, public playing fields) • Easements (e.g. electricity and telecommunications access, water, sewer and stormwater)
Communal rights and interests
<ul style="list-style-type: none"> • Community titles • Strata titles • Aboriginal Land Rights Acts grants (held communally and inalienable)
Public rights (for present and future generations)
<ul style="list-style-type: none"> • National parks or World Heritage areas • State Forests • Reserves, conservation areas
Private rights and interests
<ul style="list-style-type: none"> • Permits (e.g. water rights, access, profit-a-prendre (i.e. timber collecting)) • Licences (e.g. exploration, mining activity) • Leasehold – lesser rights (e. g. pastoral, mining) • Leasehold – exclusive possession (e.g. residential, commercial) • Private freehold

The contents of Boxes A2 and C2 in Table 1 can be summarised and compared as follows.

Table 4. Indigenous and Anglo-Australian land management techniques

Box A2 Indigenous traditional land management techniques	Box C2 Anglo-Australian land management techniques
<ul style="list-style-type: none"> • Land is an integral part of their belief system • Collective or communal responsibility for country • Cannot hand over land outside of the Indigenous system for personal gain • Spiritual and physical connections to country • Formal territoriality between groups, but with common area of land between neighbouring groups • Decisions about land or waters made by those that have connection with country • ‘Native title’ is the term used by the High Court in <i>Mabo</i> (No. 2), the common law and the <i>Native Title Act 1993</i> (Cth) to describe these rights and interests 	<p>Land & Real Property Acts</p> <ul style="list-style-type: none"> • Land is viewed as an economic commodity which may be bought and sold • Torrens title system, guaranteeing priority of interests and security of title • Hierarchy of tenurial interests (See Table 3) <p>Planning Acts</p> <ul style="list-style-type: none"> • Strategic planning • Statutory land use planning • Development controls/codes • Appeals/review of decisions • Enforcement of planning schemes <p>Environment and Heritage Protection Acts</p> <ul style="list-style-type: none"> • Environmental strategies • Environmental Impact Statements • State of Environment Reporting <p>Building Acts</p> <ul style="list-style-type: none"> • Building Code of Australia • Regulations

While the Commonwealth does not have Constitutional jurisdiction for land administration and development in its own right, Commonwealth legislation impinges on many aspects of land law. Examples include the compulsory acquisition of land for Commonwealth purposes, bankruptcy, trade practices, family law and, of course, the *Native Title Act 1993* (Cth).

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Table 4 shows that both cultures have an enduring approach to land management reflecting their respective cultural values. The Anglo-Australian approach is firmly rooted in statute law, the Crown's power to grant interests in land, and to regulate and change those rights and interests. Conceptually, at least, the system is designed to balance public and private interests as well as the interests of present and future generations, although the degree to which these ideals are achieved in practice is highly debateable. In contrast, Indigenous Australian approaches to land management reflect their special relationship to land and waters and their sense of stewardship in the use, preservation and renewal of natural resources for present and future generations.

3.3 Comparing the content of land and water rights and interests

The third level of Table 1 draws together the content of land and water rights and interests of the two different cultures. Box A3 identifies the content of Indigenous rights and interests in land and waters, while Box C3 identifies the content of Anglo-Australian statutory land use and development controls. The contents of these two boxes are discussed below, followed by a comparative table.

The content of Indigenous rights and interests in land and waters - Box A3, Table 1

To date, the High Court has not made a universal ruling on the content of Indigenous rights and interests in land and waters, and it is unlikely to do so. This is because native title rights and interests are *sui generis* (Deane and Gaudron JJ, *Mabo* (No. 2) 1992:89). That is, they are unique within the law. The rights and interests vary from location to location and between different groups, clans or tribes according to the traditional laws acknowledged and customs observed by Aboriginal people and Torres Strait Islanders.

Nevertheless, a question that is often posed is: What rights and interests does native title include? The list provided below is indicative of the kinds of rights and interests that may be included in native title rights and interests. The list does not purport to be definitive of the kinds of activities or uses that may be part of a native title claim or determination. Because Indigenous property rights and interests are *sui generis* (unique within the law), these will vary between different clans, tribes or groups and from location to location.

Lee J in *Miriuwung and Gajerrong* found that the native title rights in relation to the particular claim area of the Miriuwung and Gajerrong peoples in northern Western Australia include rights:

- to possess, occupy, use and enjoy the area;
- to make decisions about the use and enjoyment of the area;
- of access to the area;
- to control the access of others to the area;
- to use and enjoy resources of the area;
- to control the use and enjoyment of others of resources of the area;
- to receive a portion of any resources taken by others from the area;

- to maintain and protect places of importance under traditional laws, customs and practices in the area; and
- to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

At the time of writing, the *Miriuwung and Gajerrong* judgment is on appeal to the full bench of the Federal Court.

The content of Anglo-Australian statutory land use and development controls - Box C3, Table 1

As mentioned above, the ways in which land may be used are governed by an array of State or Territory legislation, including planning, environmental and heritage protection legislation, and local government development and building controls. Land use planning and development control decisions are the quintessential public interest issue. The use and development of land needs to be balanced and justified against the public interest, the environmental effects and the externalities of the development and against alternate uses. The list in this part of the table is only indicative of the range of different kinds of uses to which land may be put or developed. It is important to understand that this list is not exhaustive and that the codes and methods of development control vary considerably between and within the various jurisdictions. Consistent with current approaches to land use classification, the list distinguishes between private and public interests in land use and development.

The content of Boxes A3 and C3 in Table 1 can be summarised and compared in the following table.

This comparison shows that the ways in which land and water are utilised are very similar in nature and are closely regulated in some way.

Table 5. The content of Indigenous and Anglo-Australian land and water rights and interests

Box A3 The content of Indigenous rights and interests in land and waters	Box C3 The content of Anglo-Australian statutory land use and development controls
<ul style="list-style-type: none"> • Deriving social and economic benefits from land use • Use, occupation and enjoyment • Access • Living • Travelling over • Cultural activities • Use of resources, such as hunting, fishing and gathering • Including elaborate trading arrangements across the country • Ceremonies • Celebrations • Burial • Maintain and protect places of importance • Maintain, protect and prevent misuse of cultural knowledge of the native title holders • Etc. 	<p>Private rights and interests</p> <ul style="list-style-type: none"> • Residential • Commercial • Industrial • Agricultural • Mining • Private sporting or recreation • Leisure • Etc. <p>Public rights and interests</p> <ul style="list-style-type: none"> • Public parks (national parks, state forests, conservation areas) • Public administration (Council offices, government offices, etc.) • Public institutions (Law courts, schools, universities etc.) • Public infrastructures • Public open spaces • Places of worship • Cemeteries • Community facilities • Roads • Railways • Airports • Etc.

**4. The interface:
‘Bucketfuls of extinguishment’² and no compensation ‘on just terms’**

The middle column, column B, is the most important part of Table 1. It shows the distinct factors influencing and governing the relationship between the two sets of rights and interests, as far as we currently know and understand them. From the Indigenous perspective there are Indigenous traditional laws and customs. From the Anglo-Australian perspective there is the common law and statute law.

4.1 Indigenous Traditional Laws and Customs

As Lee J states in *Ben Ward & Ors on behalf of Miriuwung Gajerrong Peoples v. the State of Western Australia* [1998] 1478 FCA:33:

The expression ‘traditional laws and customs’ used in *Mabo* (No. 2) should be taken to be an inclusive statement consistent with the expression ‘practices, traditions and customs’ referred to in Canadian authorities (*Wik* per Toohey J at 126; *R v. Van der Peet* per Lamer CJ at 548.) The expression necessarily implies that the words are to be understood from an Aboriginal perspective, not constrained by jurisprudential concepts. Law in Aboriginal terms is an aggregation of traditional values, rules, beliefs and practices derived from Aboriginal past. It might correspond to an anthropologist’s description of ‘aboriginal culture’ or ‘aboriginal lore’ (K Maddock, ‘The Australian Aborigines – A portrait of their society’ at 24.)

As a consequence of the fiction of *terra nullius* and the dispossession of the rights of occupation and ownership of this land by Aboriginal peoples and Torres Strait Islanders for over two hundred years from 1788 to 1992, Australia does not have a good understanding of the traditional laws and customs of its original indigenous inhabitants and custodians. There is so much to learn.

4.2 Anglo-Australian Common Law

The common law is largely a law of precedent dating back several centuries when king-made law evolved into judge-made law. In Australia, judge-made common law continues to follow (although is not bound to) legal precedents set long before colonial occupation. Common law was introduced into Australia when the colony of New South Wales was established in 1788. Australia shares its common law roots with other common law countries, many of which also share a history of colonisation. When considering the common law of Indigenous rights, the courts in Australia draw on the experiences of countries like Canada, New Zealand and the United States.

Decisions emerging from judge-made law had an impact on the development of Australian land law. The respect traditionally paid by Australian courts to decisions of the English higher courts has resulted in a reasonably consistent interpretation of the land law in the two countries. To some extent, this was compelled by the rules of precedent. However, the High

² Statement made by the Deputy Prime Minister, The Hon Tim Fischer 1997 (See Attard 1997 and Brough 1997).

Court of Australia has for some time felt free to depart from English decisions of the House of Lords or the Court of Appeal.

Any doubt about the separate and independent development of Australian law was finally removed by Section 11 of the *Australia Act 1986* (Cth), which abolished appeals from State courts to the Privy Council. This means that the law that governs Australia is no longer English law, but Australian law. Australian courts often cite and apply decisions from other countries, especially Canada, New Zealand and the United States of America, and English decisions are now useful in Australia only to the extent that their reasoning is persuasive (*ALGA et al*: 1999).

In the native title context, High Court and Federal Court decisions are increasingly citing decisions made by the courts of Canada, New Zealand and the United States.

Just as Australia has begun to grapple with the nature and parameters of native title rights, so too are the courts in Canada and New Zealand faced with similar issues. Having determined that the common law does recognise native, or aboriginal, title, the challenge is now to consider the boundaries of the doctrine of native title. Applicants in all three jurisdictions are pressing the courts by claiming the existence of rights in an increasingly diverse range of situations. Does native title extend to offshore? Does it include self-government, or the right to co-manage resources with government? Not surprisingly, we see a cross-fertilisation, or infiltration, of ideas and precedents from one jurisdiction to another (Dorsett 1998:33).

In Australia, Canada and New Zealand, aboriginal title has a common foundation. In all three countries aboriginal title arises from Indigenous use or occupation of land prior to the acquisition of sovereignty by the British Crown. ‘On acquisition, the common law recognised and preserved these pre-existing rights with respect to land’ (Dorsett 1998:34). Acknowledgments can be found in the leading cases from all three countries, namely *Mabo* (No. 2) (Australia), *Te Runanganui o Te Ika Whenua Inc. Society v. Attorney-General* (1994) 2 N.Z.L.R. 20 (New Zealand), and *Delgamuukw v. the Queen in Right of British Columbia*, reported in 79 DLR (4th) 185 (Canada).

The body of common law dealing with native title in Australia is still evolving. By comparison with other common law countries, Australia is a relative newcomer to this field and Federal and High Court judgements will continue to assist in clarifying under what circumstances the common law in Australia will continue to recognise Indigenous rights and interests in land and waters. Since the historic landmark judgement in *Mabo* (No. 2), there are a number of other important High Court judgements, including *Wik*, *North Galanja* (*Waanyi*), and *Fejo*. There have also been some key judgements from the Federal Court, including *Fourmile*, *Yarmirr*, *Miriuwung* and *Gajerrong*, and *Yorta Yorta*. At the time of writing some of these latter cases are subject to appeal to the full bench of the Federal Court or the High Court. Nevertheless, these cases have contributed to clarifying the common law recognition of native title rights and interests on leasehold land, when private freehold has been returned to the Crown, offshore waters, onshore waters, and in relation to the declaration of public roads.

Each of these cases adds to our knowledge and will assist in clarifying under what circumstances the common law will continue to recognise Indigenous rights and interests in

land and waters. There will be more cases over time.

4.3 Constitutional Law

The Australian Constitution has a direct and immediate impact on a vast range of Australian affairs, including on economic arrangements, social relationships (family law), environmental protection, international relations and many other things. The Australian Constitution provides the Commonwealth and the States with separate fields of responsibility. The Commonwealth has exclusive powers in some areas such as defence, foreign affairs and immigration. The States have exclusive powers over other areas, including land and water management and many other related fields.

Section 51xxxii in the Constitution is pertinent to the discussion about rights and interests in land. Section 51xxxii requires the Commonwealth Government to compensate owners for the acquisition of their property 'on just terms'. Similar constraints apply to Territory Governments, but not to State Governments, although they normally compensate owners whose property rights are resumed. The founding fathers of the Australian Constitution were inspired by the Bill of Rights of the United States of America to include a requirement that legislation for the acquisition of land by the Commonwealth should provide for acquisitions to be undertaken 'on just terms' (The Law Reform Commission 1980:ix).

'Just terms' has been interpreted by the High Court as requiring the payment of compensation on the basis of special value to the owner, not the value to the acquiring authority. This will include the payment of compensation, if applicable, for damage to the remaining land due to severance, injurious affection, consequential losses, and disturbance, in addition to the value of the land or interest taken (Wensing and Sheehan 1997:22).

The existing approach to compensation for the acquisition of property rights by the Commonwealth is one of the relatively few guarantees of rights expressly stated in the Constitution. Kirby J in *Newcrest Mining (WA) Ltd & or v. The Commonwealth of Australia & Ors.* (High Court, unreported FC 97/036 at 146) has stated that 'the terms of s51xxxii were intended to recognise the principle of the immunity of private and provincial property from interference by the federal authority, except on fair and equitable terms'. Kirby J (at 161) also stated that fundamental rights such as section 51xxxii are such that: '[t]his court should ensure that the promise is kept'.

Consistent with s51xxxii of the Constitution, native title holders are entitled to compensation for any loss or impairment of their rights and interests 'on just terms', the same as anyone else in the community if Governments affect their rights and interests (Wensing and Sheehan 1997:22, Sheehan and Wensing 1998:35-39). Perhaps Kirby J in *Newcrest* was foreshadowing that claims for compensation for the loss, impairment, diminution or extinguishment of native title rights and interests will be considered in exactly the same way as for the effect on any other property rights and interests.

As Reynolds (1999:203) concludes:

But whether extinguishment has occurred or not, indigenous communities currently own land under native title or have done so in the past and have a moral, if not a legal, right to compensation. This places them in a very different situation from the one they experienced when *terra nullius* was the pervading doctrine. They either were once or

still are landowners, with the respect that position brings and all the protection provided by the common law famous for its defence of private property.

4.4 Anglo-Australian Statute Law

The Australian Constitution also provides for a system of parliamentary democracy based on the British Westminster system. New laws or Acts of Parliament can only be made, or existing laws changed or removed, by or under the authority of State or Federal Parliaments. The principle of parliamentary sovereignty means that the Federal Parliament is not bound by its own prior legislation. It can pass legislation that overrides previous legislation.

In relation to native title rights and interests, there are three Commonwealth statutes of particular relevance. They are the *Racial Discrimination Act 1975* (Cth), the *Native Title Act 1993* (Cth), and the *Native Title Amendment Act 1998* (Cth).

Prior to the amendments to the *Native Title Act 1993* (Cth) in mid-1998, the States and Territories responded in different ways to the regime established by the *Act*. Some of them adopted what can be described as complementary (or mirror) legislation, in that their legislation is largely parallel to the Commonwealth *Act*. Some adopted a minimalist response, while others have legislation that falls between these two extremes.

Since the passage of the *Native Title Amendment Act 1998* (Cth), the States/Territories are still considering whether or not to establish 'recognised bodies' or 'equivalent bodies' to take over all or part of the functions and responsibilities of the Federal Court of Australia and the National Native Title Tribunal in their State/Territory. Following the Western Australian Government's failure to secure the passage of its legislation through the WA Upper House in December 1998, the Premier of Western Australia is on the public record as stating that the Western Australian Government has scrapped moves to establish its own State-based regime. The State Government has rejected amendments forced on the plan by the Upper House, and has, for the time being, laid the legislation aside (*The West Australian*, 24 December 1998).

At the time of writing, the Senate had voted to disallow the Northern Territory Government's complementary native title legislation. It is the first state-based regime to go to the Parliament for Senate approval as a result of the 1998 amendments to the *Native Title Act 1993* (Cth). The democrats, Independent Senator Brian Harradine and Tasmanian Greens Senator, Bob Brown sided with Labor to pass the disallowance motion because future changes could be made to the alternative scheme without further monitoring by the Federal Parliament (AIATSIS 1999:9). Discussions are continuing between the Democrats and the Government as to whether any amendments will be made to the *Act* to ensure that any amendments to state-based schemes will require scrutiny by the Federal Parliament. However, the National Party has indicated that it will not accept a compromise that will allow the Senate to act as a house of review for State and Territory regimes (*The Australian*, 2 September 1999).

The remainder of this paper focusses only on the Commonwealth's legislation. A good summary of State and Territory native title future act regimes can be found in a paper prepared by James Fitzgerald of Arnold Bloch Liebler (Fitzgerald 1999).

The Racial Discrimination Act 1975 (Cth)

The *Racial Discrimination Act 1975* (Cth) puts into effect Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*. In summary:

- Section 9 makes it unlawful for a person to discriminate on grounds of race where the discrimination has the effect of impairing the enjoyment of any human right or fundamental freedom; and
- Section 10 provides that where, by reason of any law, persons of a particular race do not enjoy a right to the same extent as persons of another race, then the first-mentioned persons enjoy that right to the same extent.

Since its introduction in 1975, Australian people of any race have the same rights in respect of human rights and fundamental freedoms as people of any other race. It is important because it provides a federal 'safety net' against action by State and Territory Governments to deny rights on the basis of race.

The *Racial Discrimination Act 1975* (Cth) was tested in an earlier stage of the *Mabo* litigation (known as *Mabo (No. 1)*). The Queensland Parliament had passed the *Queensland Coast Islands Declaratory Act 1985* (the *Queensland Act*) in an attempt to thwart the native title claim. The *Queensland Act* sought to extinguish any native title rights claimed to exist in the Murray Islands, as of 1879 when the Islands were annexed by the Crown to Queensland. It sought to deny any rights to compensation in respect of that extinction, and to confirm grants made by the Crown.

In 1988 the High Court held that this *Queensland Act* impaired, on a discriminatory basis, the human rights of the Torres Strait Islanders to own and inherit land. On the assumption that native title existed from the time of annexation, a majority of the High Court held that:

- but for the operation of the *Racial Discrimination Act 1975* (Cth), the *Queensland Act* would have extinguished native title;
- the *Queensland Act* discriminated on the basis of race in relation to the human right to own property, and the right to not be arbitrarily deprived of property. It did so because the native title interests sought to be extinguished were held only by Indigenous people; and
- the *Queensland Act* was inconsistent with the *Racial Discrimination Act 1975* (Cth) and, by virtue of s109 of the Constitution, invalid. Section 109 of the Constitution states that where a State law is inconsistent with a Commonwealth law, the State law is invalid.

More recently, in 1995, the High Court took a similar view of Western Australian legislation [the *Land (Titles and Traditional Usage) Act 1993* (WA) (The *WA Act*)] that was designed to extinguish native title in Western Australia and attempted to substitute vulnerable statutory rights of traditional usage.

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While the *Racial Discrimination Act 1975* (Cth) makes it illegal to discriminate against the property rights of Aboriginal people, there is a complex interaction between the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth). Under the principles of parliamentary sovereignty, the Federal Parliament can pass legislation subsequent to the *Racial Discrimination Act 1975* (Cth) that specifically authorises action inconsistent with the provisions of that Act. ‘Such later legislation, in the absence of explicit provision to the contrary, overrides or impliedly repeals the *Racial Discrimination Act 1975* (Cth) to the extent that the subsequent legislation is inconsistent with it’ (Antonios 1999:37).

The 1998 amendments to the *Native Title Act 1993* (Cth) require the Act to be ‘read and construed subject to the provisions of the *Racial Discrimination Act 1975* (Cth)’. This is qualified by a subsequent clause which states that the racial discrimination legislation will only apply to powers and functions conferred or authorised by the *Native Title Act 1993* (Cth). For example, the Native Title Registrar must carry out his or her functions in a non-discriminatory way and State or Territory native title bodies must also exercise their powers in a non-discriminatory way. However, the racial discrimination legislation does not apply to the substantive provisions made under State legislation governing native title (that is, the provisions enabling States and Territories to pass complementary legislation validating ‘past acts’ and ‘intermediate period acts’ as extinguishing native title rights and interests and the provisions confirming the extinguishment of native title over a vast number of different tenure types which in many cases pre-empt the common law), even though Section 109 of the Australian Constitution ensures that federal legislation overrides or invalidates State/Territory legislation to the extent that State/Territory law is inconsistent with the federal law.

Once again, the rights and interests of Indigenous Australians arising from native title have been seen as being subservient to the real estate interests of non-indigenous Australians, because the *Native Title Act 1993* (Cth) “prioritises other proprietary interests ahead of native title interests” (Antonios 1999:55) and exempts such actions from the application of the *Racial Discrimination Act 1975* (Cth).

The response to *Mabo (No. 2)* in the *Native Title Act 1993* (Cth) as first enacted, was reasonable and balanced even though it validated acts that occurred prior to 1 January 1994 and in certain circumstances enabled native title to be extinguished permanently. It was the outcome of intense negotiations between Indigenous and non-indigenous interests. By comparison, the response to *Wik* in the *Native Title Amendment Act 1998* (Cth) can only be characterised as ‘mean spirited’ in terms of its impact on the human and property rights of Indigenous Australians.

Even before the *Native Title Amendment Bill (1997)* was passed, some commentators were predicting that there may be well-founded constitutional or discriminatory grounds upon which the legislation could be challenged before the courts (Sheehan and Wensing 1998:53). More recently, the United Nations Committee on the Elimination of Racial Discrimination (UN CERD) (1999) has expressed concern about the compatibility of the amended *Native Title Act 1993* (Cth) with Australia’s international obligations under the *International Convention on the elimination of all forms of Racial Discrimination*. This is discussed in more detail below.

The Native Title Act 1993 (Cth) and the Native Title Amendment Act 1998 (Cth)

In *Mabo* (No. 2) the High Court left many issues unresolved. Many of these could have been resolved through the development of common law on a case-by-case basis. However, within the non-indigenous community, legislation was deemed essential for three reasons:

- the need to validate titles issued since 1975 which were probably invalid under the *Racial Discrimination Act 1975* (Cth);
- the need for a legislative process to allow mining and other development to occur on native title land; and
- the need for certainty as to whether or not land was subject to native title rights and interests (Nettheim 1998:23).

It was clear that the Federal Government favoured a legislative response. According to Nettheim (1998:23), a stark dichotomy emerged between a human rights context and a real estate context. To Indigenous leaders, native title was primarily a human rights issue. They called for the recognition of Indigenous rights to land, to socio-economic equality, and to self-determination. The situation presented the opportunity for a radical reassessment of the relationship between Indigenous and non-indigenous Australia. In contrast, the hardline State Premiers and the Northern Territory Chief Minister and many business leaders, particularly from the mining and pastoral industries, saw *Mabo* (No. 2) as a High Court created real-estate problem. They wanted the issues resolved by legislation negating native title (Nettheim 1998:23).

In 1993 the then Federal Labor Government enacted the *Native Title Act 1993* to provide a statutory framework for the recognition and protection of Indigenous rights and interests in land where they continue to exist. The *Native Title Act 1993* (Cth) as first enacted was Australia's first attempt to come to grips with the divergent perceptions and attitudes of two cultures to a basic resource - land. The *Act* provided a legislative framework for the application of the common law in relation to native title, by, inter alia, moulding a form of litigation for the determination of the existence of native title at common law and by providing that such litigation is an exercise of federal jurisdiction.

The *Native Title Act 1993* (Cth) does **not** replace common law native title with a statutory right enforceable under the *Act*. Section 10 of the *Act* states that native title is recognised and protected in accordance with the *Act*. The principal protection is provided by section 11(1), which states that native title is not able to be extinguished contrary to the *Act*.

By 1995 it was openly acknowledged by all stakeholders that certain parts of the *Native Title Act 1993* (Cth) were becoming unworkable and that amendments were necessary. A *Native Title Amendment Bill 1995* was tabled in Federal Parliament in late 1995 by the former Keating Government, but the *Bill* lapsed with the dissolution of the House of Representatives in early 1996. The incoming Howard Government released a discussion paper in May 1996 and tabled the *Native Title Amendment Bill 1996* in June. In October this was followed by the introduction of a further round of amendments.

Comparing Native Title

In late 1996 the High Court handed down its judgment in *Wik Peoples v. The State of Queensland and Ors* (1996) 141 ALR 129. The judgment confirmed that native title rights and interests may exist over land which is or has been subject to a pastoral lease and possibly some other forms of statutory estates. The judgment also confirmed that the statutory rights and interests granted by the Crown prevail over native title rights and interests to the extent of any inconsistency. It prompted wide-spread public debate, much of which was very ill-informed (Bachelard 1998).

The Government's response was to abandon the earlier amendment *Bills*, in favour of a comprehensive reform package. In May 1997 the Government released a 'ten-point plan', and draft legislation to implement the plan was released for comment in June. The *Native Title Amendment Bill 1997* was introduced into the House of Representatives in September. Following two weeks of debate the *Bill* was passed in early December 1997 with several amendments by the non-government parties in the Senate. The Government submitted the Senate's amendments to the House of Representatives at a special sitting on 6 December, only the second time the House has sat on a Saturday since Federation.

Predictably, the Government rejected most of the Senate's amendments and declared that it would resubmit the *Bill* in its original form to the Senate in March 1998. This led to talk of a double dissolution of Federal Parliament and, in some quarters, of a divisive 'race-based' election. When the Senate sat in March and April 1998 it again passed the *Bill* with a number of amendments. On 9 April 1998, the House of Representatives laid the *Bill* aside after agreeing to 110 Senate amendments, but disagreeing to the remainder. On 3 July 1998 the decision to lay the *Bill* aside was rescinded following a last minute compromise reached between the Federal Government and the Independent Senator for Tasmania, Senator Brian Harradine. The agreement between the Government and Senator Harradine allowed the *Bill* to pass through the Senate on 8 July 1998. The resolution agreeing to certain Senate amendments was amended, the resolution disagreeing to certain Senate amendments was amended, and a further 88 Government amendments were made to the *Bill*. Most of the amendments to the *Act* commenced on 30 September 1998.³

The amendments to the *Act* significantly shift the focus away from the recognition and protection of Indigenous rights and interests in land and waters, to extinguishment. Instead, the *Act* concentrates on the extinguishment or impairment of native title in many more circumstances than was the case under the *Act* as first enacted, regardless of whether or not the various grants of rights and interests included extinguish native title at common law.

In a report to the United Nations Committee on the Elimination of Racial Discrimination (hereinafter the UN CERD Committee), the Aboriginal and Torres Strait Islander Commission (ATSIC) (ATSIC 1999) points out that the amendments to the *Native Title Act 1993* (Cth):

- prefer the rights of non-native title holders over those of native title holders;
- fails to provide native title holders with protection of the kind given to other land owners;

³ For fuller discussion of the amendments made in 1998, see for example, ALGA 1998, and NSW Parliamentary Library Research Service, Briefing paper No. 15/98.

- allow for discriminatory action by governments;
- place barriers to the protection and recognition of native title; and
- do not provide appropriately different treatment of unique aspects of Aboriginal culture.

In particular, ATSIC (1999) notes that the amendments:

- pre-empt the development of the common law by confirming the extinguishment of native title permanently on particular classes of titles and grants of interest in land;
- retrospectively validate those potentially invalid acts of government done in the period between the commencement of the *Native Title Act 1993* (Cth) in January 1994 and the date of the *Wik* decision in December 1996;
- enable pastoralists who currently enjoy little more than rights of pasturage over vast areas of land, to apply for an upgrade of their rights to permit a broad range of higher intensity ‘primary production activities’ without having to consult or negotiate with native title holders;
- remove, replace or diminish the right to negotiate in relation to a variety of future acts; and
- suspend the effect of the *Racial Discrimination Act 1975* (Cth). Those provisions of the *Native Title Act 1993* (Cth) that are discriminatory override the *Racial Discrimination Act 1975* (Cth).

Indeed, the Aboriginal and Torres Strait Islander Social Justice Commissioner (Antonios 1999:44) shares similar views. According to the Commissioner, the amendments

...pre-empt the development of the common law. They seek to apply the largely undeveloped common law to a myriad of interests across the country in ways that cannot be done accurately. They apply the wrong test for extinguishment, by not focusing on whether in granting the titles there was a clear and plain intention to extinguish native title. They also deem extinguishment to be permanent where that is not necessarily the understanding at common law.

The recent decision of Lee J in *Ben Ward & Ors on behalf of Miriuwung Gajerrong Peoples v The State of Western Australia* [1998] 1478 FCA, found that native title had not been extinguished at common law on a number of leases that were ‘confirmed’ as extinguishing native title in the amended *Native Title Act 1993* (Cth). Lee J also found that the criterion used to confirm extinguishment was directed at the wrong question. The question is not whether the grant of the right or interest gives rise to a right of exclusive possession, but whether in granting the title there is a clear and plain intention to extinguish native title (Bartlett 1997:30).

The Western Australian Government has lodged an appeal against Justice Lee’s decision in *Ben Ward & Ors on behalf of Miriuwung Gajerrong Peoples v The State of Western Australia* [1998] on several grounds, including challenging the findings outlined above. The appeal is yet to be heard by the Full Bench of the Federal Court.

Comparing Native Title

However, the Aboriginal and Torres Strait Islander Social Justice Commissioner believes that by scheduling certain grants of interests in land in the *Native Title Act 1993* (Cth)

the Parliament has given priority to the interests of non-indigenous title holders over those of native title holders. It is a clear breach of Australia's international obligations to treat people equally and without discrimination' (Antonios 1999:45).

The Aboriginal and Torres Strait Islander Social Justice Commissioner (Antonios 1999) concludes that:

- the validation provisions favour non-indigenous interests in land over those of native title holders based on the dubious justification that Governments had acted in accordance with the assumption (proven wrong in *Wik*) that native title had been extinguished by pastoral leases, and goes far beyond the scope of that justification; and that
- the confirmation provisions go beyond confirming the operation of the common law and indeed extinguish native title permanently. Again, these provisions favour the interests, often historic and short-term in nature, of non-indigenous people over those of Indigenous people. They do not satisfy the reasoning of either *Mabo (No. 1)* or *Western Australia v the Commonwealth* (Antonios 1999:48).

In August 1998 the Country Rapporteur of the UN CERD Committee reported to the United Nations that:

...the central goals and compromises that formed the basis of the original Act now bear little relationship to the amended *Native Title Act*. The main aims of the original Act, namely the protection and recognition of native title, do not appear to be the central aims of the amended Act. The original Act sought to establish a mechanism by which to affirm the *Mabo* decision. In contrast, provisions that extinguish or impair the exercise of native title rights or interests pervade the amended Act. In many ways, therefore, the amended Act appears to wind back the protections of native title offered by the *Mabo* and *Wik* decisions.

In August 1998 the UN CERD Committee issued Australia with a 'please explain', the first stable Western democracy to have been issued with such a notice.

After receiving submissions from the Australian Government and a range of other parties, the UN CERD Committee delivered its final observations on Australia in March 1999. In its report the UN CERD Committee expressed its concern over the compatibility of the *Native Title Act 1993* (Cth) as currently amended with Australia's international obligations under the *Convention on the Elimination of All Forms of Racial Discrimination*. The Committee concluded that

...the amended (Native Title) Act appears to create legal certainty for governments and third parties at the expense of indigenous title. The Committee notes in particular, four specific provisions that discriminate against indigenous title holders. These include: the Act's 'validation' provisions; the 'confirmation of extinguishment' provisions; the primary production upgrade provisions; and restrictions concerning the right of

indigenous title holders to negotiate non-indigenous land uses (UN CERD Committee 1999).

The UN CERD Committee called on Australia to address these concerns 'as a matter of utmost urgency' and to 'suspend implementation of the 1998 amendments and re-open discussions with representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention' (UN CERD Committee 1999).

The Committee also decided to keep this matter on its agenda under its early warning and urgent action procedures to be reviewed again at its fifty-fifth session.

The Australian Government's reaction to the UN Committee's findings was predictable. In a press release issued following the decision, the Commonwealth Attorney-General stated that the Committee's comments were 'an insult to Australia and all Australians as they are unbalanced and do not refer to the submission made by Australia on the native title issue (Williams 1999).

In April 1999 the Senate considered two motions relating to the decision. One expressing the 'grave concern' of the Senate at the CERD Committee's conclusions, to support their call for Australia to address the issues as a matter of urgency, to urge the government to re-open discussions with Indigenous representatives, and to invite the Committee to come to Australia. The other motion sought to establish a parliamentary committee to inquire into the compatibility of the amended *Native Title Act 1993* (Cth) with Australia's obligations under the *Convention on the Elimination of All Forms of Racial Discrimination* and the principles of the *Racial Discrimination Act 1975* (Cth). Both motions were defeated by the Government members of the Senate with the support of the Independent Senator for Tasmania, Brian Harradine. By doing so, the Australian Government also made it clear that the CERD Committee was not welcome to visit Australia.

The UN CERD Committee is the same committee that condemned the apartheid laws of South Africa as inimical to international standards. It is not in Australia's best interests to continue denying the CERD Committee's findings. Denial never works as a long-term solution. Sooner or later we will need to deal with the CERD Committee report or we may face the kind of sanctions once imposed on South Africa.

If Australia continues to deny the CERD Committee findings, it could become the first western nation to be reported to the United Nations General Assembly for breaching the *International Convention on the Elimination of All Forms of Racial Discrimination*.

5. Two systems compared

There are two systems of law in Australia. There is the older system of laws of the Aboriginal peoples and Torres Strait Islanders and there is, by comparison, the relatively young system of Anglo-Australian laws.

The Cabinet papers for 1968 recently became public following the thirty-year embargo. The papers show that many of the arguments used by opponents to Australia's first Aboriginal land rights claim by the Gurindji peoples near Wattie Creek in the Northern Territory were contrived and ludicrous. For example, it was argued that the claim was 'dubious' and 'erroneous' and that any concession to the Aboriginal peoples would be a 'surrender to communist pressure tactics' which were being exerted through the Indigenous community. The editorial of the *Sydney Morning Herald* commented in January 1999 that 'the flight of fancy involved in such an approach is hardly a thing of the past' (SMH 1 January 1999).

Following the High Court's decision in *Wik*, exaggerated and extravagant scare mongering was actively undertaken by several non-indigenous interests. For example, the then Deputy Prime Minister, the Hon. Tim Fischer, made several public statements (ABC Radio News December 1997) that even residential and commercial leasehold properties in the ACT are no longer secure because they may at some time in the future be subject to an application for a determination of native title. A passing knowledge of Canberra's history would show that such claims have little if any merit. A search of the public records would reveal that most of the ACT had been in the estate of private freehold or conditional purchase freehold before it was handed over to the Commonwealth by NSW in 1910 and later compulsorily acquired by the Commonwealth for the purposes of developing the national capital.

According to the former President of the National Native Title Tribunal, Justice Robert French (*Sunday Times* 20 December 1998, p21), consecutive Federal, State and Territory Governments have failed to educate the public about native title. The only sphere of government to undertake a comprehensive program of accurate and timely information dissemination about the implications of native title on its roles and functions has been Local Government⁴. Indeed, some States have deliberately set out to make the *Native Title Act 1993* (Cth), as originally enacted, unworkable (De Soyza 1998). According to Muir (1999:4), the amendments to the *Native Title Act 1993* (Cth) in July 1998 represented the high point in State and Territory Governments' political campaign against native title.

Critics citing the lack of native title determinations reflect a disturbing lack of information, knowledge and understanding about the concept of native title and the processes under the *Native Title Act 1993* (Cth), and about the roles of governments, the courts and tribunals. Justice French believes that Governments' responsibility to educate the community about the essential nature of native title, native title processes and the functions of the National Native Title Tribunal have not been properly discharged. This failure has prevented and hindered agreements being negotiated and finalised.

⁴ Since 1997 the ALGA with assistance from the Aboriginal and Torres Strait Islander Commission and the National Native Title Tribunal, has been conducting a national information project for Local Government on how to work with native title.

The recognition and protection of Indigenous rights and interests in relation to land and waters has faced strong opposition from many of the core institutions of post-colonial Australia. This is largely because systems of land management and land tenure are under the direct control of State and Territory Governments in the Australian Federal system and are clearly central to state control of land and natural resources (Head and Hughes 1996:278). Until the passage of the *Native Title Amendment Act 1998* (Cth) through the Federal Parliament in July 1998, all State and Territory Governments (with the exception of the ACT Government) were opposing all native title determination applications and were not prepared to contemplate agreements without first pursuing litigation. Indeed, some State Governments will still not contemplate agreements until such time as the potential native title holders can produce credible evidence that their native title rights and interests continue to exist (NSW 1999).

However, there are some early signs that the Federal Parliament is beginning to recognise the need for public information and education about native title. In its Fourteenth Report, the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, after extensive consultations around Australia noted as a matter of considerable concern the clear need for the dissemination of information about native title (PJC 1999:15).

In commenting on the proposed amendments to the *Native Title Act 1993* (Cth) in his 1997 *Native Title Report*, the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Michael Dodson, noted:

The Federal Government, playing variously ringmaster and pawn to State and Territory Governments, has contrived a land management proposal tremendously destructive to the legitimate rights and interests of native title holders. The Australian Government's proposals are so focussed on servicing vested interests and political constituencies that it has lost sight of a wider social vision in which prosperity is founded on respect for the human rights of all Australians. (Dodson 1997:99)

Noel Pearson eloquently sums up the situation in a paper presented to a forum hosted by the Rural Landholders for Co-Existence in Charters Towers in August 1998. He was summarising the effect of the High Court's judgments in *Mabo (No. 2)* and *Wik*. While the following quote is lengthy, it points out precisely the extent to which one set of rights has been treated very differently from another set of rights by the setting aside of the *Racial Discrimination Act 1975* (Cth).

So there are three simple principles of native title put forward by the court. The blackfellas keep whatever is left over, the white-fellas keep everything they've already gained and the big area in between you have to share, but in the sharing, the Crown title prevails over native title. That was the simple proposition put forward as the foundation for peace by the High Court, and my own view is that no more just, no more sensible, no more practicable an arrangement could ever be devised.

Who can say that is an unfair formula for accommodation and co-existence in Australia? All of the wealth, all of the privilege, all of the work, all of the entitlement built up by non-Aboriginal Australia over two centuries is theirs, cannot be

diminished. No one can go to court to take that away from them is the clear principle put forward by the court in all its decisions. The blackfellas get whatever slithers are left over. In many of the settled parts of the country you're hard up finding wedges of uncompromised land.

But there are large areas of pastoral lease where the court's prescription for sharing the land might in fact deliver to the Indigenous people some kind of substantial result. But whatever the Indigenous people get out of that co-existence is secondary to the rights granted by the Crown to the leaseholders. So, it seems to me that if we're going to have reconciliation, the terms of that reconciliation were put forward by white Australia's judicial elders. A unilateral offer by white Australians to black Australians to shake hands on this deal.

What we have been going through over the last five years are ructions right across the country about the fairness of that deal. What we have had through two bouts of native title legislation, where we are at now, is that in relation to the white-fellas' rights, they have not diminished one-iota. The High Court's ruling in favour of non-Aboriginal people's titles has been in no way disturbed by all of the Native Title legislation passed since 1992.

In relation to the left over bits, well governments are given the power under native title legislation to compulsorily diminish whatever is left over. The left over bits are subject to compulsory acquisition powers, even for the grant of the title to other private citizens. There is now power under the Native Title Act for the Crown to take the left over native title lands and give it to third parties. In relation to the rest of the citizens, the Crown cannot take a non-Aboriginal title and give it to a private citizen, to a developer, or a company, or a golf course, the Crown can only take private title if it takes the title for a public purpose. But in relation to Aboriginal title, Aboriginal title can be taken compulsorily and given to other citizens – that is a power that does not apply to other people's titles and the government will be able to do this in the future because the *Racial Discrimination Act* has been set aside in relation to such actions.

So, what would otherwise be unlawful under the *Racial Discrimination Act* is now made lawful by the government setting aside the *Racial Discrimination Act*. So even in relation to the left over land, it is not at all assured that the Indigenous people will get the small bits of land that are left over.

In relation to pastoral leases the government has attempted to try and put provisions in place that allow those leases to be changed, to be upgraded, for their duration to be lengthened, for more rights to be given to the leaseholder and even to allow the eventual freeholding of leases. All of those powers are now given by the Commonwealth legislation to the State and Territory Parliaments. They have the power to affect native title on pastoral leases in a discriminatory way and, again, the *Racial Discrimination Act* has been set aside to enable that to happen (Pearson 1998:3-4).

On reading the High Court's native title judgements from *Mabo (No. 2)* to *Fejo* and all of the major judgements of the Federal Court, there can be no doubt that Anglo-Australian law is asserting that it is dominant.

Comparing Native Title

Indeed, Kirby J in *Fejo v the Northern Territory of Australia* [1998] (HCA 58:47) states that there are at least two basic considerations that restrain the disturbance of interests in land.

The first is that a court should not destroy or contradict an important settled principle of the legal system. The second is that, in every society, rights in land which afford an enforceable entitlement to exclusive possession are basic to social peace and the order as well as to economic investment and prosperity. Any significant disturbance of such established rights is therefore, a matter for the legislature not the courts.

As Kado Muir states: ‘This assertion of dominance has little to do with the inherent characteristics of the laws; rather it has more to do with the weight behind the hammer’ (Muir 1998:3).

Noel Pearson describes native title as a recognition concept (Pearson 1996:120, 1997:150). Muir maintains that it is recognition of only one aspect of Indigenous law and that its recognition is also ‘conditional upon Indigenous law being submissive to the dominant regime. The real issue is how much and to what extent this dominant group is prepared to tolerate the operation of Indigenous laws in parallel to its own laws’ (Muir 1998:4).

The difficulty is that:

Indigenous laws continue to operate regardless of the intrusions of Australian law. It continues to allocate rights and interests in country, dictate the nature of social interactions and acts as the basis of Indigenous social, cultural and political identity. The implications for land management, extinguishment and subsequent compensation is that acts which serve to extinguish the recognition of native title only really operate to extinguish recognition in the domain of Australian law. That is, a grant of an interest or right under Australian law, which wipes out the recognition of native title over that land, may not necessarily do so under Indigenous law (Muir 1998:4).

Muir (1998:4, 8) maintains it is critical to understand that Australian law does not and simply cannot extinguish Indigenous law. However, Australian law affects on the ability of Aboriginal and Torres Strait Islander peoples to maintain a way of life free of oppression, marginalisation and injustice. This lack of recognition of Indigenous law not only affects rights and interests to land, but also affects the entire interaction between Indigenous and non-indigenous Australians.

More recently, Muir (1999:5) poses the question:

Why is it that non-indigenous property rights can be determined with no reference to the law – that is, at the whim of government – while Indigenous people are forced to undergo an arduous and offensive ‘inquisition’ before gaining recognition of rights we already hold? The *Mabo (No. 2)* decision settled the question of terra nullius; the determination process should now be one that starts on the premise of recognition of native title and then be a process of facilitating that recognition within the social, political and economic framework of the nation state. This is possible through mediation, but not through the courts.

This paper draws a comparison between two different timelines, two different laws and customs, and two different sets of rights and interests in land and waters. The comparison shows that while there are differences in the detail, there are some remarkable similarities. The comparison in Table 1 can be applied or extended to other areas of Indigenous law and custom and Anglo-Australian law and custom, such as intellectual property rights, governance and decision-making, justice and corrective behaviour, and family law.

The paper also highlights how one culture has exerted its dominance and authority over the other culture, circumventing Australia's international obligations to the *International Convention on the Elimination of All Forms of Racial Discrimination*. This has been done by selectively setting aside the *Racial Discrimination Act 1993* (Cth) to various components of the *Native Title Amendment Act 1998* (Cth). In particular, the Act's validation and confirmation of extinguishment provisions, in many cases pre-empting the common law as demonstrated in the Federal Court's decision in *Ben Ward & Ors on behalf of Miriuwung Gajerrong Peoples v The State of Western Australia* [1998]. In addition, the validation of 'intermediate period acts' (certain acts affecting native title between 1 January 1994 and 23 December 1996) allows governments to cure retrospectively their failure or refusal to observe the future acts procedures of the *Native Title Act 1993* (Cth), at the expense of native title and without consultation or negotiation with native title holders (Fitzgerald 1999:4). As Fitzgerald (1999:4) notes, many unlawful actions by State and Territory governments, whether intentional or unintentional, have been rewarded by the intermediate period act validation provisions in the *Native Title Act 1993* (Cth).

The *Native Title Amendment Act 1998* (Cth) amounts to an extraordinary expropriation of property rights and interests for one section of the community with no compensation 'on just terms', and was an act akin to the notion of *terra nullius*.

History will one day judge the *Native Title Amendment Act 1998* (Cth) for what it really is. In the eyes of the international community, Australia's reputation as a fair and just society has already been severely tarnished.

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