

# Indigenous Peoples and Governance Structures

## A Comparative Analysis of Land and Resource Management Rights

Garth Nettheim  
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## Foreword ■

The rights of Indigenous peoples to self-government have been explicitly denied by colonial governments, particularly in Australia. However the reality of Indigenous governance, the ongoing exercise of authority and the assertion of autonomy have led to the implicit acknowledgment of that right. While many decision-makers perceive native title to be limited to the recognition of interests in land, the collective nature of the right necessarily encompasses the need and indeed the right to administer those lands.

Outside the native title context, too, the recognition of Indigenous self-government has been implicit in other forms of land management that have devolved autonomy or integrated Indigenous peoples' interests into the management of land and waters. While forms of statutory land rights have existed in many states and territories prior to the recognition of native title, the native title era has seen a greater recognition of the right of Indigenous peoples to be involved in decision-making over their traditional lands and waters in a more general sense, regardless of the formal recognition of native title.

This book, together with the companion volume on Prescribed Bodies Corporate, examines the policies and practices of various regimes of governance on Aboriginal land including the emerging regimes for the management of native title areas, and the incorporation of Indigenous interests into land administration. The authors have augmented this assessment with a comprehensive comparative analysis of regimes in operation in other jurisdictions. This study highlights the need for such structures of engagement to be designed in ways that reflect Indigenous peoples' interests, perspectives and aspirations. To do so, Indigenous peoples must be involved in their design and implementation. While the non-Indigenous sector may wish to place controls and accountability structures in the institutions of Indigenous governance, this should not undermine the Indigenous interests they represent.

This book will be an important point of reference as new structures emerge in response to an ever increasing number of native title determinations and as innovative approaches are explored in land management and governance. The diversity of Indigenous communities across the country will be reflected in the adopted models of governance. The benefit of learning from a rigorous assessment of the successes and failures of other models will no doubt be greatly valued.

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*Research Fellow and Manager*  
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# Chapter 1 ■

## Introduction

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### The project

An Australian Research Council (ARC) Collaborative Research Grant for a project under this title was awarded for 1997-99 to Emeritus Professor Garth Nettheim (University of NSW), Associate Professor Gary Meyers (Murdoch University) and Associate Professor Donna Craig (Macquarie University) to work in collaboration with the National Native Title Tribunal (the NNTT) serving as the grant's industry partner.

The major component of the NNTT's in-kind contribution was to attend to the most urgent element of the project, the design of prescribed bodies corporate for the purposes of the *Native Title Act 1993* (Cth) (the NTA). This work was conducted by Christos Mantziaris and David Martin as a separate, but linked, project. Their overall study<sup>1</sup> was distilled into a shorter volume<sup>2</sup> which was released in advance of the final report as an aid to those charged with the task of establishing such bodies. These studies are referred to in Chapter 13.

The larger part of the remaining research was published in the form of Discussion Papers (DPs) on specific aspects of the project. These DPs were eventually disseminated to a mailing list which grew to about 165 addresses in Australia and overseas. The DPs were also placed on the internet, courtesy of the Australasian Legal Information Institute (AustLII).<sup>3</sup> The DPs attracted a number of helpful responses.

Further feedback was sought in the context of a workshop held at University House in Canberra on 31 March 2000, sponsored by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). Some sixty or so people took the time to participate in the Workshop which generated valuable information and ideas.

Additional papers finalised subsequent to the workshop were not published in print but were placed on the Internet site, while work proceeded on revising and updating the research for publication in book form.

The first discussion paper gave a broad outline of the project, based on the original application to the Australian Research Council. Some of the principal elements of this paper are reproduced here, adjusted in the light of the fact that the project is now at its conclusion rather than its beginning.

## Background

In *Mabo v Queensland*<sup>4</sup> (Mabo (No 2)) the High Court held that the pre-existing rights of Indigenous Australians in respect of land and waters may survive under the common law as native title. Legislation was subsequently enacted to fit native title into the legal landscape, notably the NTA, as amended, and complementary state and territory legislation. It is in this particular context that the project was developed. The project was seen to be significant at both theoretical and practical levels.

In terms of theoretical significance, the decision of the High Court of Australia in *Mabo (No 2)*, one of the most significant judicial decisions in Australia's history, reversed the convenient assumption that the non-Indigenous settlement of Australia could proceed without any acknowledgment of the pre-existing rights of the Indigenous peoples in relation to land and waters. It was not, however, unprecedented, because other common law countries had long acknowledged pre-existing rights. In particular, there was a substantial body of North American jurisprudence on which the High Court was able to draw.

There was also Australian jurisprudence drawing on experience under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the Land Rights Act). While that Act was predicated on the earlier denial of native title in *Milirrpum v Nabalco*,<sup>5</sup> it established, for one jurisdiction, a claim process whereby Aboriginal rights in respect of claimable land might be recognised by Australian law if established under Aboriginal law. Thus, by the time of the decision in *Mabo (No 2)*, the essence of the Aboriginal relationship to land had become understood in Australian law together with the processes by which Aboriginal rights and interests might be established and asserted.

The challenge under the Land Rights Act (and land rights legislation for other Australian jurisdictions) has been essentially the same as the challenge flowing from the *Mabo (No 2)* decision and the native title legislation. It is a challenge that arises once there is acknowledgment by Australian law that Aboriginal peoples and Torres Strait Islanders may have legal rights in respect of land and waters and their resources. That challenge is how best to provide for the co-existence of forms of land holding and governance under Indigenous laws with those under Australian laws. It is a challenge in terms of legal pluralism and cross-cultural statesmanship. Both forms of law — Indigenous and Australian—may need to be adapted in order to achieve a satisfactory interrelationship.

The practical significance of the project arose from the fact that we are beginning to have a number of determinations that native title exists in various parts of Australia. The NTA requires that, when it is determined that native title exists, there shall be a determination that a prescribed body corporate be designated, either to hold the title as trustee for the common law holders or, otherwise, to serve as their agent. (A number of other provisions of the NTA refer to prescribed bodies corporate.) Similarly, provision is made in the NTA

for representative Aboriginal/Torres Strait Islander bodies to exercise important functions under the legislation.

Such institutions are designed to provide interface between Aboriginal and Torres Strait Islander laws and decision-making and Australian laws and governments. The issue has already been raised in court proceedings whether such institutions created under Australian law are compatible with adequate recognition of Indigenous rights and interests.<sup>6</sup>

The project is not, however, confined to matters of land-holding and decision-making on land subject to continuing native title.

Aboriginal peoples and Torres Strait Islanders may have strong continuing associations with land and waters which are not claimable under native title legislation for the reason that native title is regarded by Australian law as having been extinguished. Extinguishment may be effected by grants of interests to others, or by governments using the land for public purposes, where such grants or uses are inconsistent with the continuance of native title. Australian law may need to adapt to continuing Aboriginal and Torres Strait Islander rights and interests in lands and waters despite the fact that native title has, according to Australian law, been extinguished.

The issue can arise in at least three contexts under the NTA:

- The issue can arise in relation to the role of the NNTT in the course of mediating disputed claims to native title and/or compensation. A potential agreement may relate not only to the particular lands or waters which are claimable but also to nearby areas which are not, where, for example, the Indigenous people have concerns about environmental management or about the protection of sacred and significant places.
- The issue can also arise under the future acts regime where the NNTT may be called on to exercise its arbitral function in deciding whether or not mining activity should proceed on land subject to native title or to claims to native title. Experience indicates that a negotiated agreement prior to reference to the NNTT or during its proceedings may well involve important Indigenous interests in areas which are not claimable.
- The issue may also arise in relation to regional agreements under section 21 of the original NTA, or Indigenous Land Use Agreements under the 1998 amendments to the NTA. The potential for such regional agreements has attracted considerable interest in Indigenous peoples' organizations, industry groups and the NNTT itself as a means of by-passing some of the specific hurdles relating to native title and compensation claims and future act proposals under the NTA. Indeed, such agreements may involve the Indigenous peoples agreeing to forgo claims to native title (but not to surrender native title) in return for statutory forms of title and other measures to meet Indigenous aspirations.<sup>7</sup>

The project thus has both theoretical and practical ramifications of the highest order.

### **Focus of the project**

The problem which the project particularly addresses is that traditional forms of land ownership and control under the laws of Aboriginal peoples and Torres Strait Islanders are not designed to interact with non-Indigenous forms of law and government.

The purpose of the project is to develop recommendations for a more adequate fit between the systems. Most specifically, it focusses on provisions in the NTA concerning prescribed bodies corporate and representative Aboriginal/Torres Strait Islander bodies. In this context, it is a study of governance structures for Indigenous Australians for claiming land and for holding title and managing land after determinations that the land is subject to native title. The project also extends to a consideration of structures for asserting and protecting Indigenous peoples' interests in land or waters which are *not* subject to native title, in matters such as resources development, environmental protection and cultural heritage.

The expectation has been that the studies in the present volume will provide guidance to the NNTT and the Federal Court in exercising their powers under the NTA, to organisations representing Indigenous Australians, to parties negotiating agreements and to parliamentarians and others considering improvements to the legislation. Improvements in legislation and in administrative practice to achieve a better representation of Indigenous authority structures and processes may yield both economic and social benefits.

Major development projects will continue to be proposed for lands in which Indigenous Australians have continuing rights and interests under their laws. Most developers are not now opposed to the notion that Aboriginal peoples or Torres Strait Islanders may have rights and interests that need to be considered. But some of them express concern at particular aspects of the need to deal with Indigenous peoples. These concerns include the problem of ensuring that they are dealing with the appropriate people and the additional time that may be involved in negotiations.

Such developments may be of economic benefit to Australia and to the Indigenous people concerned. If they are of benefit to the Indigenous people, they stand also to be of benefit to other taxpayers in lessening the welfare dependency which is the lot of many Indigenous communities.

For such purposes it is essential that Indigenous Australians have appropriate institutional mechanisms through which to represent, to developers and to governments, their

essential interests in land and waters, resources, cultural heritage and the environment (whether on or off land or waters which are subject to native title).

Satisfactory arrangements for these purposes will also reduce points of tension within Australian society, contribute to the maintenance of viable Indigenous cultures and land use traditions, and contribute, also, to the goal of Reconciliation.

## The elements of the project

The project comprises several elements:

- a consideration of relevant international law standards,
- comparative studies of land-holding and governance structures for Indigenous peoples in other parts of the world—the USA, Canada, New Zealand, Scandinavia and Greenland,
- an analysis of provisions for land-holding and governance structures under Australian land rights legislation, commencing with the Commonwealth's 1976 legislation for the Northern Territory,
- a review of other Australian experience concerning governance bodies for Indigenous Australians, including provisions for corporations and councils,
- consideration, in the specific context of native title, of experience to date relating to representative Aboriginal/Torres Strait Islander bodies and prescribed bodies corporate,
- a study of mechanisms for Indigenous people to have effective control over use and environmental management developments affecting them other than on land or waters which is held under native title, and
- a compilation and analysis of Australian and overseas experience of cross-cultural negotiations for co-management of land, waters and resources, and environmental management regimes, including various forms of regional agreements.

## Acknowledgements

The authors especially acknowledge the collaboration of the NNTT as the industry partner in the portion of the study which it undertook in relation to prescribed bodies corporate, but also in other contributions to the project, in cash and in kind, and the particular inputs from Stephen Sparkes, head of the NNTT's Legal Research Unit. The support of our respective universities is also acknowledged.

Throughout the period in which discussion papers were circulated we benefited from responses from a number of people. Some of those contributions are acknowledged elsewhere in this volume. Peter Jull was an important source of information and perspectives

on developments in comparative countries. We also sought and gained valued guidance on the overall development of the project from Darryl Cronin and from Patrick Sullivan.

We particularly acknowledge the assistance of the AIATSIS, both generally, and through its Native Title Research Unit, in a variety of forms, notably the hosting of the Canberra Workshop held on 31 March 2000. Particular thanks are due to the Chairman, Mick Dodson, the Deputy Chair, Marcia Langton, the Principal, Russell Taylor, and, from the Native Title Research Unit, Kado Muir and Lisa Strelein, who has written the Foreword to this volume.

The Centre for Aboriginal Economic Policy Research (CAEPR) at the Australian National University co-sponsored the workshop and provided a number of participants. Our thanks go to Jon Altman, Director of the Centre, and to Will Sanders, Bill Arthur, Neil Westbury and David Martin. ATSIC too contributed to the Workshop through the participation of Commissioner Eric Bedford and Paul Burke. The National Indigenous Working Group on Native Title participated through its Chair, Parry Agius. The NNTT participated through its President, Graeme Neate, and through several of its members. The input provided by the other people who participated in the workshop is also acknowledged.

The project had the assistance of a series of research assistants. In Sydney, they were (for shorter and longer periods) Simeon Beckett, Frith Way, Steven Freeland, Willa McDonald, Kristen Howden and Stephen Bennetts. Laurie Berg assisted at the final stages in consolidating draft chapters for publication.

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- DP2: *Chapter 2 International Standards* — Garth Nettheim.
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- DP8: *Chapters 8 Introduction, 9 Scandinavia and 10 Greenland* — Steven Freeland and Donna Craig assisted by Barbara Hocking.
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- Chapter 15 Negotiated Agreements and Regional Governance Agreements—Donna Craig.
- Chapter 16 Conclusions and Recommendations—Garth Nettheim, Gary D. Meyers, Donna Craig.

Donna Craig  
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December 2000

#### Notes

- <sup>1</sup> C Mantziaris and D Martin, *Native title corporations: a legal and anthropological analysis*, NNTT with Federation Press, 2000.
- <sup>2</sup> C Mantziaris and D Martin, *Guide to the design of native title corporations*, NNTT, 1999.
- <sup>3</sup> [www.austlii.edu.au/au/special/rsjproject/rsjlibrary/arccrp/index.html](http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/arccrp/index.html).
- <sup>4</sup> *Mabo v Queensland* (1992) 175 CLR 1.
- <sup>5</sup> (1971) 17 FLR 141.
- <sup>6</sup> *Mabo (No 2); Pareroutja v Tickner* (1993) 117 ALR 206. See G Nettheim, 'The relationship between native title and statutory title under land rights legislation' in MA Stephenson (ed), *Mabo: The native title legislation*, UQP, 1995, p 183.
- <sup>7</sup> Early examples of such agreements include: the Mount Todd agreement between Zapopan NL, the Jawoyn Association and the Northern Territory government; and the Cape York Peninsula Draft Heads of Agreement involving the Cape York Land Council, the Peninsula Regional Council of ATSIC, the Cattlemen's Union of Australia Inc, the Australian Conservation Foundation and the Wilderness Society.





## Chapter 2 ■ International Law Standards

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### Introduction

This project is concerned with the crafting of governance structures for Indigenous Australians so as to facilitate interaction with non-Indigenous governments and structures while, remaining as close as possible to Indigenous structures and processes.<sup>1</sup> Guidance can be obtained from standards established by international law instruments, not so much in terms of detail but, rather, in terms of broad principles accepted by large numbers of States.

A central aspiration of Indigenous peoples world-wide is to have an effective voice in regard to decisions by non-Indigenous governments affecting their lands and waters, natural resources, wildlife and environment. This aspiration is at least partly covered by a number of international law standards. Some of those standards apply to peoples generally, some apply to minorities and some apply specifically to Indigenous peoples.

Most of the relevant standards represent binding treaty obligations on States which have accepted them—Australia has ratified most of these. Some of them are now regarded as having evolved into customary international law, to be observed by all States, regardless of formal ratification. Other standards may not be formally binding in the legal sense because they are in the form of ‘soft law’, for example, declarations, General Assembly resolutions, or recommendations from World Conferences.

For convenience, the rights considered here are grouped under the following headings: equality rights, property rights, cultural rights and participation rights. As Indigenous people will correctly observe, however, rights are integrated and interdependent.

### Equality rights

The United Nations Charter requires respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion (Articles 1(3), 55(c)). The *Universal Declaration of Human Rights* develops this principle in

Article 2:

Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...

Article 7 of the *Universal Declaration of Human Rights* is also relevant:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

The International Covenant on Civil and Political Rights (ICCPR) and the *International Covenant on Economic Social and Cultural Rights* (ICESCR) both spell out the obligations on States Parties in Article 2 which, in each case, precludes distinction or discrimination 'of any kind such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status'. Article 26 of the ICCPR also states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The entire purpose of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) is, of course, to develop the broad principle of non-discrimination on the basis of race and to set forth a range of obligations on States Parties, both in general, and in relation to specific human rights (for example, the right to property). A strong body of opinion holds that the principle against discrimination on the basis of race has become a principle of customary international law, independently of any specific treaty obligations.<sup>2</sup>

Does the non-discrimination principle require only formal equality of treatment? May there be an obligation to provide additional levels of protection for particular groups? The Convention makes it clear that all distinctions on the basis of race are not necessarily forbidden; in some circumstances 'special measures' to overcome disadvantage are permitted (Article 1(4)) and may even be required (Article 2(2)).

Such special measures will not constitute discrimination for the purposes of the Convention.

There are limitations to this special measures exclusion:

- they must be for the sole purpose of securing advancement for a particular group;
- they must be necessary for that purpose; and
- they are to continue only for as long as the disadvantage continues.<sup>3</sup>

It does not follow, however, that every distinction based on race which does not qualify under the 'special measures' exclusion amounts to prohibited discrimination. Differential treatment may be justified in a number of situations as not constituting discrimination.<sup>4</sup> The Human Rights Committee under ICCPR has made the same point in its General Comment 18 (1989) on the principle of non-discrimination. The Committee also notes that:

...not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Similarly the Committee on the Elimination of Racial Discrimination (CERD) formed under ICERD, in General Recommendation XIV (1993) on Article 1(1), observes that:

...a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of Article 1, paragraph 4, of the Convention. ...In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.

The relationship of Indigenous peoples to their territories is of a qualitatively different nature from the relationship of non-Indigenous peoples to land. It requires differential treatment in order to achieve substantive equality of outcome. This proposition has been accepted in a series of Australian inquiries into land rights legislation.<sup>5</sup> It has also been accepted in international law (as discussed below).

The issue is not solely to do with principles of non-discrimination. It relates to equality rights generally and to the specific rights of ethnic minorities and Indigenous peoples.

True equality requires measures to ensure that members of racial minorities are placed in every respect on a footing of perfect equality with other citizens and to ensure for the minority the means to preserve their particular characteristics and traditions. This was decided as long ago as 1935 by the Permanent Court of International Justice in its Advisory Opinion on *Minority Schools in Albania*.<sup>6</sup> The need for differential treatment to protect the basic and distinguishing characteristics of minorities has been reiterated on a number of subsequent occasions, for example, in the judgment of Judge Tanaka in the 1966 *South West Africa Case* in the International Court of Justice.<sup>7</sup>

The quest for equality concerning the territorial (and other) rights of Indigenous Australians permits and, arguably, requires that due regard be given to Indigenous cultures and traditions when organisational structures are devised for dealings with non-Indigenous governments and interests.

## Property rights

The *Universal Declaration of Human Rights* (UDHR) was adopted by the UN General Assembly on 10 December 1948. Formally, it has only the status of a Declaration or resolution, as distinct from a binding treaty. But it provided the basis for the subsequent development of the two core human rights covenants—the ICCPR (and its two Optional Protocols) and the ICESCR. Australia has ratified both Covenants. The UDHR, with the Covenants, is generally known as the International Bill of Human Rights.

Article 17 of the UDHR states:

- 1 Everyone has the right to own property alone as well as in association with others.
- 2 No one shall be arbitrarily deprived of his [sic] property.

Article 17 was *not* incorporated in the language of the Covenants. However, it may have some independent binding force, either on the basis that the UDHR represents customary international law or on the basis that it represents an authoritative interpretation of the references to human rights in the Charter of the United Nations. The Charter of course, has binding legal force in regard to UN member States.<sup>8</sup>

The principle in Article 17 of UDHR is incorporated in ICERD. Its article 5 requires equality before the law without distinction as to race, colour, or national or ethnic origin in the enjoyment of various rights, including:

- (d) (v) The right to own property alone as well as in association with others.
- (vi) The right to inherit.

Australia has ratified ICERD and implemented most of its obligations in national law through the *Racial Discrimination Act 1975* (Cth). On this basis the High Court of Australia in *Mabo v Queensland*<sup>9</sup> held invalid a 1985 Queensland Act to extinguish native title in the Torres Strait. Also on this basis the High Court in *Western Australia v Commonwealth*<sup>10</sup> held invalid Western Australian legislation to extinguish native title and substitute defeasible statutory rights of traditional usage.

The CERD monitors compliance by States with ICERD. On 18 August 1997 the Committee published General Recommendation XXIII (51) setting out its interpretation of the Convention in relation to Indigenous peoples.<sup>11</sup> Paragraphs 3-5 of the General Recommendation state:

3. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardised.
4. The Committee calls in particular upon States parties to:
  - (a) recognise and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
  - (b) ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
  - (c) provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

- (d) ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;
  - (e) ensure that indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs, to preserve and to practice their languages.
5. The Committee especially calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

The emphasis on Indigenous culture in the above General Recommendation receives additional support from the ICCPR, as noted below.

The right to property, in conjunction with the cultural significance of land for Indigenous peoples, again supports the proposition that structures for Indigenous ownership and management of land should reflect Indigenous peoples' laws and authority structures.

## **Cultural rights**

In Article 27 the ICCPR provides:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>12</sup>

The Human Rights Committee monitors compliance by States parties with the ICCPR. In formulating its 'views' on a number of communications brought to it under the first Optional Protocol to the Convention, it has made it clear that Article 27 applies to the use of land and resources by Indigenous peoples.<sup>13</sup>

In a 1995 General Comment on Article 27, the Human Rights Committee said:

...[c]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. ...The enjoyment of those rights may require positive legal means of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

The reference in this General Comment to 'effective participation' draws attention to another set of human rights.

## Participation rights

The right of peoples to self-determination (together with the principle of equal rights and non-discrimination) is one of the few specifics in the United Nations Charter's references to human rights. Even then, it remained an elusively broad concept.

It was given closer definition in the identically-worded Article 1 in both Covenants (the ICCPR and the ICESCR):

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources. ...In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant...shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

This collective right of entire peoples is usually discussed in relation to their political status, especially in the context of decolonisation. However, Article 1(1) also stresses economic, social and cultural issues and Article 1(2) emphasises economic issues. Article 1 has particular relevance to issues of resource development on the lands and waters of Indigenous peoples.

The CERD, in its 1996 General Recommendation XXI (48) on the Right to Self-Determination,<sup>14</sup> stressed that the economic, social and cultural aspects represent the internal aspect of the right to self-determination. In paragraph 10, the Committee stated that:

Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens...

Article 3 of the *Draft Declaration on the Rights of Indigenous Peoples*<sup>15</sup> (currently under consideration by the UN Commission on Human Rights) echoes the language of Article 1(1) of the Covenants in relation to Indigenous peoples.

This right of self-determination would, of itself, appear to require the effective participation of Indigenous peoples in decisions which affect them, their territories and resources and their cultures. It thus presupposes interaction on such matters between Indigenous peoples and the dominant non-Indigenous society, but requires that such interaction be based on proper respect for the rights of Indigenous peoples in terms of their own law, traditions and culture.

Article 25 of the ICCPR confers a general right of public participation which focuses primarily on such political matters as elections and access to public office. Further, more specific provision for effective participation by Indigenous peoples in government development decisions has been made in a number of recent and emerging international instruments particularly related to environmental protection and sustainable development which are key concerns of many Indigenous peoples. There have also been important resolutions on the issue emerging from international conferences.<sup>16</sup>

The *Rio Declaration on Environment and Development* was adopted at the 1992 UN Conference on Environment and Development.<sup>17</sup> Generally, it stresses the need for sustainable development and environmental protection, with adequate opportunities for participation by peoples affected by development proposals. Principle 22 states:

Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

The 1992 Rio Conference went beyond broad principles and produced more specific standards in *Agenda 21: Programme of Action for Sustainable Development* adopted by most nations in the world at the Rio Conference.<sup>18</sup> Chapter 26 of *Agenda 21* is headed 'Recognising and strengthening the role of Indigenous People and their Communities':

**Programme Area**

*Basis for Action*

26.1 Indigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands. In the context of this chapter the term 'lands' is understood to include the environment of the areas which the people concerned traditionally occupy. Indigenous people and their communities represent a significant percentage of the global population. They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment. Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. Their ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognise, accommodate, promote and strengthen the role of indigenous people and their communities.

...

*Objectives*

- 26.3 In full partnership with indigenous people and their communities, Governments and, where appropriate, intergovernmental organisations should aim at fulfilling the following objectives;
- (a) Establishment of a process to empower indigenous people and their communities through measures that include:
    - (i) Adoption or strengthening of appropriate policies and/or legal instruments at the national level;
    - (ii) Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate;
    - (iii) Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development;
    - (iv) Recognition that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities;
    - (v) Development and strengthening of national dispute-resolution arrangements in relation to settlement of land and resource-management concerns;
    - (vi) Support for alternative environmentally sound means of production to ensure a range of choices on how to improve their quality of life so that they can effectively participate in sustainable development;
    - (vii) Enhancement of capacity-building for indigenous communities, based on the adaptation and exchange of traditional experience, knowledge and resource-management practices, to ensure their sustainable development;
  - (b) Establishment, where appropriate, of arrangements to strengthen the active participation of indigenous people and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and their initiation of proposals for such policies and programmes;
  - (c) Involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies, such as those suggested in other programme areas of Agenda 21.

*Activities*

- 26.4 Some indigenous people and their communities may require, in accordance with national legislation, greater control over their lands, self-management of their resources, participation in development decisions affecting them, including, where appropriate, participation in the establishment or management of protected areas. The following are some of the specific measures which Governments could take:



- (a) Consider the ratification and application of existing international conventions relevant to indigenous people and their communities (where not yet done) and provide support for the adoption by the General Assembly of a declaration on indigenous rights;
- (b) Adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices.

...

26.6 Governments, in full partnership with indigenous people and their communities should, where appropriate:

- (a) Develop or strengthen national arrangements to consult with indigenous people and their communities with a view to reflecting their needs and incorporating their values and traditional and other knowledge and practices in national policies and programmes in the field of natural resource management and conservation and other development programmes affecting them.

The *World Conference on Human Rights*, held in Vienna in 1993, produced the Vienna Declaration and Programme of Action.<sup>19</sup> In paragraph 31, the World Conference urged States 'to ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them'.

The *International Conference on Population and Development* was held in 1994 in Cairo.<sup>20</sup> Chapter VI D relates specifically to Indigenous people. Objectives, as set out in 6.24, include:

To incorporate the perspective and needs of indigenous communities into the design, implementation, monitoring and evaluation of the population, development and environment programmes that affect them.

Actions proposed in the Programme of Action include:

- 6.27 Government should respect the cultures of indigenous people and enable them to have tenure and manage their lands, protect and restore the natural resources and ecosystems on which indigenous communities depend for their survival and well-being and, in consultation with indigenous people, take this into account in the formulation of national population and development policies.

The *World Summit for Social Development* took place in Copenhagen in March 1995.<sup>21</sup> Clauses in the Copenhagen Declaration on Social Development include commitments to:

- 26 (m) Recognise and support indigenous people in their pursuit of economic and social development, with full respect for their identity, traditions, forms of social organisation and cultural values.

In addition:

Commitment 4

(f) Recognise and respect the right of indigenous people to maintain and develop their identity, culture and interests, support their aspirations for social justice and provide an environment that enables them to participate in the social, economic and political life of their country.

The Program of Action from Copenhagen includes the following prescriptions:

- 31 (f) Protecting, within the national context, the traditional rights to land and other resources of pastoralists, fisher workers and nomadic and indigenous people, and strengthening land management in the areas of pastoral or nomadic activity, building on traditional communal practices, controlling encroachment by others.
- 75 (g) Promoting and protecting the rights of indigenous peoples, and empowering them to make choices that enable them to retain their cultural identity while participating in national, economic and social life, with full respect for their cultural values, languages, traditions and forms of social organisations.

## ILO Convention No 169

In 1989 the International Labour Organisation (ILO) revised ILO Convention No 107 (1957) by adopting *ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries*.<sup>22</sup> ILO Convention No 169 has not yet been ratified by Australia.

A number of the operative paragraphs are directly relevant to self governance:

*Article 2*

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
2. Such action shall include measures for:...
  - (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions.

...

*Article 5*

In applying the provisions of this Convention:

- (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;
- (b) the integrity of the values, practices and institutions of these peoples shall be respected;

- (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

*Article 6*

- 1 In applying the provisions of this Convention, Governments shall:
  - (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
  - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
  - (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
- 2 The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

*Article 7*

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use; and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and cooperation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.
4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

*Article 8*

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

...

*Article 13*

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
2. The use of the term “lands” in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

*Article 14*

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

*Article 15*

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned

shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

## UN Draft Declaration

The *Draft Declaration on the Rights of Indigenous Peoples* has not yet been adopted by the General Assembly. It was developed over a number of years by the UN Working Group on Indigenous Populations (WGIP) in full consultation with Indigenous peoples from around the world. It can be described as the most coherent and comprehensive articulation of the aspirations of the world's Indigenous peoples. In 1994 the draft was adopted by the WGIP's parent body, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (as it then was), and referred 'up the line' to the Commission on Human Rights. The Commission established its own open-ended working group to consider the *Draft Declaration*.<sup>23</sup>

Provisions which relate directly to this Project include:

### *Article 3*

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

### *Article 4*

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

...

### *Article 8*

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognised as such.

...

### *Article 10*

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation, and, where possible, with the option of return.

...

### *Article 12*

Indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and

future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

*Article 13*

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected

*Article 14*

Indigenous peoples have the right to revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

...

*Article 19*

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

*Article 20*

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

*Article 21*

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

...

*Article 23*

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

...

*Article 25*

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

*Article 26*

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

*Article 27*

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

*Article 28*

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation...

...

*Article 30*

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.

Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

### *Article 31*

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by nonmembers, as well as ways and means for financing these autonomous functions.

### *Article 32*

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

### *Article 33*

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards.

...

### *Article 37*

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognised herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

...

### *Article 39*

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

## Conclusion

Within the body of 'hard law' represented by international treaty obligations accepted by Australia, there is sufficient basis for requiring governments to deal with Indigenous peoples in making decisions which affect their territories and their cultures. Those requirements should be at least equal to national legal requirements which relate to



non-Indigenous peoples and should go beyond those standards in order properly to respect the intense cultural relationship that Indigenous peoples have with their territories.

Such government dealings with Indigenous peoples in respect of activities which affect their lands should, at the very least, involve their effective participation and may well require their informed consent. Furthermore, participation and cultural rights require that proper respect be paid by governments to Indigenous peoples' authority structures and their decision-making processes.

The challenge is to establish governance structures for an interface between governments and Indigenous peoples which can produce effective decisions in non-Indigenous terms and, at the same time, accord as closely as possible with Indigenous structures and processes.

## Notes

- <sup>1</sup> See Chapter 1.
- <sup>2</sup> See for example *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 per Stephen J at 220-21.
- <sup>3</sup> G Nettheim, 'Special measures: a response' in Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review*, AGPS, 1995, p 233.
- <sup>4</sup> S Pritchard, 'Special measures' in Race Discrimination Commissioner, id, p 183.
- <sup>5</sup> 'I believe that to deny to Aborigines the right to prevent mining on their land is to deny the reality of their land rights': Aboriginal Land Rights Commission, *Second report*, Government Printer of Australia, 1975, para 568. In consequence, strong controls over mining on Aboriginal land were written into the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*. Inquiries in several other states led to land rights legislation which also vested significant control over development on Aboriginal and Torres Strait Islander lands.
- <sup>6</sup> *Minority Schools in Albania* (1935) PC IJ Ser A/B No 64.
- <sup>7</sup> *South West Africa Case* (Second Phase) [1966] 1CJ Rep 6. See also: F Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities*, UN Doc E/CN.4/Sub.2/384 Rev 1, 1977; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities* (1992); General Comment (1995) of the Human Rights Committee on Article 27 of the ICCPR; 1996 General Recommendation XXI (48) of the Committee on the Elimination of Racial Discrimination on the internal aspect of the right of self-determination. For a more extended discussion see S Pritchard, 'Native title in an international perspective' in P Patton (ed), *Sharing country: Land rights, human rights and reconciliation after Wik*, RIHSS University of Sydney, 1997, pp 33-66.
- <sup>8</sup> See generally H Steiner and P Alston, *International human rights in context*, Oxford University Press, 1996, pp 118-48.
- <sup>9</sup> *Mabo v Queensland (No 1)* (1988) 166 CLR 186.
- <sup>10</sup> (1995) 183 CLR 373.

- <sup>11</sup> Set out in (1998) 3 *Australian Indigenous Law Reporter* 142. It is worth noting that the CERD has expressed sustained criticism of 1998 amendments to the *Native Title Act 1993* (Cth): CERD/C/54/Misc 40/Rev 18 (18 March 1998), set out in (1999) 4(2) *Australian Indigenous Law Reporter* 134; CERD/C/55/Misc 31/Rev 3 (16 August 1999), set out in (1999) 4(4) *Australian Indigenous Law Reporter* 148; CERD/C/56/Misc 42/Rev 3 (24 March 2000).
- <sup>12</sup> The *UN Convention on the Rights of the Child*, ratified by Australia, contains parallel language specifically for children, and extended so as to expressly include 'persons of indigenous origin' (Art 30).
- <sup>13</sup> *Kitok v Sweden* Communication No 197/1985, UN Doc CCPR/C/33/D97/1985 (1988); *Ominayak v Canada* Communication No 167/1984, *Report of the Human Rights Committee*, UN Doc A/45/40 (1990); *Länsman v Finland* Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (1994); reproduced in (1996) 1(1) *Australian Indigenous Law Reporter* 154; *Hopu and Bessart v France* UN Doc CCPR/C/60/D/549/1993 (1997); reproduced in (1998) 3(1) *Australian Indigenous Law Reporter* 144. In 2000 the Human Rights Committee, in considering Australia's periodic reports, expressed its concerns about the 1998 amendments to the *Native Title Act 1993* (Cth).
- <sup>14</sup> See (1997) 2 *Australian Indigenous Law Reporter* 191.
- <sup>15</sup> Set out below, and in (1996) 1 *Australian Indigenous Law Reporter* 133.
- <sup>16</sup> See Compilation of Extracts of Declarations and Programs of Action pertaining to Indigenous Peoples from High-level United Nations Conferences (UN DOC E/CN4/Sub 2/AC4/1996/s Add 1).
- <sup>17</sup> See (1997) 1 *Australian Indigenous Law Reporter* 344.
- <sup>18</sup> See (1997) 2 *Australian Indigenous Law Reporter* 348.
- <sup>19</sup> Extracts are set out in (1997) 2 *Australian Indigenous Law Reporter* 358.
- <sup>20</sup> See Principles and extracts in (1997) 2 *Australian Indigenous Law Reporter* 460.
- <sup>21</sup> See (1997) 2 *Australian Indigenous Law Reporter* 463 for extracts.
- <sup>22</sup> The text is set out in (1996) 1 *Australian Indigenous Law Reporter* 472.
- <sup>23</sup> For the text of the *Draft Declaration* see (1996) 1 *Australian Indigenous Law Reporter* 132. For the text of the Commission's resolution see (1996) 1 *Australian Indigenous Law Reporter* 145.

## Chapter 3 ■

# Environmental and Natural Resources Management by Indigenous Peoples in the United States

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### Introduction

This Chapter reviews the powers of United States (US) Indian Tribes (outside of Alaska)<sup>1</sup> to manage the environment of their reservations and control access to, protect and manage natural resources subject to tribal control on and off those reservations. These powers generally arise from judicial acknowledgment of the common law recognition of the Indians' occupation of their lands as organised Tribes prior to white settlement.

The first Section provides a brief history of the development and progress of US Indian law. The second Section gives an overview of the sources of powers available to Tribes who seek to assert authority over natural resources on and off reservations, focusing in particular on US Tribes' inherent sovereignty and the federal trust responsibility owed to them. The third Section delineates Indian rights and powers in specific natural resource areas: water, hunting and fishing, minerals, timber and landuse planning. The Chapter concludes by summarising US law.

### History of Indian law

#### Introduction

The legal history of Native Americans in the US has been extensively addressed elsewhere.<sup>2</sup> While an in-depth review of this history is beyond the scope of this Chapter, one must have some knowledge and understanding of the history and treatment of Native Americans by the US federal government to understand Indian law.

Most commentators identify six major periods of American Indian policy: Discovery, Conquest and Treaty-Making; Removal, Relocation and Reservations; Allotment and Assimilation; Reorganisation and Self-Government; Termination; and Self-Determination.<sup>3</sup> It is this unique history and associated ambivalence which is reflected in the laws dealing with Indian sovereignty and jurisdiction in 'Indian Country'.<sup>4</sup>

#### Discovery, conquest and treaty-making (from Columbus to 1789)

Long before the Europeans 'discovered' America in the late fifteenth century, Indians were living there, utilising the land and waters and their resources to provide for all their needs. Some Indian Tribes had highly developed communities and engaged in trade, while others were small, nomadic family groups.<sup>5</sup> The discovery of Indian Tribes in America posed a problem for the British Crown as it began to colonise North America in

the seventeenth century—how to secure the peace and coexistence of the new settlers with those peoples who already occupied the ‘new world’. Whether arising from a sense of Judeo-Christian morality, monarchical benevolence or fear of extended Indian wars, the Crown adopted the position of protector and guardian of the Tribes from the excesses of the colonists.<sup>6</sup>

Upon independence in the late eighteenth century, the new US government faced similar problems of non-Indian aggression and threatened Indian retaliation.<sup>7</sup> In order to maintain some stability, the drafters of the Constitution placed Indian affairs in the hands of the federal government. Congress was granted the power to ‘regulate Commerce with the Indian Tribes’ while the President was authorised to make treaties with the Indians, with the consent of the Senate.<sup>8</sup> Congress also enacted a series of Trade and Intercourse Acts with the clear intent to separate Indians and non-Indians and to subject nearly all interaction between the two groups to federal control.<sup>9</sup> The government thus entered into a policy of isolation which it believed would adequately protect Indians from settlers.

During the early years of nationhood, the government began negotiating treaties with the Indian Tribes. The treaty terms usually involved the cession of large tracts of land in exchange for less territory, federal protection from local settlers and the right to be left alone in their new homeland. Prior to the British withdrawal from the United States’ territory in 1815, the treaty negotiations between the US and the Tribes bore the semblance of arms-length negotiations between sovereign governments seeking peace, trade and military alliances.<sup>10</sup> These early treaties often obligated the US to deliver certain goods (such as farming tools, cattle and wagons) to the Tribe, to provide health and education services to the Tribe and to pay annuities.<sup>11</sup> The early treaties recognised Tribes as sovereign powers, possessing the right to govern their own internal affairs and to be free from state interference.<sup>12</sup>

After the British left US territory following the War of 1812, American Indians, no longer able to ally themselves with either the British or the Americans, lost most of their bargaining power and the treaties increasingly reflected the settlers’ pressures for land and the dependent status of the Tribes in relation to the federal government.<sup>13</sup> Negotiators for the US used highly effective means, including fraud, coercion, bribery and threats to persuade Tribes to cede land or, better yet, leave their traditional homelands for reservations in the far west.<sup>14</sup> As the Supreme Court acknowledged in a 1970 decision, these treaties were generally imposed on Indian Tribes, leaving them ‘no choice but to consent’.<sup>15</sup>

### **Removal, relocations and reservations (the formative years, 1789–1871)**

The federal government quickly realised that drawing lines around Indian Country alone would not adequately isolate Indians and prevent friction between Indians and settlers who wanted Indian land. The government therefore modified its isolation policy to include removal to the western lands.<sup>16</sup> As history has shown, manifest destiny prevailed and white settlement did not stop at the Mississippi but continued to the Pacific. Indian Tribes found themselves continually moved, relocated and pushed westward. Tribal resistance proved unsuccessful, as exemplified in the ‘voluntary’ removal of the Five Civilised Tribes<sup>17</sup> and the hundreds of treaties signed that relegated Tribes to reservations far from their traditional homelands. Even so, Indians still had too much land for white settlement purposes. Between 1871 and 1928, Congress changed Indian policies from isolation to assimilation.

### **Allotment and assimilation (1871–1928)**

For various reasons, some more malicious than others, the federal government determined that Indian welfare required assimilation. If Indians were given individual plots to cultivate, they would prosper and become assimilated into mainstream America as Jeffersonian yeoman farmers. The organised Tribe and its extensive control of communal land stood as a barrier to assimilation, as well as to land-grabbing speculators.

In 1887 Congress passed the *General Allotment Act*, commonly referred to as the *Dawes Act*.<sup>18</sup> The Act authorised the President to allot tribal lands in designated acreage to individual Indians and to hold such allotments in trust for them for 25 years (or less if the Indian was competent and capable of managing his or her affairs) at which time the land could be conveyed to the Indian in fee simple, free from all encumbrances.<sup>19</sup> The holding period was to protect the Indian allottees from state taxation and to allow them to learn farming.<sup>20</sup> Under the Act, the allottees became US citizens and subject to state criminal and civil law.<sup>21</sup> The most detrimental part of the Act allowed the government to purchase all surplus land remaining after allotments so as to make it available for homesteading by non-Indians.<sup>22</sup>

During the 50 years allotment lasted, about 90 million acres left Indian control.<sup>23</sup> Surplus land was sold; allottees were forced to sell their land to pay state taxes; and Indians lost their land at the hands of savvy settlers. The legacy of allotment has resulted in checkerboard or patchwork ownership of reservation land, jurisdictional nightmares, extensive leasing of tribal and allotted lands and the loss of the ‘measured separatism’ promised in every treaty.<sup>24</sup>

### **Reorganisation and self-government (1928–43)**

Despite great efforts to dismantle Indian Tribes during the latter part of the nineteenth and early part of the twentieth centuries, tribal traditions and cultures were not completely destroyed by allotment era reforms. Reservations were still ‘Indian Country’, but the physical and spiritual life of Indians lay in tatters. Indians lived in abject poverty, with abominable health services and educational programs.<sup>25</sup> Their land base was diminished and the remaining reservations were checkerboarded with non-Indian land holdings interspersed throughout reservations.

In 1934 Congress enacted the *Indian Reorganisation Act* (IRA) which encouraged tribal self-government.<sup>26</sup> The US repudiated the previous policy of allotment and sale of surplus reservation land. Tribes were encouraged to consolidate their land base and control over it, to adopt federally approved constitutions and bylaws and to set up formal tribal governments. While the IRA has been subject to criticism for being too little, too late,<sup>27</sup> some Tribes took advantage of the opportunity to create governments more autonomous from the federal government’s oversight and to assert their sovereignty.

### **Termination (1943–1961)**

In the 1950s, still faced with the ‘Indian problem’, Congress decided that federal policy needed to change again. The goal, once again, was to integrate Indians into mainstream life, to end federal supervision of Indians as wards of the government and to grant them all the rights and prerogatives pertaining to American citizenship. The solution was to terminate the Tribes and free them from the oppressive federal Indian bureaucracy controlling daily life on the reservations.

Congress adopted a policy statement and passed individual termination acts and other assimilationist legislation during the termination era, much of which allowed unprecedented state intrusion into Indian Country and tribal programs.<sup>28</sup> During this time, about 109 Tribes were terminated.<sup>29</sup> In exchange for a cheque for the value of the land, those Tribes lost their land base, their tribal authority over education, adoptions, alcohol consumption, landuse planning and other areas of social and economic concern, as well as their identity as Indians. Tribes faced extreme discrimination in state courts which now had jurisdiction over criminal, civil and taxation matters.

Termination did little to promote freedom or to root out discrimination. It ended the special federal-tribal relationship and transferred almost all responsibilities for, and powers over, affected Indians from the federal government to the states. The historic special status of Indians abruptly ended for terminated individual Indians and Tribes, without their consent or participation in the process.

### **Self-determination (1961 to the present?)**

In 1970 President Nixon repudiated the termination policy, enunciated a policy of Indian self-determination and stressed the continued importance of the trust relationship between the federal government and the Tribes.<sup>30</sup> While this era may not have fundamentally reformed federal-tribal relations, it has resulted in an unprecedented volume of favourable Indian legislation.<sup>31</sup> In reauthorisations of many environmental statutes, Congress has enacted provisions that treat Tribes as states, giving them primary authority to enforce regulatory statutes.<sup>32</sup> The vast majority of this legislation was sponsored at the behest or with the participation of the Tribes. The legislation generally involves the Tribes as permanent players in the federal system. In the last few years, the president and governmental agencies have issued policies that acknowledge the federal trust responsibilities to Tribes, recognise Tribes as sovereigns and encourage government-to-government relations in matters involving a Tribe or its resources.<sup>33</sup>

Even so, it remains to be seen if or how the self-determination era will persist. The Supreme Court can no longer be seen as the protector of tribal interests and sovereignty. As Tribes have successfully asserted and exercised fishing and hunting rights, public opposition has been bitter and sometimes violent.<sup>34</sup> Likewise the success of Indian gaming for a few Tribes has raised the ire and attention of the states and Congress. In a case pending before the Supreme Court, Alaska Natives may discover that their land allocated pursuant to the *Alaska Native Claims Settlement Act* is not 'Indian Country' and that the tribal villages no longer have the right to act as sovereign governments.<sup>35</sup> In short, there is no reason to believe that American policy towards Indians will not shift again as the political winds change.

### **Sources and scope of power to govern, manage and use tribal natural resources**

#### **Introduction**

Indian Tribes have two primary avenues that may be used to exercise control over their lands and natural resources on and off-reservation: inherent sovereignty and the federal trust responsibility. While a detailed discussion of either power is beyond the scope of this Chapter, the basic outlines of each are reviewed below.

#### **Inherent sovereignty**

##### *Defining sovereignty*

To reservation Indians, sovereignty means independence - an existence separate and apart from the dominant white society. This independence includes the capacity to act as a government, the power to make and enforce laws on matters of importance to the Tribe

and the right to be treated as a sovereign government.<sup>36</sup> To courts, tribal sovereignty refers to those 'inherent powers of a limited sovereignty which ha[ve] never been extinguished' by treaty, statute or implication as a result of the Tribes' dependent status.<sup>37</sup>

While the outer contours of inherent tribal sovereignty remain unclear, courts have always recognised that US Indian Tribes were independent, distinct political entities who retained some, but not all, sovereign powers.<sup>38</sup> Inherent tribal sovereignty traditionally includes the right to govern one's members and one's territory,<sup>39</sup> but generally does not extend to the activities of non-members in Indian Country.<sup>40</sup> The Supreme Court has recognised only two exceptions (the *Montana* test).<sup>41</sup> First, a Tribe may regulate, through taxation, licensing or other means, the activities of non-members who enter consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases or other arrangements.<sup>42</sup> Second, a Tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation 'when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe'.<sup>43</sup>

Contemporary Supreme Court decisions have repeatedly rejected tribal efforts to enact comprehensive land management schemes in heavily allotted parts of the reservation,<sup>44</sup> to regulate hunting and fishing on non-Indian fee lands<sup>45</sup> or on condemned reservation land<sup>46</sup> and to regulate non-Indian water use within reservation boundaries.<sup>47</sup> A fundamental misunderstanding of tribal sovereignty drives these decisions. The current Supreme Court views Tribes more as proprietary voluntary organisations, a concept that was rejected in *Wheeler*,<sup>48</sup> than as sovereign governments.<sup>49</sup> If the Tribes were no more than fraternal associations then it would make sense to limit their authority only to members and their activities, but Tribes have to protect and manage tribal resources and reservation environments (which do not respect the checkerboard nature of land ownership on most reservations).

While US Indian Tribes continue to hold considerable power to manage their reservation lands, environment and resources,<sup>50</sup> the modern Court's narrow perspective of sovereignty ignores the long history of Tribes as governmental entities with rights, responsibilities and obligations to their members and territories. Tribes need to be able to exercise the requisite control, that is, sovereignty, over their territory, to protect both their lands and their unique interests in those lands.

### *Environmental Protection*

Only in the area of environmental protection does one not see a retrenchment away from inherent sovereignty. In reauthorisations of environmental protection statutes, Congress has enacted Tribes as States (TAS) provisions which authorise Tribes to enforce pollution control statutes reservation-wide.<sup>51</sup> The US Environmental Protection Agency (EPA), the primary federal agency in charge of enforcing the nation's pollution control statutes, has



issued Indian policies which reaffirm its commitment to government-to-government relations with Tribes, recognise the Tribes as 'sovereign entities with primary authority and responsibility for the reservation populace' and emphasise the agency's commitment to enabling Tribes to assume regulatory and program management responsibilities for reservation lands.<sup>52</sup>

For example, EPA's implementing regulations for the TAS provision for the *Clean Water Act* authorise tribal development of water quality standards for the management and protection of water resources within the borders of the Indian reservation.<sup>53</sup> In a recent decision, the Ninth Circuit upheld the regulations, finding that they properly followed the *Montana* test for exercise of inherent tribal authority over non-member activities.<sup>54</sup> In an earlier decision, the Tenth Circuit upheld the adoption of tribal water quality standards that required upstream dischargers to comply with the more stringent downstream tribal standards because such standards were in accord and within the inherent powers of tribal sovereignty.<sup>55</sup> Finally, courts have affirmed EPA rulings which preclude the application of state hazardous waste laws to all persons in Indian Country.<sup>56</sup>

The source of authority for the exercise of tribal power in the environmental protection area can be justified in two ways: first, as a Congressional grant of authority and, second, as a recognition of inherent sovereignty. Arguably, the authority to manage tribal resources arises from a mix of both sources of power, but clearly the judicial recognition of tribal sovereignty provides the foundation for congressional grants of authority. Without the one, the other would not have occurred. In any event, Tribes have begun to develop programs to protect tribal resources. Such efforts include not only the development of water quality standards, but also solid waste management regimes,<sup>57</sup> joint ventures,<sup>58</sup> recycling and job development programs,<sup>59</sup> and public education.<sup>60</sup> New organisations, some supported with EPA funding, have been formed to support such efforts.<sup>61</sup> Unfortunately, many Tribes still lack the technical, financial and administrative resources to develop such programs, while the EPA lacks sufficient personnel or funding to assist them.

### **Trust responsibilities**

A general trust relationship exists between the federal government and the Indian peoples.<sup>62</sup> The concept first appeared in Chief Justice Marshall's decision in *Cherokee Nation v Georgia* where he concluded that US Indian Tribes could best 'be denominated domestic dependent nations...in a state of pupilage' and that their relation to the US resembled that of 'a ward to his guardian'.<sup>63</sup> One year later, in *Worcester v Georgia*, Marshall emphasised the federal government's duty to protect tribal lands, resources and government by holding that the laws of Georgia would have no effect in Cherokee territory.<sup>64</sup>

These early cases provide two distinct models for viewing the federal trust responsibility.<sup>65</sup> At one end is *Cherokee Nation's* guardian-ward model and its line of cases (exemplified by the *Lone Wolf* decision) which draw on tribal dependency and the federal duty of protection to support nearly unchecked federal power over Tribes, including power over their internal governments.<sup>66</sup> At the other end is the *Worcester* model and its line of cases which presume native sovereignty and focus the government's trust duties not only on protecting tribal lands and resources but also on protecting their measured separatism.<sup>67</sup>

However the trust relationship is viewed, courts agree that it imposes general fiduciary obligations on the federal government to protect tribal interests. Nevertheless, the trust doctrine has never effectively restrained Congress in its dealings with Indians.<sup>68</sup> Courts have regularly upheld a wide range of questionable congressional actions as part of its plenary power to manage Indian affairs (for example, unilaterally abrogate treaties, terminate the trust relationship, substitute tribal lands for money or property of equivalent value). For a hundred years, courts presumed perfect good faith by Congress in its dealings with Indians.<sup>69</sup> This position changed in 1980. In *United States v Sioux Nation of Indians*, the Supreme Court affirmed Congress's power when acting as trustee for the Tribes to transfer land out of Indian ownership as long as Congress could show objective good faith efforts to provide Tribes with cash or property of equivalent value.<sup>70</sup> However, in assessing fair equivalent value, the Court finally rejected *Lone Wolf's* good faith presumption in favour of a 'thoroughgoing and impartial examination of the historical record'.<sup>71</sup> Nevertheless, the *Sioux Nation* decision did not impose any real fiduciary standards on Congress. Instead it merely requires that any tribal property taken by Congress meet the constitutionally required fair compensation constraints imposed by the Fifth Amendment.<sup>72</sup>

The only other constraints on congressional action are judicially-created canons of treaty interpretation and abrogation.<sup>73</sup> Since Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress's intent is benevolent. When construing Indian treaties, the Supreme Court has required that treaties be interpreted as the Indians would have understood them,<sup>74</sup> that ambiguous words and phrases be resolved in favour of the Indians<sup>75</sup> and that treaties be liberally construed in favour of Indians.<sup>76</sup> Similarly, courts have been extremely reluctant to find congressional modification or abrogation of treaty rights.<sup>77</sup> These rulings require a showing of clear and plain congressional intent to extinguish or modify treaty rights.<sup>78</sup> As one commentator notes, however, even with the canons, in the congressional context, the trust doctrine is little more than a moral obligation without strict, justiciable standards for its enforcement.<sup>79</sup>

In contrast, courts have used the trust doctrine to impose strict fiduciary duties on executive agencies in the administration of Indian affairs.<sup>80</sup> In *United States v Sioux Nation*, the Supreme Court explained that in carrying out its treaty obligations with the Indian Tribes, the federal government had charged itself with 'moral obligations of the highest

responsibility and trust' and that its conduct should therefore be judged by 'the most exacting standards'.<sup>81</sup> Courts have applied the ordinary standards of a private fiduciary to executive administration of Indian property or federal programs.<sup>82</sup> One court has argued that the trust responsibility includes both procedural and substantive duties.<sup>83</sup> Under the procedural duty, the federal government must consult with Tribes in the decision making process to avoid adverse effects on treaty resources.<sup>84</sup> Substantively, the government must protect 'to the fullest extent possible' the Tribe's treaty rights and the resources on which these rights depend.<sup>85</sup>

While the source of the Indian trust doctrine is the original assumption of supervisory power (ultimate sovereignty) over Indian Tribes, enforceable fiduciary duties commonly arise in two circumstances.<sup>86</sup> First, treaties, agreements, statutes, executive orders and administrative regulations which plainly give the federal government full responsibility to manage tribal lands and resources held in trust for the benefit of Indians establish a fiduciary relationship.<sup>87</sup> In addition, a fiduciary relationship necessarily arises when the government assumes such elaborate control or supervision over tribal money or properties even though the authorising or underlying statute says nothing about a trust or fiduciary connection.<sup>88</sup>

Indians have invoked the trust responsibility not only to require compensation for federal mismanagement of tribal resources but also to seek additional power in decisions affecting such resources. For example, the Nez Perce Tribe has primary responsibility for monitoring a reintroduced wolves project in Central Idaho. The Department of Interior has involved the Nez Perce primarily because of its commitment to implement the trust obligations. Other examples include the participation of the Pacific Northwest Tribes in addressing the diminishing salmon and steelhead runs and the EPA's adoption of programs involving Tribes in regulating and protecting land from pollution. It is often unclear whether a Tribe's participation arises from its inherent sovereignty, treaty rights or federal trust responsibilities, but the end result is that Tribes participate in the management of resources much more than in previous years.

## **Practical powers**

### **Water rights**

#### *Introduction*

In the semi-arid western US, economic and physical survival depends on water. In the mid to late 1800s, without even a nod to Indian water rights, western states adopted the miners' mantra of water law — 'first in time (to divert and use, that is, appropriate), first in right'.<sup>89</sup> Not surprisingly, states were shocked to discover that Indians had reserved water rights, with the Tribes usually having the most senior water rights in the area.

As US Indian Tribes have sought to exercise their water rights, to establish tribal agencies to administer tribal water codes and to regulate water use within reservation boundaries, they have faced anger from states and current water users, a morass of cases that have left open numerous issues and the potential loss of this valuable resource. The following Sections address the nature, scope and extent of Indian reserved water rights, the quantification of such rights and the regulation and administration of water in Indian Country.

*Nature, scope and extent of Indian reserved water rights*

The *Winters* doctrine provides that upon the creation of an Indian reservation by treaty, statute or executive order, the federal government impliedly reserved that amount of unappropriated water necessary to fulfil the purposes for which the reservation was created.<sup>90</sup> These water rights have a priority date of either the date the reservation was established<sup>91</sup> or time immemorial.<sup>92</sup> As opposed to water rights held under state law, Indian water rights cannot be lost due to non-use.<sup>93</sup> These rights extend to streams, lakes and springs which arise upon, border or traverse a reservation. It remains an open issue whether *Winters* rights extend to groundwater that underlies the reservation.<sup>94</sup> It also remains an open issue whether *Winters* rights entitle a Tribe to insist upon a certain water quality as well as quantity.<sup>95</sup>

Since the tribal reservation's purpose (enunciated in the treaty, executive order or other treaty substitute) defines the nature, scope and extent of the Indian water right, the judicial interpretation of specific treaty language can significantly affect a Tribe's rights. Indian treaties usually have general language evincing a homeland purpose for the reservation and specific language identifying the primary purpose of the reservation to be the transformation of nomadic Indians into 'pastoral and civilised people', that is yeoman farmers.<sup>96</sup>

Many Tribes, especially those in the mid-West and Great Plains, have significant quantities of 'paper' water.<sup>97</sup> However, in many instances, the water resource remains untapped because those Tribes cannot afford or do not want to develop the large-scale irrigation projects necessary for profitable farming in these areas and the courts have been unwilling to interpret the treaty language to allow the Tribes to use their reserved water rights for purposes other than those related to farming (despite the fact that other people may use water for a variety of purposes). For example, Tribes could immediately benefit from their water rights if they could use them for increased stream flows to improve fisheries and wildlife, which could eventually support a tribal hunting and fishing industry. These and other non-consumptive uses would cost the Tribe nothing but could impose significant impacts on other appropriators to the extent that a Tribe's non-consumptive reservation of water prevents non-tribal appropriators from depleting streams below a certain level. But states and local users who have been using Indian water for free have successfully opposed tribal efforts to use the water non-consumptively.<sup>98</sup>

Tribes have faced difficulties when trying to change the water use to anything other than the original agricultural purpose. While this area of the law remains in flux, states have successfully argued that Tribes must resort to state law to change their use.<sup>99</sup> Such a ruling essentially maintains the status quo, with Tribes not using their water, because most prior appropriation states do not allow changes in use that will adversely affect junior users. Moreover, any contemporary application for a water right would be virtually useless in these over-appropriated stream systems because of the late priority date. As long as Tribes are limited to water for irrigation purposes and provided no funding, they are deprived of one very real and potentially significant means of subsistence. Indians have once again been frozen in an instant of time, unable to evolve and use their limited reservation resources as their societies develop.<sup>100</sup>

### *Quantification*

For fifty years after *Winters*, Indian water rights were relegated to the 'legal attic'.<sup>101</sup> In 1963 the US Supreme Court reaffirmed the *Winters* doctrine, reiterating that the government must have intended to reserve water for the Indians because otherwise their lands would have been useless.<sup>102</sup> The Court quantified the Tribe's rights, finding that enough water was reserved 'to irrigate all the practicably irrigable acreage [PIA] on the reservations'.<sup>103</sup> In the Court's opinion, the PIA standard was a feasible and fair way to provide water necessary to satisfy the future and present needs of the Indian reservations.<sup>104</sup> However, to the extent that reservations were created for homeland or other purposes, the PIA standard does not apply. Courts use different standards to quantify these other water rights.<sup>105</sup>

### *Regulation and administration of water in Indian Country*

Tribal regulation and administration of Indian reserved water rights, including the authority to change uses, are essential if sovereignty and self-government are to have any meaning. Unless the Tribes have the power to make decisions about how their water is to be used on the reservation, they will never be able to economically develop and provide for their members.

US Tribes do retain some power over water allocation. They may regulate the water use of Indians on their reservations as part of their inherent sovereignty.<sup>106</sup> While they may enact water codes and regulations, the Tribes have been stymied by the federal moratorium on the approval of tribal water codes.<sup>107</sup> Many Tribes have water codes nonetheless.<sup>108</sup>

However, a serious debate rages when Tribes seek to regulate non-Indian water use within reservation boundaries. Applying the *Montana* test, the Tribes may only regulate non-Indians on fee lands where the water use has some substantial and direct effect on tribal health or welfare, political integrity or economic security.<sup>109</sup> Although it would seem that fragmented administration of stream systems would necessarily have a substantial and

direct effect on tribal health and welfare, the courts have not seen it that way and instead have allowed the states to regulate non-Indian use of excess waters.<sup>110</sup>

### *Determination of water rights*

#### *The McCarren amendments*

Fearful that the Tribes may yet figure out how to use their paper water rights and in need of certainty, the states have sought to quantify Indian water rights by joining the Tribes or the US in general (state administered) stream adjudications. The authority for doing so rests on shaky ground but has been repeatedly upheld.

In 1952 Congress enacted the *McCarren Amendment* which waived federal sovereign immunity to be joined in general stream adjudications.<sup>111</sup> The Supreme Court extended the *McCarren Amendment* to the adjudication of tribal reserved water rights, whether they are asserted by the Tribes<sup>112</sup> or the US on behalf of the Tribes.<sup>113</sup> In 1994 the Ninth Circuit required the Tribes to adjudicate water rights claims in a state administrative general stream adjudication.<sup>114</sup> Thus, the Tribes' attempts to adjudicate water rights claims in federal courts have been rebuffed, while the courts have deferred to state expertise in water law matters.

From a tribal perspective, adjudicating Indian reserved water rights in state court is not appropriate because of the states' traditional animosity to tribal rights, their lack of jurisdiction over Indian affairs, the federal nature of Indian water rights and the early priority date, which as a practical matter, obviates the need to adjudicate Indian rights with other water rights. Rather, the Tribes would prefer to adjudicate their rights in federal court and incorporate their right in the state decree at the conclusion of state proceedings.<sup>115</sup> The extension of the *McCarren Amendment* to state adjudications of tribal water rights in administrative proceedings reflects the lessened recognition of Tribes as sovereign governments.

#### *Water settlements*

Because of the costs, uncertainties and difficulties inherent in state general stream adjudications and the limitations placed on tribal use of water, many Tribes have begun negotiating water settlements.<sup>116</sup> Such settlements may provide the Tribes with added benefits. For example, settlements may enable Tribes to use water for a broader array of purposes, such as instream flows for fisheries, recreation, wildlife and tourism, and allow some forms of off-reservation uses, such as water marketing.<sup>117</sup> Tribes may obtain irrigation projects, restoration of fisheries, development of minerals, establishment of small businesses, promotion of tourism, recreation or crafts, or other revenue-generating projects in settlements in exchange for quantifying tribal water rights, waiving tribal priority dates or limiting water usage. Tribes can also negotiate the right to market Indian water.

Negotiated water settlements take time, money and, usually, congressional approval. In the last few years, the federal government's efforts have slowed as Congress has been less willing to allocate funds to bolster the settlements.<sup>118</sup> Even so, many commentators view settlements sceptically and wonder if this is not the modern way of stripping Indians of any remaining assets.

## Hunting/fishing rights

### *Introduction*

Fishing and hunting have always been vitally important practical and spiritual activities to American Indians.<sup>119</sup> As a result, many Tribes insisted upon specific provisions in the treaties that expressly reserved their traditional rights to fish and hunt. As the Supreme Court acknowledged in an early twentieth century case, these rights 'were not much less necessary to the existence of the Indians than the atmosphere they breathed'.<sup>120</sup>

Today, many Tribes depend on fishing and hunting to provide revenue and livelihoods for tribal members. Some Tribes have expanded their traditional commerce in fish by operating fishing fleets and packing companies. Other Tribes sell recreational fishing and hunting licenses to non-members to raise revenue for the reservation.

The tribal exercise of treaty protected hunting and fishing rights, free from state regulation, has been fiercely litigated.<sup>121</sup> While tribal regulation rarely has any significant impact on state revenues, the states vigorously fight tribal efforts to exercise their sovereignty over non-Indians who fish and hunt on reservation. Many of these states, particularly in the Pacific Northwest and the Great Lakes area, depend on commercial fishing as a major part of their economies and fear that Tribes may yet capture fish and wildlife revenues as they develop expert agencies and related businesses.

### *On-reservation rights*

Tribes have exclusive jurisdiction over on-reservation fishing and hunting by tribal members.<sup>122</sup> This authority flows from the accepted understanding of tribal sovereignty, that is, the right to control one's internal affairs.<sup>123</sup> It does not matter whether the actual land ownership is Indian or non-Indian, as long as the tribal member's activity is on the reservation.

No clear rule applies to situations where Tribes assert control over non-Indian fishing and hunting within reservation boundaries. Following the *Brendale* notion of closed and open areas,<sup>124</sup> courts are more willing to allow Tribes to regulate non-Indian fishing and hunting when they can show consolidated tribal land bases and a coordinated effort to develop wildlife or fisheries resources without state involvement. The decisions degenerate into a balancing of interests — federal, tribal and state — the smaller the state's interests, the better chance of tribal regulation.

In *New Mexico v Mescalero Apache Tribe*,<sup>125</sup> the Court refused to allow the state to exercise jurisdiction over non-Indian fishing and hunting on the reservation. The Tribe and federal government had expended significant time and resources to develop the reservation's hunting and fishing resources. Using federal funds, the Mescalero Apaches had established eight artificial lakes, stocked by the US Fish and Wildlife Service; the National Park Service had provided the initial herd of 162 elk which the Tribe had increased to about 1,200; and the Tribe and federal government jointly conducted a comprehensive management program, including the adoption of hunting and fishing ordinances which conflicted with state regulations. Other crucial factors included the fact that the Tribe owned all but 193.85 of more than 460,000 acres (even then, 160 acres were unimproved and unoccupied and 10 acres belonged to the Catholic Church) and the state had minimal involvement and insubstantial loss of revenue. Concurrent jurisdiction and the application of state laws on the reservation would have effectively nullified tribal efforts to manage its resources.<sup>126</sup>

Without a doubt, the facts in *New Mexico v Mescalero* were compelling.<sup>127</sup> In many other cases, the Tribes have not fared as well. In *South Dakota v Bourland*,<sup>128</sup> for example, the Supreme Court refused to allow tribal regulation of non-Indian fishing and hunting in an area within the reservation boundaries that had been condemned by the federal government for construction of a dam and reservoir. The Court reasoned that Congress had opened such lands for public recreational use and made hunting and fishing subject to federal regulation.<sup>129</sup>

Wild animals and fish do not respect political boundaries, therefore wise resource management often requires coordination of goals and regulatory approaches. Even so, states and Tribes attempt to assert exclusive jurisdiction over the natural resources and litigation ensues. Only after litigation stalls or becomes prohibitively expensive have states and Tribes begun to work together and enter cooperative wildlife management agreements.<sup>130</sup>

### *Off-reservation rights*

The nature of tribal off-reservation fishing or hunting rights varies widely according to the language of the treaty.<sup>131</sup> Thus while fishing rights in the Pacific Northwest have been viewed as continuing or perpetual property rights, hunting rights have often been considered defeasible privileges giving way as the status of open and unclaimed land changes.<sup>132</sup>

Nevertheless, the nature, scope and extent of Indian fishing rights often depends on whether a court applies the Indian canons of construction.<sup>133</sup> In a series of Pacific Northwest fishing cases,<sup>134</sup> the Supreme Court has interpreted the Indian treaty right 'to take fish at all usual and accustomed places in common with all citizens of the territory' to mean far more than just an equal opportunity, shared with millions of other citizens, 'to dip their nets into the territorial waters'.<sup>135</sup> The off-reservation fishing right includes



a right of access on private property to reach traditional fishing places.<sup>136</sup> It precludes state assertion of licensing fees or other regulations on Indians unless indispensable to the effectiveness of state conservation programs.<sup>137</sup> However, the courts have been unwilling to allow states to expand the ‘interests of conservation’ loophole too far. States may only regulate the manner of fishing and the size of the take and restrict commercial fishing provided that the regulation ‘meets appropriate standards and does not discriminate against Indians’.<sup>138</sup>

Pacific Northwest Tribes have the right to take a fair share of the available salmon and other anadromous fish runs that pass through tribal fishing areas.<sup>139</sup> The Court has created the ‘moderate living’ doctrine, which defines a fair share as a 50 percent allocation based on the Indians’ reliance on the fish for their livelihood and then adjusting slightly downward due to other relevant factors.<sup>140</sup> The Tribes are not confined to the methods of fishing, hunting or gathering that they used at treaty time.<sup>141</sup>

The issue of whether the Tribes have a right to protect fish runs and prevent habitat degradation remains open. In *Washington-Phase II*, which was subsequently vacated on procedural grounds, the US District Court held that the state may not degrade fish habitat to the extent that it would deprive the Tribes of moderate living needs.<sup>142</sup>

#### *Treaty rights versus federal conservation laws*

Finally, while the federal government has generally joined with Indian Tribes in contesting state challenges to Indian fishing and hunting rights, national conservation laws have brought Indians into conflict with the US.<sup>143</sup> The basic principle seems to be that enunciated by Justice Douglas in *Puyallup II*—we do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the state is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.<sup>144</sup>

While such a premise appears facially neutral and reasonable, benefiting both the fisheries and Indians in the long run, the effects have often been borne more by the Indian Tribes than others. For example, in efforts to protect salmon in the Pacific Northwest, the federal government has often sought to decrease the Indians’ right to take fish before pursuing more difficult avenues, such as forcing the federally-operated dams to operate in a more ‘fish-friendly’ manner. Indians have responded in different ways: litigation, co-management and settlement.<sup>145</sup>

Another example of Indian treaty rights conflicting with federal conservation goals has involved the taking of endangered species for ceremonial purposes. For example, various

federal laws prohibit killing bald or golden eagles and, in some cases, possessing even a single eagle feather;<sup>146</sup> yet many Tribes revere the eagle and use their feathers and other parts in religious ceremonies, claiming that treaty provisions authorise such activities. The courts, however, have (with one exception) consistently refused to overturn convictions based on violations of federal conservation laws where Indians asserted treaty rights<sup>147</sup> or constitutional claims of free exercise of religion<sup>148</sup> as a defence.

## **Mineral rights**

### *Introduction*

Indian Tribes are the third largest owners of mineral resources in the US.<sup>149</sup> Indian lands are estimated to contain roughly three percent of the nation's known oil and gas reserves, thirty percent of the coal west of the Mississippi, a third or more of the nation's uranium and smaller quantities of many other valuable minerals.<sup>150</sup> The development of these resources often provides the only hope for economic development on many reservations. Over time, the Tribes have played different roles in mineral development: that of owner, lessor, developer and regulator.<sup>151</sup>

### *Ownership of the mineral estate*

Tribes own the minerals and other natural resources on reservations absent an express provision in the relevant treaty or treaty substitute reserving a federal interest in minerals. In *United States v Shoshone Tribe of Indians*,<sup>152</sup> the US Supreme Court notes that subsurface minerals are 'constituent elements of the land itself' and holds that when land was set aside as a homeland for a Tribe, whether by treaty, agreement or executive order, the Tribe acquired all beneficial incidents in the land, including beneficial ownership of the natural resources.<sup>153</sup> Tribes thus own the mineral estates on tribal trust lands. Yet continuing the legacy of allotment, Tribes do not own the minerals on allotted or fee lands.<sup>154</sup>

Moreover, the rule that precludes Tribes from selling or conveying trust lands to any person without the approval of the federal government<sup>155</sup> also applies to the sale of tribal resources, like minerals.<sup>156</sup> Most Tribes lack the resources to exploit the mineral estate themselves and thus depend on non-Indian entities to pay bonuses, rents and royalties to do so.

### *Statutory scheme for exploiting minerals on tribal lands*

Until recently, tribal involvement in the exploitation of minerals on the reservations was primarily that of a lessor. Congress quickly enacted legislation that authorised leasing of tribal lands. Some of the early leasing statutes did not even require tribal consent, but rather trusted the Interior Secretary to exercise his discretion and responsibly protect the Indians' interests.<sup>157</sup>

Today, two main statutes govern mineral leasing on tribal lands: the *Indian Mineral Leasing Act of 1938* (the 1938 Act) and the *Indian Mineral Development Act of 1982*. In 1938 Congress enacted the *Indian Mineral Leasing Act* to achieve uniformity in this substantive area and repeal all inconsistent legislation.<sup>158</sup> All mineral leases of tribal land require consent by the Tribal Council, subject to the approval of the Secretary of the Interior. The leases were to last for a period ‘not to exceed ten years and as long thereafter as minerals are produced in paying quantities’.<sup>159</sup> All leases were to be granted on the basis of competitive bidding and payment of a bonus consideration, though the Secretary could authorise a mineral lease by private negotiations if no satisfactory bid was received. Both the Tribes and Department of Interior were given the right to access leased premises for inspection.

The 1938 Act excluded certain Tribes and allowed for Tribes organised under the IRA to lease lands for mining in accordance with their constitutions and charters.<sup>160</sup> In addition the Act did not generally include leases of allotted lands and, more importantly, did not require tribal consent or even consultation prior to the issuance of a mineral lease for allotted lands.<sup>161</sup>

While the 1938 Act introduced uniformity into the leasing process, it did not significantly increase tribal control or involvement. Tribes generally signed a standard lease form developed by the Department of Interior and their consent was only necessary for the initial decision to lease tribal lands for mineral development.<sup>162</sup> The Secretary could choose which specific tracts to offer as long as it was within an area previously authorised. In addition, the Tribes could not unilaterally cancel a lease for breach of the lease terms. Indian Tribes had to rely on the benevolence of the Secretary or courts, who often found cancellation to be too harsh a remedy and instead awarded damages, an adjustment of bonuses, rents or royalties.<sup>163</sup>

Finally, the Act was supposed to ensure that Tribes received the greatest return from their property. In reality, the federal government failed in its obligations to the Indians. The Tribes received only minimal levels of income due to: below-market bonus bids, rents and royalties as a result of inadequate advertising, minimal geological information and poor selection of tracts offered for bids; royalty mismanagement; inadequate accounting practices; and mineral theft and fraud.<sup>164</sup>

Indian Tribes responded by bringing breach of trust actions against the government. In *Jicarilla Apache Tribe v Supron Energy Corp* the Tenth Circuit held that, like the timber statutes, the 1938 Act and its implementing regulations created enforceable trust obligations.<sup>165</sup> The court observed that the government owes a fiduciary duty to ensure that the Tribes receive the maximum benefits from the mineral resources and must act at all times in the best interests of the Tribes. The Secretary’s duties to the Tribes extend to approval of leases, monitoring of lessee’s compliance with lease terms and federal regulations,

determination of the method of royalty calculations and approval of communitisation agreements for oil and gas.<sup>166</sup> Courts have not, however, readily found liability in these breach of trust actions.

While the 1938 Act dramatically improved the scheme governing mineral leasing on tribal lands, the Tribes still had little control, and the Act did not offer much flexibility to change that. Thus in 1982, Congress enacted the *Indian Mineral Development Act* (IMDA) to expand tribal control over mineral resources.<sup>167</sup> The IMDA authorises the Tribes, subject to secretarial approval, to 'enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement' for mining activities. The IMDA applies to all mineral resources in which the Tribe 'owns a beneficial or restricted interest', reaching tribal mineral estates reserved under allotted or off-reservation lands. Further, mineral resources belonging to allottees may be included in tribal agreements, subject to approval by the parties and a finding by the Secretary that it is in the best interests of the Tribe.

These alternatives to leasing increase control but also the risk to the Tribes. The fiduciary responsibilities established in cases arising under the 1938 Act apply to mineral agreements under the IMDA, though Congress expressly stated that the federal government shall not be liable for losses sustained by a Tribe or individual Indian under a mineral agreement. Congress has no intent of guaranteeing the profitability of these agreements

Two additional statutes affect tribal mineral resources: the *Federal Oil & Gas Royalty Management Act* (FOGRMA) and the *Indian Energy Resources Act of 1990*. FOGRMA attempted to address the sorry state of federal royalty management by redefining the duties of the Interior Department and lessees, strengthening information gathering and dissemination, providing for inspections, interest on late payments, and civil and criminal penalties, but in the end little has changed.<sup>168</sup> The *Indian Energy Resources Act* continued the IMDA's policies of tribal economic self-sufficiency and increased control of mineral resources by establishing demonstration programs, grants and technical assistance for development of energy resources and projects in Indian Country.<sup>169</sup> The *Indian Energy Resources Act* also establishes a commission to develop recommendations on dual tribal-state taxation of lessees and on oil and gas royalty management. The problem is that the commission has only eight members chosen from tribal recommendations; the remaining ten represent non-tribal interests.

### *Taxation of mineral lessees*

US Indian Tribes have long exercised the inherent right as sovereigns to tax both members and non-members engaged in activities in Indian Country. During the 1970s, as Tribes needed increased revenue, they enacted laws to tax mineral lessees. The rents and royalties were set at low rates and the ability of Tribes to renegotiate leases to increase tribal income was limited, thus taxation schemes offered the only real means for those Tribes to increase their mineral revenues.

In defiance of the trend to narrowly construe tribal self-government initiatives, the courts have upheld tribal taxes as a valid exercise of the Tribes' inherent sovereign power to govern. In *Merrion v Jicarilla Apache Tribe*,<sup>170</sup> the Supreme Court upheld a tribal severance tax imposed on lessees after the lease terms were finalised. The Court notes that the lessee confused the Tribe's dual roles as mineral owner and sovereign government. While a lessor has no right unilaterally to alter the terms of a lease, a sovereign retains the power to tax non-members to the extent that the non-members enjoy the privileges of activities in Indian Country. Since the lessees were doing business on Indian lands and benefited from the provision of tribal services funded by governmental revenues, they were subject to taxation.

Subsequently, in *Kerr-McGee Corp v Navajo Tribe of Indians*, the Supreme Court again upheld the tribal power to tax. The lessees argued that the crucial factor in *Merrion* was that the Jicarilla Apache Tribe was organised under the IRA which required all tax laws to be approved by the Secretary. In contrast, the Navajo Nation was not an IRA government and its taxes were not approved. The Court rejected the distinction and reiterated that the Tribe's right to tax flowed from its inherent sovereignty, not the Secretary's approval of the tax.<sup>171</sup>

For a myriad of reasons, none particularly compelling, states impose taxes on minerals obtained by non-Indian lessees on Indian lands. Thus, mineral lessees often face double taxation which lessens the desirability of mineral development on tribal lands. This double taxation clearly implicates tribal sovereignty and control over mineral development but the courts have authorised such taxation thus far.

### *Timber resources*

Many US Tribes have timber resources in the form of forested or partially forested lands, comprising approximately one percent of all commercial forest land in the US.<sup>172</sup> As with minerals, the Tribes enjoy full equitable ownership of timber located on tribal reservation lands.<sup>173</sup> It does not matter that a treaty fails to mention timber. The Tribes still retain the right to use and harvest timber located on their lands. By the same token, Indian Tribes and allottees holding trust land may not sell or alienate the timber on the land without express approval of the Secretary of the Interior.

As a result, the federal government has played a pervasive role in the sale of timber from Indian lands and Congress has enacted a comprehensive statutory scheme which permits timber sales on trust lands.<sup>174</sup> The Department of Interior is responsible not only for selling timber and applying the proceeds for the benefit of the Indians but also for 'managing the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests'.<sup>175</sup> Detailed regulations address virtually every aspect of forest management, including the size of sales, contract procedures, advertisements and methods of billing, deposits and bonding requirements,

allowable heights of stumps, tree marking and scaling rules and percentage of the trees to be left as a seed source. To address forest mismanagement, Congress expressly directed that the Interior Department manage Indian forests 'on the principle of sustained-yield management'. In *United States v Mitchell*,<sup>176</sup> the Supreme Court held that the Tribes could bring a breach of trust action against the government for mismanagement of timber resources. Even so, the Department has left many reservations with decimated forests and no money to show for it.

### **Landuse planning / zoning**

The authority to zone is considered the most essential function performed by local government. It enables governments to engage in a systematic effort to manage their land base in a manner consistent with future growth and values. As often stated, it enables governments to avoid putting 'the pig in the parlour, instead of the barnyard'. For Indians whose existence is often tied to the checkerboard acreage throughout the reservation, the power to zone is vital to managing their territory in a manner consistent with their unique historical and cultural connection to the land.

Nevertheless, a divided Supreme Court has held that Indians retain the power to zone only in 'closed areas', that is, those defined areas in which only a small percentage of the land is held in fee.<sup>177</sup> The Court rejected any rationale for tribal zoning power based on inherent sovereignty, instead resting its decision on the proprietary right to exclude non-members from tribal land.<sup>178</sup> Along with the power to exclude comes the power to define the essential character of the territory. Thus, once a Tribe loses the majority of its land base through allotment, cession or other transfer, it likewise loses the power to zone. In Justice Stevens' view (the apparent majority view), the Tribes have no inherent authority over non-Indians on reservation lands. In dissent, Justice Blackman attacks such reasoning precisely because it ignores the sovereignty of Indian Tribes. Although acknowledging the difficulties raised by reservations that include entire townships, he argues that Tribes should have zoning authority over Indian Country with some exceptions made for extreme cases.

The current Supreme Court does not share his views. In sum, Indian Tribes may enact zoning ordinances over non-Indians if the reservation is mostly trust land. Likewise, the Tribes may not zone non-Indian fee land if the reservation is at least 50 percent allotted or otherwise non-Indian owned. The exact line demarking tribal zoning power, however, remains unclear.

## Conclusion

At the most fundamental level, US Indian Tribes retain inherent sovereignty arising from their prior occupation of the land,<sup>179</sup> that is, the ability to govern their members and their territory (reservations).<sup>180</sup> This sovereignty is, however, limited to those incidents of sovereignty which have not been extinguished by treaty, federal statute or by implication as a result of the Tribe's dependent status.<sup>181</sup> Generally, subject to the two *Montana* test exceptions,<sup>182</sup> the power to govern tribal territory does not extend to non-member activities in Indian Country.<sup>183</sup>

At a practical level, inherent tribal sovereignty provides the Tribes with considerable power to manage reservation environments and resources. This Chapter does not allow for consideration of the details of administration which may differ from Tribe to Tribe. However, in general Tribes are like states in that they manage their lands and other resources subject to tribal constitutions, statutes and administrative regimes which, like those employed by the various state governments, may differ according to local practice. These powers and rights may be summarised as follows.

First, the Tribes have powers similar to those of states to adopt and enforce environmental protection regimes governing, for example, water quality or hazardous waste disposal.<sup>184</sup> Second, the Tribes exercise landuse planning/zoning power over Indian fee lands and may, in compelling circumstances, extend that authority to non-fee lands within the reservation boundaries.<sup>185</sup> Third, the Tribes own the resources within reservation boundaries. This resource ownership is manifest in a variety of ways.

In respect of land, timber, minerals and similar resources, the Tribes own the resource, unless specifically excepted by treaty or treaty substitute,<sup>186</sup> but the selling or leasing of the land or other resources is subject to federal government oversight and approval. Tribes also retain the inherent right to tax resource extraction, in addition to the right to receive royalty, rent or other lease payments from those activities.<sup>187</sup>

In respect of water, the Tribes own or hold a priority right to use water on or bordering the reservation (generally limited to agricultural purposes) and have full authority to allocate water rights to tribal members.<sup>188</sup> In some circumstances, Tribes may have the capacity to protect water quality.

With respect to wildlife and fisheries, the Tribes may regulate all activities of tribal members on the reservation.<sup>189</sup> Tribes may also license non-member hunting or fishing on tribal lands. Moreover, in many cases, the Tribes reserved rights to hunt and fish off-reservation. These rights ensure access to traditional hunting and fishing grounds free from state regulation, except for legitimate, non-discriminatory conservation regimes.<sup>190</sup> Some courts have acknowledged that such rights may impose a duty on the states to protect the resources subject to off-reservation rights.<sup>191</sup> Rights to hunt and fish are,

however, generally subject to federal conservation laws,<sup>192</sup> though many of those laws provide permit exceptions for Indian subsistence hunting and fishing.<sup>193</sup>

Whether the rights developed in the context of US-Indian relations are applicable to or can inform the future understanding of native title law in Australia is a question that is addressed fully in Chapter 7. Briefly however, in our view, the answer depends on identifying and understanding the source of those rights. Arguably, that source is the same in the US and all other common law jurisdictions (including Australia)—the common law's historical acknowledgment of the pre-existing rights of Indigenous peoples which arise from their prior occupation of the land in organised societies.

### Notes

- <sup>1</sup> While Alaskan Native lands may or may not still be part of Indian Country (see note 35 below), they are administered under a different legal regime from Indian lands in the lower 48 states. The Alaskan statutory regime is more like a regional agreements' regime and will be considered in Chapters 4 and 5. For an overview of the Alaskan Natives' position in US law see: DS Case, 'The Alaska experience: In a twinkling – The Alaska Native Claims Settlement Act and agreements relating to the use and development of land' in GD Meyers (ed), *The way forward: Collaboration and cooperation 'in country'*, Proceedings of the Indigenous Land Use Agreements Conference, Darwin Australia, 26-29 September 1995, second edition AGPS/NNTT, 1996, pp 102-26.
- <sup>2</sup> See, generally, RA Williams Jr, *The American Indian in western legal thought: The discourses of conquest*, Oxford University Press, 1990; FS Cohen, *Handbook of federal Indian law*, WS Hein, 1982; V Deloria Jr and CM Lytle, *American Indians, American justice*, University of Texas Press, 1983; DH Getches et al, *Cases and materials on federal Indian law*, third edition West Publishing, 1993; CF Wilkinson, *American Indians, time and the law*, Yale University Press, 1987.
- <sup>3</sup> See Cohen, above note 2, pp 47-204; WC Canby Jr, *American Indian law in a nutshell*, 2nd edition West Publishing, 1988; Deloria and Lytle, above note 2, pp 2-24; Getches et al, above note 2.
- <sup>4</sup> The term Indian country refers specifically to those geographical areas (primarily west of the Mississippi River) where Indian Tribes exercise sovereignty. However, as Deloria and Lytle note, the term has both a highly technical-legal meaning as well as a more general meaning for Indian Tribes. Moreover, it is a 'back drop' concept, understood best in the context of its use by various interests (Tribes and federal and state governments) and in its contemporary form is undergoing radical changes in meaning. It no longer has solely a geographical meaning, but also contemplates social, economic and political constructs: Deloria and Lytle, above note 2, pp 58-79.
- <sup>5</sup> See, generally, AM Gibson, *The American Indian: Prehistory to the present*, HM College Division, 1980; P Farb, *Man's rise to civilisation: The cultural ascent of the Indians of North America*, 2nd edition EP Dutton, 1988; EH Spicer, *A short history of the Indians of the United States*, D Van Norstrand Co, 1969.
- <sup>6</sup> See Canby, above note 3, p 10. For a review of colonial policy in North America prior to US independence from England see RN Clinton, 'The Proclamation of 1763: Colonial prelude to two centuries of federal-state conflict over the management of Indian affairs' (1989) 69 *Boston U L Rev* 329.
- <sup>7</sup> The US policy of negotiating treaties was 'born of necessity and convenience': Getches et al, above note 2, p 2.
- <sup>8</sup> Congress repealed the President's power to negotiate treaties with Indian Tribes in 1871. See Cohen, above note 3, p 62. Treaty substitutes (executive orders, congressional statutes and agreements) created rights and liabilities virtually identical to those established by treaties: id at 127. See also *Antoine v Washington* 420 US 194, 204 (1975) (hunting rights preserved in ratified agreement); *Arizona v California* 373 US 546, 598 (1963) (water rights reserved by executive order).



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- <sup>9</sup> Canby, above note 3, pp 11-12.
- <sup>10</sup> CF Wilkinson and JM Volkman, 'Judicial review of Indian treaty abrogation: "as long as water flows, or grass grows upon the earth" – How long a time is that?' (1975) 63 *Cal L Rev* 601, pp 608-09.
- <sup>11</sup> Cohen, above note 2, pp 65-68.
- <sup>12</sup> *Id.*, p 69.
- <sup>13</sup> Wilkinson and Volkman, above note 10, p 609.
- <sup>14</sup> *Id.*, p 610.
- <sup>15</sup> *Choctaw Nation v Oklahoma* 397 US 620, 630-31 (1970).
- <sup>16</sup> See Cohen, above note 2, pp 78-98.
- <sup>17</sup> *Id.*, pp 78-92. The five Civilised Tribes included the Cherokee, Choctaw, Creek, Chickasaw, and Seminole Nations in the US South-East. They were called 'civilised' because of their historically extensive interaction with white settler communities (many tribal members intermarried with Scottish and Irish traders). Additionally, many tribal members were educated, some in white schools and all but the Seminoles adopted formal constitutions and governments modelled on Euro-American models: Deloria and Lytle, above note 3, pp 90-91. Unfortunately, all their efforts to be like the whites failed to convince the settlers that the Tribes were equals with whites and failed to prevent their forced removal from their traditional lands in Florida, Georgia, Tennessee and other parts of the South to 'new homelands' in Kansas and Oklahoma: *id.*, pp 64-65.
- <sup>18</sup> *Id.*, pp 130-43.
- <sup>19</sup> Canby, above note 3, p 20.
- <sup>20</sup> *Ibid.*
- <sup>21</sup> *Ibid.*
- <sup>22</sup> *Ibid.*
- <sup>23</sup> *Id.*, p 138.
- <sup>24</sup> See Wilkinson, above note 2, pp 4-5. As Wilkinson notes, the promise of 'measured separatism' made in treaties and treaty substitutes was that the Tribes would enjoy a diminished independence on their reservations, 'free to rule their internal affairs outside state compulsion but subject to an overriding federal power and duty of protection'.
- <sup>25</sup> Cohen, above note 2, p 144.
- <sup>26</sup> *Id.*, p 147.
- <sup>27</sup> CF Wilkinson, 'To feel the summer in the spring: The treaty fishing rights of the Wisconsin Chippewa' (1991) *Wis L Rev* 375, p 392.
- <sup>28</sup> See CF Wilkinson and ER Biggs, 'The evolution of the termination policy' (1977) 5 *Am Indian L Rev* 139, pp 149-54, 158-62.
- <sup>29</sup> *Id.*, p 151.
- <sup>30</sup> Message from the President of the United States Transmitting Recommendations for Indian Policy (1970) HR Doc No 363 91<sup>st</sup> Cong 2<sup>nd</sup> Sess.
- <sup>31</sup> See, for example, *American Indian Agricultural Resource Management Act* 25 USCA §§ 3701-3746 (West Supp 1984-1997); *American Indian Religious Freedom Act* 42 USCA § 1996 (West 1994 and Supp 1998); *Indian Gaming Regulatory Act* 25 USCA §§ 2701-2721 (West Supp 1984-1997); *Indian Land Consolidation Act* 25 USCA §§ 2201-2211 (West Supp 1984-1997); *Indian Mineral Development Act* 25 USCA §§ 2101-2108 (West 1983); *National Indian Forest Resources Management Act* 25 USCA §§ 3101-3120 (West Supp 1984-1997); *Native American Graves Protection and Repatriation Act* 25 USCA §§ 3001-3013 (West Supp 1984-1997).

- <sup>32</sup> See, for example, *Clean Air Act* 42 USC § 7601 (West 1995); *Clean Water Act* 33 USC § 1377 (West Supp 1998); *Comprehensive Environmental Response, Compensation, and Liability Act* 42 USC § 9626 (West 1995); *Safe Drinking Water Act* 42 USC § 300j-11 (West 1991); *Oil Pollution Act of 1990* 33 USC § 2706 (West Supp 1998) (natural resource damages); *Surface Mining Control and Reclamation Act of 1977* 30 USC § 1300 (West 1986 and Supp 1998).
- <sup>33</sup> Presidential Memorandum, 'Government-to-government relations with Native American tribal governments', 29 April 1994, 59 FR 22,951 (4 May 1994); US Dept Of Interior, 'Order No 3175: Departmental responsibilities for Indian trust resources', 8 November 1993 (on file with author); US Dept of Interior, 'Order No 3206: American Indian tribal rights, federal-tribal trust responsibilities, and the Endangered Species Act', 5 June 1997 (on file with author); US Dept of Justice, 'Policy on Indian sovereignty and government-to-government relations with Indian Tribes', 1 June 1995 (on file with author); US Environmental Protection Agency, 'Policy for the administration of environmental programs on Indian reservations', 8 November 1984; Federal Emergency Mgmt Agency, 'Draft American Indian and Alaska Native policy', 17 February 1998, 63 FR 7793-01; Dept of Health and Human Services, 'Policy on government-to-government relations with Native American tribal governments', 14 August 1996, 61 FR 42255-01.
- <sup>34</sup> Wilkinson, above note 27, p 375.
- <sup>35</sup> *State of Alaska v Native Village of Venetie Tribal Government* 101 F 3d 1286 (9<sup>th</sup> Cir 1996) cert granted 117 S Ct 2478 (1997).
- <sup>36</sup> See Wilkinson, above note 2, pp 54-55; MC Wood, 'Indian land and the promise of Native sovereignty: The trust doctrine revisited' (1994) *Utah L Rev* 1471, p 1474 who notes that sovereignty is composed of four attributes: secure land base, functioning economy, self-government and cultural vitality.
- <sup>37</sup> *United States v Wheeler* 435 US 313, 322-23 (1978).
- <sup>38</sup> Tribal sovereignty was first recognised by Chief Justice Marshall in a trilogy of cases: *Johnson v M'Intosh* 21 US (8 Wheat) 543, 572-88 (1832); *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831); *Worcester v Georgia* 31 US (6 Pet) 515 (1832). In these cases, on which thousands of pages have been written, Marshall explained that long before contact with Europeans, American Indian Tribes were sovereign nations with broad inherent powers that, almost without exception, exist by virtue of inherent right, not by delegation: *Worcester* at 559-60. This sovereignty was necessarily diminished on incorporation into the US and by tribal acceptance of protection: *Johnson* at 591; *Cherokee Nation* at 17 (function of Tribe's status as 'domestic dependent nation'). Tribal rights held to be diminished included the ability to transfer land to anyone other than the discoverer, first European nations and then the US (*Johnson* at 574), the right to enter into direct commercial or governmental relations with foreign nations (*Worcester* at 559) and the power to determine their external relations (*Wheeler* at 326). Subsequently, by treaty and by statute through the exercise of congressional plenary control, the Tribes lost other sovereign powers. See, for example, *Wheeler* at 323. Through it all, however, the right to govern one's own internal affairs free from state laws has remained an essential element of tribal sovereignty. See *Worcester* at 561 (excluding state law from Indian country).
- <sup>39</sup> *Wheeler* at 323.
- <sup>40</sup> *Ibid.*
- <sup>41</sup> *Montana v United States* 450 US 544 (1981).
- <sup>42</sup> *Id* at 565.
- <sup>43</sup> *Ibid.*
- <sup>44</sup> *Brendale v Confederated Tribes and Bands of the Yakima Indian Nation* 492 US 408 (1989). Tribes may zone in 'closed' areas, but not heavily allotted 'open' areas.
- <sup>45</sup> *Montana* at 566.

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- <sup>46</sup> *South Dakota v Bourland* 508 US 679, 697 (1993).
- <sup>47</sup> *United States v Anderson* 736 F 2d 1358, 1366 (9<sup>th</sup> Cir 1984).
- <sup>48</sup> *Wheeler* at 323.
- <sup>49</sup> For example, in *Brendale* at 429, Justice White took exception to the notion that tribal retained sovereignty could be equated with a local government's police power. Moreover, Justice Stevens argued that the source of regulatory authority derives from the tribal power to exclude non-members from reservation land and the lesser included power to define the character of that land: at 433-37. See also *Merrion v Jicarilla Apache Tribe* 455 US 130, 160 (1982) (Stevens dissenting). This perspective resulted in Tribes having authority to regulate land use only in 'closed' areas, those lands which were restricted to tribal members and retained their Indian character – mostly trust lands: *Brendale* at 444-47.
- <sup>50</sup> For an overview of tribal powers to govern, manage and control access to reservation lands and resources see Coggins and Donley, above note 1, pp 90-101.
- <sup>51</sup> See above note 31 (list of environmental statutes with 'Tribes as States' provisions).
- <sup>52</sup> US EPA, *EPA Policy for the administration of environmental programs on Indian reservations*, 1984; Memorandum from EPA Deputy Administrator to Assistant and Regional Administrators and General Counsel re Indian Policy Implementation Guidance, 8 November 1984 (on file with author).
- <sup>53</sup> See *State of Montana v United States Environmental Protection Agency* F 3d 1998 WL 86148 (9<sup>th</sup> Cir 1998).
- <sup>54</sup> *Ibid.* The Court rejected Montana's challenge to the granting of TAS status to the Confederated Salish and Kootenai Tribes which allowed the Tribes to promulgate water quality standards that would apply to all sources of pollutant emissions within the reservation boundaries: *id* at 1. The state argued that the EPA regulations authorising tribal exercise of authority over non-members was improper because it exceeded the recognised scope of a Tribe's inherent powers. In response, the Court affirmed the two exceptions set forth in *United States v Montana* (see above notes 38-40 and accompanying text) and noted that the EPA regulations created standards that properly delineated the scope of inherent authority and applied the 'direct effects' exception. The Tribes had to make case specific showings that conduct involving tribal water rights could reasonably pose serious and substantial threats to tribal health and welfare, making tribal regulation essential.
- <sup>55</sup> *City of Albuquerque v Browner* 97 F 3d 415 (10<sup>th</sup> Cir 1996).
- <sup>56</sup> See *State of Washington, Department of Ecology v US Environmental Protection Agency* 752 F 2d 1465 (9<sup>th</sup> Cir 1985) (court affirms EPA's decision to refuse to allow state of Washington to apply its hazardous waste regulations to the activities of all persons, Indians and non-Indians, in Indian Country even though RCRA has no TAS provision authorising Tribes to develop and implement their own hazardous waste management programs).
- <sup>57</sup> The White Mountain Apache Tribe developed its own landfill, closed a 30-year-old dump, started a residential collection program and expanded community education efforts. But see *Backcountry Against Dumps v Environmental Protection Agency* 100 F 3d 147 (DC Cir 1996) (EPA could not approve solid waste management plan of Campo Band of Mission Indians because Congress has not enacted a TAS provision under RCRA; the Tribe could, however, apply for a site-specific regulation which would allow it to design and monitor landfill facility on reservation).
- <sup>58</sup> The Confederated Tribes of Silez Indians of Oregon.
- <sup>59</sup> The Confederated Tribes of the Warm Springs Reservation of Oregon received an Oregon grant to build a recycling program on the reservation. The Tribes now sell newspaper to a business which manufactures fire-resistant doors, collect white paper with the help of school children and recover cardboard, glass and telephone books. A community-wide recycling education plan is under development, and a new landfill and associated recycling building are planned. Sitka Tribal Enterprises designed a composting program to produce marketable products from organic wastes of Alaskan industries.

- <sup>60</sup> The Nez Perce Tribe of Idaho used a grant to develop environmental programs such as the pickup of office recyclables, education of school children about recycling, waste audits of local businesses and public meetings; it is also developing a memorandum of understanding with local and state officials to diminish dumping of waste from outside the reservation. St Regis Mohawk Tribe's Solid Waste Education Project featured free workshops on composting, used oil collection days and demonstrations showing the negative impacts of backyard burning with the intent to develop a comprehensive integrated solid waste management program.
- <sup>61</sup> See, generally, Native Americans and the Environment <<http://conbio.rice.edu/nae/all.html>> (last modified on 2 June 1998) an excellent online resource listing and summarising the mission and efforts of tribal organisations involved in natural resources and providing information about tribal activities; EPA, Municipal Solid Waste Management in Indian Country <<http://www.epa.gov/tribalmsw>> (last updated 13 January 1998) which lists tribal programs supported by the EPA to address solid waste problems on reservation. Some organisations involved in addressing environmental problems on reservation include: Inter-Tribal Environmental Council of Oklahoma, consisting of 31 member Tribes, which provides technical support, environmental services and assistance in developing tribal environmental programs; Tribal Association on Solid Waste and Emergency Response, formed in July 1997 to involve Tribes more actively in EPA's policy and regulatory decision-making process; National Tribal Environmental Council, which consists of over 80 Tribes and Alaska Native Villages and provides Tribes with volunteer mentors who assist with such efforts as setting up solid waste plans, environmental technical support, workshops on environmental issues, intergovernmental cooperation, a resource clearinghouse, newsletters, updates and federal regulatory and legislative summaries; Inter Tribal Council of Arizona, which consists of 19 Tribes and has an Environmental and Natural Resources Program to help Tribes with funding and technical assistance for preparation of integrated solid waste management plans and other environmental protection issues.
- <sup>62</sup> *US v Mitchell* 463 US 206, 225 (1983). See, generally, RP Chambers, 'Judicial enforcement of the federal trust responsibility to Indians' (1975) 27 *Stan L Rev* 1213, pp 1215-22 (discussing the origins and scope of the federal trust responsibility).
- <sup>63</sup> 30 US (5 Pet) 1, 17 (1831).
- <sup>64</sup> 31 US (6 Pet) 515, 594-97 (1832).
- <sup>65</sup> See Wood, above note 36, p 1502 (sovereign trustee model and *Kagama* 'guardian ward' model are at opposite ends of the spectrum of federal-Indian relations).
- <sup>66</sup> *Id.*, p 1504; Chambers, above note 62, pp 1219-20. See *United States v Kagama* 118 US 375, 383-84 (1886) ('From [Tribes'] very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. ...The power of the General Government...is necessary to their protection, as well as to the safety of those among whom they dwell'); *Lone Wolf v Hitchcock* 187 US 553 (1903) (Congress has plenary authority over Indian lands, which includes, for example, power to unilaterally abrogate treaties). These cases have been discredited but never overruled. As a result, some tribal advocates are reluctant to use the trust doctrine. And see also, Wood, above note 36, p 1508 (stressing the importance of the trust doctrine in protecting tribal land base and resources from degradation and need to separate doctrine from plenary power).
- <sup>67</sup> Wood, above note 36, p 1504.
- <sup>68</sup> *Id.*, p 1508.
- <sup>69</sup> *Lone Wolf* at 568 (upholding the validity of a federal statute providing for transfer of Indian land in violation of treaty).
- <sup>70</sup> 448 US 371 (1980) (government must compensate Sioux for unlawful taking of Black Hills in 1877).
- <sup>71</sup> *Id.* at 414-16.

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- <sup>72</sup> Id at 423-24. See Wood, above note 36, p 1510.
- <sup>73</sup> See Cohen, above note 2, pp 221-25.
- <sup>74</sup> For example, *Choctaw Nation v Oklahoma* 397 US 620, 631 (1970); *United States v Shoshone Tribe* 304 US 111, 116 (1938); *United States v Winans* 198 US 371 (1905).
- <sup>75</sup> For example, *McClanahan v Arizona State Tax Comm'n* 411 US 164, 174 (1973); *Winters v United States* 207 US 564, 576-77 (1908).
- <sup>76</sup> For example, *Choctaw Nation v United States* 318 US 423, 431-32 (1943).
- <sup>77</sup> See generally Wilkinson and Volkman, above note 10. This same reluctance applies to statutes, agreements, and executive orders dealing with Indian affairs: Cohen, above note 3, pp 223-24.
- <sup>78</sup> See for example, *Menominee Tribe v United States* 391 US 404 (1968) (termination statute did not nullify on reservation treaty fishing and hunting rights). But see *Rosebud Sioux Tribe v Kneip* 430 US 584 (1977) (court found intent to disestablish Indian Country).
- <sup>79</sup> Chambers, above note 62, p 1227.
- <sup>80</sup> Courts apply stricter duties on the executive agencies in part because of their daily involvement with reservation life. See Wood, above note 36, p 1478. The Bureau of Indian Affairs exercises daily supervision and varying degrees of control over tribal land and resources. It approves or disapproves tribal council decisions on certain uses of reservation lands. This involvement and authority flows from the nature of Indian title which requires the federal government to hold nearly all tribal and allotted lands in trust with the beneficial interest held by the Tribe or individual Indian allottees. In addition, the executive branch does not have the same unfettered plenary power of Congress.
- <sup>81</sup> *Seminole Nation* 316 US 286, 297 (1942) (government breached its fiduciary duties to Indians by disbursing annuities to tribal council known to be corrupt).
- <sup>82</sup> See Cohen, above note 2, p 226. See also *Pyramid Lake Paiute Tribe of Indians v Morton* 354 F Supp 252, 256-57 (DDC 1972) modified in part on other grounds 360 F Supp 669 (1973) rev'd in part on other grounds 499 F 2d 1095 (DC Cir 1974) cert denied 420 US 962 (1975) (Secretary of Interior breached trust responsibilities to the Tribe when he made a 'judgment call' approving regulations which authorised diversion of water for federal reclamation project and harmed downstream lake on reservation).
- <sup>83</sup> *Klamath Tribes v United States* (unreported) Civil No. 96-381-HA, 10 February 1996 at 14.
- <sup>84</sup> Ibid.
- <sup>85</sup> Ibid.
- <sup>86</sup> See Wood, above note 36, pp 1513-22.
- <sup>87</sup> See for example, *United States v Mitchell II* 463 US 206 (1983) (tribal breach of trust action exists against federal government for mismanagement of timber resources because virtually every stage of timber harvesting and management is under federal control and supervision).
- <sup>88</sup> *Mitchell II* at 224. See also *Jicarilla Apache Tribe v Supron Energy Corp* 782 F 2d 855, 857 (10<sup>th</sup> Cir 1986), adopting as modified the dissent in *Jicarilla Apache Tribe v Supron Energy Corp* 728 F 2d 1555, 1563-69 (10<sup>th</sup> Cir 1984) (Seymour J dissenting) (federal government's role and responsibilities in mineral leasing on reservation are pervasive and comprehensive and create enforceable federal trust obligations to Tribes); *Brown v United States* 86 F 3d 1554 (Fed Cir 1996) (commercial leasing statute imposes fiduciary duties on government under control part of *Mitchell II* test).
- <sup>89</sup> Indian water rights cannot be understood without a minimal understanding of the prior appropriation system, adopted in one form or another in all of the western states. Under this system, one acquires water rights by applying a given amount of unappropriated water at the date of appropriation to beneficial use. Such rights may be abandoned or forfeited by non-use. In times of shortage, junior appropriators, those with later priority dates, must forego their water in favour of the senior water right

holders. See, generally, AD Tarlock, *Law of water rights and resources*, Clark Boardman Callaghan, 1995, Ch 5. Traditionally, the beneficial use requirement allowed only extractive, consumptive uses of water such as that necessary for domestic, municipal, irrigation, stock watering, mining and hydropower purposes: id § 5.16[1] at 5-86. Some states now include instream flow protection, fish and wildlife maintenance or aesthetic purposes as beneficial uses, thus negating the physical diversion requirement. Finally, water uses may not be unnecessarily wasteful, a doctrine that has never been vigorously enforced: id, § 5.16[3] at 5-89.

<sup>90</sup> *Winters v United States* 207 US 564, 577 (1908). See also *United States v New Mexico* 438 US 696 (1978) (federal reserved water rights limited to primary purposes of the reservation; secondary uses are subject to state law). Some commentators have argued that the primary-secondary distinctions apply to federal reserved rights for national forests, parks and wildlife refuges but not to Indian water rights. This view has yet to be adopted by courts.

<sup>91</sup> See for example, *Winters* at 577.

<sup>92</sup> See *United States v Adair* 723 F 2d 1394, 1414 (9<sup>th</sup> Cir 1983) cert denied sub nom *Oregon v United States* 467 US 1252 (1984) (non-consumptive aboriginal hunting and fishing water rights that are reserved in treaty carry priority date of time immemorial).

<sup>93</sup> See generally Cohen, above note 2, p 578; JV Royster, 'A primer on Indian water rights: More questions than answers' (1994) 30 *Tulsa L J* 61, pp 70-71.

<sup>94</sup> In *United States v Cappaert* 426 US 128 (1976) the Supreme Court held that the federal government had reserved sufficient water to ensure the survival of a threatened pupfish and thus upheld the government's right to enjoin groundwater pumping by a neighbouring cattle ranch that was lowering the water table and threatening the existence of a rare pupfish in Death Valley National Monument. *Cappaert* has been limited to its national monument facts and not been extended to Indian reserved water rights. See *In re General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn I)* 753 P 2d 76, 99-100 (Wyo 1988) aff'd by an equally divided court; *Wyoming v United States* 488 US 1040 (1989) (rejecting reserved groundwater right for Indian reservation). Cf *In Re General Adjudication of All Rights to County Water in the Gila River System and Source* 15 Indian L Rep 5099 (Ariz Sup Ct, Maricopa County 1988) (federal reserved water rights extend to groundwater on and off the reservation).

<sup>95</sup> In *United States v Gila Valley Irrigation District* 920 F Supp 1444 (D Ariz 1996) the district court held that the Tribe's water rights were being impaired by upstream farming practices which were raising the salinity level to such an extent that traditional salt-sensitive crops could no longer be grown.

<sup>96</sup> The Pacific Northwest and Great Lakes Tribes often had specific treaty language that protected their rights to fish and hunt in their aboriginal and reservation lands. See *United States v Winans* 198 US 371 (1905) (language in Stevens' treaties allow Indians to take fish 'at all usual and accustomed places, in common with citizens of the Territory'); *United States v Adair* 723 F 2d 1394, 1414 (9<sup>th</sup> Cir 1983) cert denied sub nom; *Oregon v United States* 467 US 1252 (1984). These water rights in essence grant the Tribes a *profit à prendre*, or an easement on private land, to access local fishing holes and have been used to limit issuance of state water permits. See, generally, MC Blumm, 'Native fishing rights and environmental protection in North America and New Zealand: A comparative analysis of profits à prendre and habitat servitudes' (1989) 8 *Wisc Int'l L J* 1, pp 8-11 (1989).

<sup>97</sup> See material on quantification below.

<sup>98</sup> See *Big Horn I* at 97-98 (court rejected tribal efforts to use water for instream purposes because despite 'permanent homeland' language, the treaty's primary purpose was agricultural). But see *Colville Confederated Tribes v Walton* 647 F 2d 42 (9<sup>th</sup> Cir) cert denied 454 US 1092 (1981) (court held that the Tribe had reserved water rights for two primary purposes—water for irrigation based on the PIA standard to fulfil agrarian homeland purpose and water for development and maintenance of replacement fishing grounds to fulfil preservation of tribal access to fishing grounds purpose). Moreover, most states do not allow individuals, including Tribes, to hold instream rights.

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- <sup>99</sup> See *In re General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn III)* 835 P 2d 273, 279 (Wyo 1992) (Tribe must go through state process to change future use from agricultural purposes to any other beneficial use). Cf *United States v Anderson* 591 F Supp 1, 5 (ED Wash 1982) (rev'd in part for other reasons, 736 F 2d 1358 (9<sup>th</sup> Cir 1984)) (since Tribe had vested property right in reserved water for fisheries and agricultural purposes, it could transfer water between the two without resorting to state law).
- <sup>100</sup> *Winters* at 577 ('it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste, [taking] from them the means of continuing their old habits, yet [not leaving] them the power to change to new ones').
- <sup>101</sup> Royster, above note 93, p 74. The US encouraged settlement of the West and construction of large irrigation projects and dams on water that flowed through or bordered Indian reservations with little or no regard for Indian water rights: Wilkinson, above note 2, pp 267-70. While non-Indians got electricity, flood control and irrigation water, Indians got nothing. In some cases, valuable farmland was flooded, forcing Tribes to move; in others, Tribes just watched water pass by as their fisheries dried up. States likewise ignored, subverted, and circumvented Indian water rights by adopting a business-as-usual approach to granting water rights and allowing diversions that directly conflicted with Indian rights: *ibid.*
- <sup>102</sup> *Arizona v California* 373 US 546, 600 (1963).
- <sup>103</sup> *Ibid.*
- <sup>104</sup> *Id* at 601.
- <sup>105</sup> Very few courts have addressed this issue. See *Colville Confederated Tribes v Walton; United States v Adair* at 1414 (non-consumptive fishing and hunting water rights prevent other appropriators from depleting streams below protected level); *United States v Anderson* at 5 (court required maintenance of 68 degrees Fahrenheit or less to protect native fish population).
- <sup>106</sup> See above notes 33-46 and accompanying text.
- <sup>107</sup> See SJ Shupe, 'Water in Indian Country: From paper rights to a managed resource' (1986) 57 *U Colo L Rev* 561, pp 579-81. In 1975 the Secretary of Interior mandated automatic disapproval of any tribal law that 'purports to regulate the use of water on Indian reservations'. This policy affects Tribes organised under the *Indian Reorganisation Act of 1934* because *IRA* constitutions generally require that tribal laws and constitutional amendments be approved by the Secretary of Interior. Tribes that have amended their *IRA* constitution and deleted that requirement and other Tribes are free to have water regulations. See *Kerr-McGee Corp v Navajo Tribe of Indians* 471 US 195 (1985).
- <sup>108</sup> See TW Clayton, 'The policy choices Tribes face when deciding whether to enact a water code' (1992) 17 *Am Indian L Rev* 523, pp 558-87 (which discusses tribal water codes and related issues regarding the Navajo, Rosebud Sioux, and Umatilla Tribes and Colville Reservation).
- <sup>109</sup> See above notes 41-43 and accompanying text.
- <sup>110</sup> In *United States v Anderson* 736 F 2d 1358 (9<sup>th</sup> Cir 1984), the Court held that state regulatory authority over non-Indian water rights on fee land on the reservation would not adversely impact tribal interests. The crucial factors were the extent of non-Indian settlement in the area, the proposed state comprehensive water management program and the geography of the stream which flowed along the boundary of the reservation. See also *Big Horn III* at 283 (held, Wyoming state engineer could enforce and administer state water rights on reservation). But see *Colville Confederated Tribes v Walton* at 51 (the Tribe has jurisdiction to regulate water use by non-Indian users on reservation, mainly because of unique factors—stream system was small, non-navigable and entirely within the reservation's boundaries, and diversions would seriously impact on tribal agricultural and fisheries). Cf *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti* 278 Mont 50, 923 P 2d 1073 (1996) (state may not issue

permits for non-Indian water use on reservation until tribal rights are quantified because otherwise state does not know if any unappropriated water remains).

<sup>111</sup> 43 USC 666 (West 1986).

<sup>112</sup> *Arizona v San Carlos Apache Tribe* 463 US 545 (1983) (*McCarren Amendment* removed any limitations that state Enabling Acts or federal policy may have placed on state-court jurisdiction over Indian water rights, including suits by Tribes).

<sup>113</sup> *Colorado River Water Conservation District v United States* 424 US 800 (1976).

<sup>114</sup> *United States v Oregon* 44 F 3d 758 (9<sup>th</sup> Cir 1994).

<sup>115</sup> See *San Carlos Apache* at 578-79 (dissent).

<sup>116</sup> See Getches et al, above note 2, pp 831-39.

<sup>117</sup> Water marketing, which is extremely controversial, involves selling water as a commodity to non-Indian users on or off reservation or leasing or selling the water right outright. Tribes may agree not to exercise the water right, thereby making it worthwhile for junior users to negotiate a deal. See, generally DH Getches, 'Management and marketing of Indian water: From conflict to pragmatism' (1988) 59 *U Colo L Rev* 515, pp 541-48; SJ Shupe, 'Indian Tribes in the water marketing arena' (1989-90) 15 *Am Indian L Rev* 185. Some critics argue that water sales are inconsistent with the nature of reserved rights, which depends on one's interpretation of the reservation's purpose – homeland versus agricultural. See *Big Horn I* at 100 (no right to sale of reserved water to non-Indians off the reservation). Others argue that water should be kept within the water basin; otherwise, cities and water districts will destroy rural areas by buying all the water. On the other hand, non-Indians may sell or lease their water rights, so Indians should be able to also provide needed revenue for Tribes. See PW Sly, 'Urban and interstate perspectives on off-reservation tribal water leases' (1996) 10 *WTR Nat Resources and Env't* 43.

<sup>118</sup> Between 1993 and 1996, no settlements occurred. In the Fall of 1997, the Warm Springs Tribe finalised a water settlement which provided certainty to the states and little to the Tribes. The Tribe waived its priority date, but obtained recognition of its treaty date (which arguably was in contention): Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement (1997).

<sup>119</sup> Getches et al, above note 3, pp 848-908.

<sup>120</sup> *United States v Winans* 198 US 371 (1905).

<sup>121</sup> See, generally, FG Cohen, *Treaties on trial: The continuing controversy over Northwest Indian fishing rights*, University of Washington Press, 1986.

<sup>122</sup> See *Mattz v Arnett* 412 US 481 (1973) (no state regulation over Indian fishing in areas of Klamath River Reservation that had been opened for unrestricted homestead entry); *Lower Brule Sioux Tribe v South Dakota* 711 F 2d 809 (8<sup>th</sup> Cir 1983) cert denied 464 US 1042 (1984) (Tribe retains exclusive jurisdiction to regulate members' hunting and fishing on reservation lands acquired by United States for dam and reservoir projects); *Leech Lake Band of Chippewa Indians v Herbst* 334 F Supp 1001 (D Minn 1971) (*Nelson Act*, which provided for a complete extinguishment of Indian title to lands of Leech Lake Reservation, did not abrogate treaty fishing and hunting rights).

<sup>123</sup> See above notes 36-43 and accompanying text.

<sup>124</sup> *Brendale* per Stevens J at 433-49.

<sup>125</sup> 462 US 324 (1983).

<sup>126</sup> State and tribal fishing and hunting regulations differed in irreconcilable ways. For example, the Tribe allowed hunting of does and bucks; the state permitted only bucks to be killed. The Tribe did not require state licences for anyone hunting or fishing on reservation. As a result, non-Indian hunters faced arrest for illegal possession of game because, even though the deer was killed on reservation, they failed to have a state hunting licence. The Tribe's management efforts would be for naught if non-Indians had to purchase both state and tribal licences and abide by state laws.



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- <sup>127</sup> But see *Montana v United States* 450 US 544 (1981). Applying a set of particularly bad facts, the Supreme Court held that the Tribe could not regulate fishing and hunting on fee lands held by non-Indians. Since the early 1920s, the state had stocked reservation waters with fish and provided some game as well. Despite a tribal resolution, the Tribe had allowed the state 'near exclusive regulation' of hunting and fishing on fee lands on the reservation.
- <sup>128</sup> 113 S Ct 2309 (1993).
- <sup>129</sup> The *Bourland* decision reflects the current beliefs of the Supreme Court more than any consistent logic. It was entirely plausible that federal law could have used tribal law since the area still maintained its tribal character. The current Supreme Court has issued few opinions that could be construed as recognizing or expanding tribal sovereignty.
- <sup>130</sup> See Getches et al, above note 3, pp 858-60. See also *Me Rev Stat An*, Title 30, 6207 (West 1993); *Minn Stat* 97.433 (1984).
- <sup>133</sup> For example, Pacific Northwest treaties generally reserved to the Tribes 'the right of taking fish at all usual and accustomed places, in common with citizens of the Territory'. See *Washington v Washington State Commercial Passenger Fishing Vessel Association* 443 US 658, 666 n 2 (1979) (lists treaties). Meanwhile, these same treaties limited 'the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands'. See J Royster, *Native American natural resources* (Spring 1997 course materials still in draft form), pp 470-71. The treaties of the Great Lakes Tribes generally do not have language limiting the territorial extent of the reserved rights and thus extend to ceded lands as well: *ibid*. See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v Voight* 700 F 2d 341, 350 n 14 (7<sup>th</sup> Cir) (*LCO I*) cert denied 464 US 805 (1983). For a comprehensive review of off-reservation resource uses and management rights and regimes see, generally MC Wood, 'Tribal management of off-reservation living resources: Regaining the sovereign prerogative' in Meyers (ed), above note 1, pp 34-66.
- <sup>131</sup> *United States v Hicks* 587 F Supp 1162, 1165 (WD Wash 1984) (Olympic National Park is no longer 'open and unclaimed' lands since use as an elk preserve and national park is inconsistent with hunting). See also *Crow Tribe of Indians v Reppis* 73 F 3d 982 (10<sup>th</sup> Cir 1995), cert denied 116 S Ct 1851 (1996) (an aberrational opinion that held that off-reservation hunting rights were not permanent rights and were repealed on statehood).
- <sup>132</sup> See above notes 68-75 and accompanying text. The Supreme Court developed canons of Indian treaty construction because the Indians and government were not bargaining from positions of equal strength, the treaties were drawn up by representatives of the US in a written language unfamiliar to the Indians, the Indians' understanding of treaty terms depended on interpreters working for the government and the Indians were unfamiliar with the legal manner of expression and its nuances. See *LCO I* at 350.
- <sup>133</sup> See *United States v Winans* 198 US 371 (1905); *Seufert Bros Co v United States* 249 US 194 (1918); *Tulee v Washington* 315 US 681 (1942); *Puyallup Tribe v Dept Of Game* 391 US 392 (1968) (*Puyallup I*); *Dept of Game v Puyallup Tribe* 414 US 44 (1973) (*Puyallup II*); *Puyallup Tribe v Dept of Game* 433 US 165 (*Puyallup III*); *Washington v Washington State Commercial Passenger Fishing Vessel Ass'n* 443 US 658 (1979) (*Fishing Vessel*).
- <sup>134</sup> *Fishing Vessel* at 679.
- <sup>135</sup> *US v Winans* at 381-82.
- <sup>136</sup> *Tulee* at 685; *Puyallup I* at 398. Compare, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v Wisconsin* 668 F Supp 1233, 1238-39 (WD Wisc 1987) (*LCO IV*) (expands state regulation of Indian off-reservation hunting rights if necessary for the purposes of health and safety).
- <sup>137</sup> *Puyallup II* at 45, 48 (the court rejected Washington's regulation banning net fishing in favour of sport hook and line fishing because it effectively eliminated all Indian fishing and was thus discriminatory).
- <sup>138</sup> *Fishing Vessel* at 684-85.

<sup>139</sup> *Id* at 685.

<sup>140</sup> *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v Wisconsin* 653 F Supp 1420, 1430 (WD Wisc 1987) (*LCO III*); *United States v Washington* 384 F Supp 312, 402 (WD Wash 1974) (*Boldt/Phase I*) aff'd 520 F 2d 676 (9<sup>th</sup> Cir 1975) cert denied 423 US 1086 (1976). But see *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v Wisconsin* 740 F Supp 1400, 1421 (WD Wisc 1990) (*LCO VII*) (Tribe has no off-reservation right to log timber because the Tribe did not historically kill trees, just used every part of the tree and kept them alive).

<sup>141</sup> See *United States v Washington* 506 F Supp 187 (WD Wash 1980) (*Phase II*) aff'd in part and rev'd in part 694 F 2d 1374 (9<sup>th</sup> Cir 1982) vacated in part 759 F 2d 1353 (9<sup>th</sup> Cir 1985) (en banc). But see *Nez Perce Tribe v Idaho Power Co* 847 F Supp 791 (D Id 1994) (Tribe has no right to damages for destruction of fish runs when dam was built because it is not entitled to certain quantity of fish). See, generally, GD Meyers, 'United States v Washington (Phase II) revisited: Establishing an environmental servitude protecting treaty fishing rights' (1988) 67 *Ore L Rev* 771, pp 771-98.

<sup>142</sup> GD Meyers, 'Different sides of the same coin: A comparative view of Indian hunting and fishing rights in the United States and Canada' (1991-92) 10 *UCLA Env L and Pol'y* 67, pp 98-102.

<sup>143</sup> At 49.

<sup>144</sup> For example, the Columbia Rivers Inter-Tribal Fish Commission (CRITFC) has been involved with the management of the Columbia basin to restore and protect the anadromous fish. For updated information about CRITFC see their home page at [www.critfc.org](http://www.critfc.org).

<sup>145</sup> The *Bald Eagle Protection Act* has a permit process to provide eagle feathers and parts to Tribes for ceremonial use. Tribes have objected because of the practical problems of actually getting feathers or parts in a timely manner. The time wait may be as long as five years.

<sup>146</sup> See *United States v Dion* 476 US 734 (1986) (court found *Bald Eagle Protection Act* and its legislative history showed clear and plain intent to abrogate treaty hunting rights to take eagles on reservation for ceremonial purposes; statute included provisions for taking or possessing eagle for Indian religious purposes); *United States v Billie* 667 F Supp 1485 (SD Fla 1987) (court found clear intent in *Endangered Species Act* to abrogate treaty hunting rights). But see *United States v Bresette* 761 F Supp 658 (D Minn 1991) (*Migratory Bird Treaty Act* lacks the clear intent needed to abrogate Chippewa treaty hunting rights).

<sup>147</sup> *United States v Jim* 888 F Supp 1058 (D Or 1995) (court rejected claims that federal statutes protecting eagles violate *Religious Freedom Restoration Act* because such acts promoted a compelling governmental interest in the least restrictive means); *United States v Lundquist* 932 F Supp 1237 (D Or 1996) (same).

<sup>148</sup> See JV Royster, 'Mineral development in Indian country: The evolution of tribal control over mineral resources' (1994) 29 *Tulsa L J* 541, p 542.

<sup>149</sup> *Ibid*.

<sup>150</sup> *Ibid*.

<sup>151</sup> 304 US 111 (1938).

<sup>152</sup> It is important to remember that under the trust system for land ownership, the US holds the fee and the Tribes retain beneficial ownership of the land. Trust lands may not be alienated, encumbered or otherwise restricted without the express consent of Congress.

<sup>153</sup> Exceptions exist. Congress sometimes expressly reserved the mineral estate of allotted lands to the Tribe indefinitely or for a period of time. See Royster, above note 149, p 549 n 39 See also *Northern Cheyenne Tribe v Hollowbreast* 425 US 649, 651-52, 658-60 (1976) (court held that the Tribe retained all mineral rights, including those on allottee's land, because of subsequent Congressional amendments which terminated original grant to allottees; allottees had an expectancy interest, not a vested future interest in the minerals).

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- <sup>154</sup> See *Johnson v M'Intosh* 21 US (8 Wheat) 543 (1823). Chief Justice Marshall concluded that on European 'discovery' of the New World, Indians retained the right of possession and occupancy of their land but lost the right to transfer it to anyone other than the federal government: id at 573-74. In furtherance of this principle, Congress enacted various statutes, eg, Indian Trade and Intercourse Acts, that precluded the alienation of interests in Indian lands. See Cohen, above note 2, pp 508-22.
- <sup>155</sup> Congress retains the exclusive right to extinguish original Indian title but until then Tribes are entitled to the full use and enjoyment of surface and mineral estates and to the fruits of the land, such as timber resources. Cohen, above note 2, p 491. See for example, *United States ex rel Hualpai Indians v Santa Fe Pac RR* 314 US 339 (1941).
- <sup>156</sup> See Royster, above note 149, pp 552-60 (for a general history of mineral leasing statutes on reservations).
- <sup>157</sup> 25 USC 396a-g.
- <sup>158</sup> 25 USC 396a.
- <sup>159</sup> Royster, above note 149, p 559.
- <sup>160</sup> Ibid.
- <sup>161</sup> See *United Nuclear Corp v United States* 912 F 2d 1432, 1435-37 (Fed Cir 1990). The Court held that United Nuclear suffered a taking when the Department of Interior refused to approve a mining plan absent tribal approval and the lease expired due to the company's failure to begin mining within the initial 10 year plan. The company had invested over \$5 million in exploration and related costs and discovered more than 20 million pounds of uranium after the Tribe's initial approval of the lease. As one commentator notes, requiring the Tribe to accept uranium mining is inconsistent with tribal sovereignty and the trend toward tribal control of mineral development: Royster, above note 149, p 564 n 142.
- <sup>162</sup> See *Jicarilla Apache Tribe v Andrus* 687 F 2d 1324 (10<sup>th</sup> Cir 1982). While the original notice technically violated the Secretary's regulations regarding the publication of oil and gas lease sales, the court refused to cancel the lease and awarded bonus payments. The court thought the Tribe was acting in bad faith by using *NEPA* to stop the unprofitable leases, but not its own quite profitable joint venture.
- <sup>163</sup> Royster, above note 149, p 566.
- <sup>164</sup> *Supron Energy* at 1563-69.
- <sup>165</sup> *Kenai Oil and Gas Inc v Dept of Interior* 671 F 2d 383, 387 (10<sup>th</sup> Cir 1982) (Secretary may consider all relevant factors affecting Indian interests, including economic ones, in determining whether communitisation agreement is in best interests of Tribe); *Cheyenne-Arapaho Tribes of Oklahoma v United States* 966 F 2d 583 (10<sup>th</sup> Cir 1992) cert denied sub nom *Woods Petroleum Corp v Cheyenne-Arapaho Tribes* 113 S Ct 1642 (1993) (Secretary abused discretion by not considering economic factors). But see *Cotton Petroleum Corp v US Dept of Interior* 870 F 2d 1515, 1525-26 (10<sup>th</sup> Cir 1989) (Secretary's disapproval of communitisation agreement based only on consideration of economic factors was arbitrary and capricious); *Woods Petroleum Corp v US Dept of Interior* 18 F 3d 854 (10<sup>th</sup> Cir 1994). For an article trying to reconcile these cases see RL Marsh, 'Secretarial discretion in communitization of Indian oil and gas leases: The tenth circuit speaks with a forked tongue' (1997) 32 *Tulsa LJ* 779.
- <sup>166</sup> The *IMDA* 25 USCA 2101-2108 retains the leasing rights of Tribes organised under the *Indian Reorganisation Act* and the rights of tribes to continue leasing under the 1938 Act.
- <sup>167</sup> *Federal Oil and Gas Royalty Management Act* 30 USC §§ 1701-1757 (West 1986 and Supp 1998).
- <sup>168</sup> *Indian Energy Resources Act of 1992* 25 USCA §§ 3501- 3506 (West Supp 1984-97).
- <sup>169</sup> 455 US 130 (1982).
- <sup>170</sup> *Kerr-McGee Corp v Navajo Tribe* 471 US 195 (1985).

## Indigenous Peoples and Governance Structures

<sup>171</sup> Cohen, above note 2, p 538.

<sup>172</sup> See *United States v Algoma Lumber Co* 305 US 415, 420 (1939); and *Shoshone* at 118.

<sup>173</sup> See *United States v Mitchell* 463 US 206 (1983) (describes role of federal government in sales of timber on Indian lands and various statutes); *National Indian Forest Resources Management Act of 1990* 25 USC 3101 et seq.

<sup>174</sup> *United States v Mitchell* 463 US 206, 220 (1983).

<sup>175</sup> *Ibid.*

<sup>176</sup> *Brendale* at 444. In dissent, Blackmun J so incredulously asked his brethren on the court: '[a]nd how can anyone doubt that a tribe's inability to zone substantial tracts of fee land within its own reservation—tracts that are inextricably intermingled with reservation trust lands—would destroy the tribe's ability to engage in the systematic and coordinated utilisation of land that is the very essence of zoning authority?': at 458.

<sup>177</sup> *Id* at 434.

<sup>178</sup> See above notes 41-43 and accompanying text.

<sup>179</sup> *Wheeler* at 323.

<sup>180</sup> *Id* at 317.

<sup>181</sup> First, Tribes may tax or license non-members entering consensual relationships with the Tribe; second, tribal regulation may extend to those activities of non-tribal members on non-fee lands within reservations when the activity has a direct effect on the political integrity, economic security or welfare of the Tribe: *Montana v US* at 565.

<sup>182</sup> *Wheeler* at 323.

<sup>183</sup> See above notes 52-64 and accompanying text.

<sup>184</sup> See above notes 175 and 36-39 and accompanying text.

<sup>185</sup> See above notes 152-56 and 172 and accompanying text.

<sup>186</sup> See above notes 170-71 and accompanying text.

<sup>187</sup> See above notes 80-110 and accompanying text.

<sup>188</sup> See above note 120 and accompanying text.

<sup>189</sup> See above notes 131-38 and accompanying text.

<sup>190</sup> See above note 142 and accompanying text.

<sup>191</sup> See above notes 143-45 and accompanying text.

<sup>192</sup> Meyers, above note 143, pp 98-101.

## Chapter 4 ■

### Governance by the Indigenous Peoples of Native Alaska

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#### Introduction

The first part of this Chapter deals briefly with the history and demography of native Alaskan peoples. This is followed by an overview of the establishment and recognition of Aboriginal title. The attempt to deal with such Aboriginal title through different non-Indigenous governance structures has had important ramifications for governance structures existing among native Alaskan peoples and villages today.

The key development relating to Aboriginal title is the *Alaskan Native Claims Settlement Act 1975* (ANCSA), which aimed to achieve native self-determination. ANCSA's failure to achieve this has had wide-ranging effects on native Alaskan culture and society, particularly on the rights to subsistence and to tribal governance, which are also examined.

The need for native Alaskans to be able to define their own political institutions is highlighted as essential to maintaining their tribal character<sup>1</sup> and their ability to possess adequate governance structures capable of dealing with their own particular social problems and cultural needs. Retaining possession and control of their land and subsistence way of life is essential for native Alaskans.

#### Native Alaskans and their history

Native Alaskans first arrived in Alaska at least 11,000 years ago. The three main groups of native Alaskans are Aleut, Yup'ik and Inupiat Inuit and Indian.<sup>2</sup> The Inupiat ancestors crossed the Bering Strait from Asia, settling on the Arctic coast, and ancestors of the Athabaskan Indians also originated from Asia.<sup>3</sup> Aleuts settled mainly on the Alaskan Peninsula and the Aleutian Islands in southwest Alaska. Yup'ik and Inupiat Inuit settled in western and northern Alaska with the Yup'ik Inuit settling on the coast of southwest Alaska and the deltas of the Yukon and Kuskokwim rivers. Tlingit, Haida and Tsimshian Indians settled in southeast Alaska and the Athabaskan Indians settled in interior Alaska, along the Yukon and Tanana rivers.<sup>4</sup> The Alaskan Indigenous First Nations described here will be referred to in this Chapter as Alaskan Native peoples unless separately referred to.

Alaska's harsh climate and remote, vast land meant that exclusive native Alaskan possession of the land, or Aboriginal title, was not altered until the arrival of Russian fur traders in the mid-eighteenth century, followed by commercial whalers and fisherman in the nineteenth century. However, the inhospitable conditions meant that the only substantial permanent Russian settlements were in Kodiak and Sitka.<sup>5</sup>

In 1867 the Russians sold their interests in Alaska to the United States (US) through the Treaty of Cession, for \$7.2 million.<sup>6</sup> After this sale, the Tlingit Indians of southeast Alaska protested to no avail, arguing that they were in fact the real owners of the land.<sup>7</sup>

In the late 1800s gold was discovered and miners spread from southeast Alaska through interior Alaska. By the turn of the century, large areas of land began to be withdrawn from native Alaskans to create parks, refuges and national forests.

## **Aboriginal title**

Article 3 of the Treaty of Cession recognised native Alaskans' prior sovereignty, but directed that 'uncivilised' Tribes were subject to laws that the US may, from time to time, invoke regarding Aboriginal Tribes of Alaska.<sup>8</sup> Accordingly, the *Organic Act* of 1884<sup>9</sup> was enacted, which recognised the native Alaskans' rights to occupy the land, but neither denied nor recognised any other rights. It allowed that the possession of lands actually used, claimed by, or in occupation of 'Indians or other persons in the said district' would not be disturbed. However, the terms under which such persons may acquire title to such lands would be reserved for future legislation by Congress.<sup>10</sup> Further, the US Supreme Court has held that the Act acknowledged the continued existence of Aboriginal rights.<sup>11</sup>

Initially, Alaskan Aboriginal title was not such a pressing issue due to the location of Alaska and its remoteness. That is, there was much less motivation to establish settlement, and hence negotiate with native Alaskans to extinguish title, than there had been in the lower 48 states. In fact such motivation did not exist for nearly a century.<sup>12</sup> During this time, after reserving the right to recognise or deny Aboriginal title, the US government made four further attempts to recognise Aboriginal title in Alaska.<sup>13</sup>

## **Native Allotment Act 1906**

The *Native Allotment Act 1906*<sup>14</sup> granted restricted title to 160 acres of public land to native adult Alaskans. The land was held in trust by the Department of Interior. Approval by the Secretary of the Interior was needed to sell or lease land,<sup>15</sup> which, prior to 1930, was used seasonally for hunting and fishing areas.

## **Native Townsite Act 1926**

The *Native Townsite Act 1926* granted native Alaskans the option of obtaining restrictive title on an entire village or alternatively fee simple title on individual lots. If fee simple was granted, vacant lots could be sold to non-natives. The Bureau of Land Management (BLM) granted restricted title to villages but simultaneously sold vacant lots to non-natives. Both native Alaskans and the Bureau of Indian Affairs (BIA), who administered native villages created under the Act, protested these sales.<sup>16</sup>

### **Reservations and the Indian Reorganisation Act 1934**

The creation of reservations was the primary means of recognising Aboriginal title in Alaska. This could be achieved by statute, by executive order prior to 1919 when the Presidential right was revoked or under the *Indian Reorganisation Act 1934* which was amended in 1936 to include Alaska.<sup>17</sup>

### **Statehood Act 1958**

The *Statehood Act 1958*<sup>18</sup> was enacted which admitted Alaska to the Union of the United States and meant the state could select 103.5 million acres of federally owned land. With the effect of this Act and the discovery of oil in Alaska, the motivation to settle any Aboriginal title to land increased significantly.<sup>19</sup> The recognition of the legal status of native Alaskan Aboriginal title, however, remained dependent upon the US government. Further, unless statutory recognition had been obtained subsequent to the *Organic Act*, native Alaskans held 'unrecognised' rights and were not eligible for any compensation for loss of land.<sup>20</sup> Although the Act did require that the state disclaim any rights or jurisdiction in lands which may have been subject to the right or title held by Indians, Inuit or Aleuts.<sup>21</sup>

### **The emergence of a new land claims Act—*The Alaskan Native Claims Settlement Act 1971***

Conflict occurred when state chosen land and native Alaskan claims overlapped. Despite the fact that Aboriginal title was never extinguished, the state classified the public domain as inclusive of lands used for subsistence purposes by native Alaskans.<sup>22</sup> By 1966, approximately 122 million acres of land were under protest by Native Alaskan land claims.<sup>23</sup> With the mobilisation of native Alaskan villagers and the creation of the Alaskan Federation of Natives (AFN) in 1966, through unified protest the land selections came to a halt in 1968 as Secretary of the Interior, Udall, imposed a land freeze.

When oil was discovered in Prudhoe Bay in 1968, oil companies joined the movement to settle native Alaskan claims. Huge profits could be facilitated by the construction of the Trans-Alaskan pipeline. However, the pipeline traversed federal lands and was affected by native claims. Thus a settlement of native claims would be beneficial for oil companies as well as for native Alaskans.<sup>24</sup> These pressures and a preference by the US government for legislative rather than litigated settlement of native claims promoted the concept of the ANCSA.

The Act was derived from a report by the Federal Field Committee for Development Planning in Alaska which concluded that native Alaskan culture was a culture of poverty and disregarded the strengths and structure of such a culture, economy and government.<sup>25</sup> In this manner, the central thesis of ANCSA was premised on the need for

large-scale economic development and the expectations of traditional cultural decline. Although ANCSA's primary purpose was to effect native self-determination and end paternal federal-Indian relations,<sup>26</sup> with the expansion of a modern economy it seemed that the US government envisaged that the traditional sector would gradually disappear.

### *Aims and Expectations*

ANCSA was heralded as a new way of resolving Aboriginal title claims to land in Alaska. It arose from a combination of land claim activism,<sup>27</sup> Indigenous aspirations for self-determination and economic and political events. After years of subjection to assimilationist policies, native Alaskans expected that their land and way of life would finally be protected for their generation and generations to come. Further, Congress also viewed ANCSA as a means to alleviate the low standard of living conditions Alaskan natives faced as a direct or an indirect result of previous policies.

In enacting ANCSA the US Congress appeared to recognise the necessity of land for native Alaskan subsistence purposes, but its primary aim was to promote the economic development of land. ANCSA was intended to enable native Alaskans to have land, capital, entrepreneurial corporations and opportunities to enter the business world, a type of development believed to be the principal means of improving societal and economic conditions in Alaska.<sup>28</sup>

### **The ANCSA model as a regional settlement of Indigenous claims**

ANCSA required that the native Alaskans relinquish Aboriginal title to most of the state of Alaska (365 million acres) and in return they would receive land selection rights to 44 million acres of land and \$962.5 million.<sup>29</sup> In the context of 1971 and the Presidency of Richard Nixon, this must have seemed to be a reasonable settlement. However, title to this land was not conveyed to native Alaskans or tribal governments, but to native corporations. The legal and economic framework of these corporations bore little relationship to Aboriginal organisations and were based on US type corporations to a significant extent.

ANCSA established 12 regional corporations in regions which were defined according to traditional use patterns and ethnology. They received title to the subsurface estate in the 22 million acres of surface estate selected by and transferred to approximately 200 village corporations, as well as surface and subsurface title to land they received independently of village selections.<sup>30</sup>

Under ANCSA, land in the village itself and immediately around it had to be reconveyed from village corporations to state chartered local governments. Further, 6 of the 12 regional corporations were entitled to another 16 million acres of land. Any remaining lands were set aside for future pending native allotment applications, townsites, historic



sites and other purposes. Each regional corporation was also required to distribute 70 per cent of its annual revenue, from the sale of natural resources, to the 12 regional corporations on a per capita basis. This was designed to balance the disparity in natural resources among regions. A 13th regional corporation was also established to accommodate the interests of native Alaskans residing outside of Alaska. This corporation was entitled to a portion of the compensatory \$962.5 million, but not to any land title.

In order to distribute the \$962.5 million to the native corporations the Alaskan Native Fund<sup>31</sup> was established. Approximately 50 per cent of all the money from the fund had to be redistributed from the regional corporations to their stockholders and to village corporations within each region.<sup>32</sup> To enrol as stockholders, native Alaskans were required to be of minimum one quarter native descent and born before 18 December 1971. Once these criteria were satisfied, stockholders were issued 100 shares of stock in one of the corporations<sup>33</sup> with those born after 18 December 1971 entitled to shares by inheritance only.

Thus a corporate system was constructed to enable native interests, assets and capital to be used towards productive investments and to maximise shareholder interests. In contrast to ordinary corporations, however, the transferability of stock was restricted but would become fully transferable to native and non-native Alaskans on 18 December 1991 when all stock in regional and village corporations was to be cancelled and new shares issued.<sup>34</sup> Further, state taxation on land received by the corporations in fee simple, under ANCSA, was also limited. Land not developed or leased to third parties was exempt from state and local real property taxes until 1991. The model of corporations and their legal requirements was essentially based on the US private corporation, with some modifications described above. After 1991, it was envisaged by the US government that they would increasingly behave like US private sector profit making corporations with normal taxation.

Such was the nature of ANCSA that it failed to address the concerns of native Alaskans that their land would be protected and remain in their possession until passed on to future generations. Under the corporate structure of ANCSA native Alaskans held genuine fears that after 1991 (when native corporations would be subject to full taxation) their land could be seized and sold to service the debts incurred by the corporation. They were also concerned that corporate takeovers could occur through the buy-out of shares and, particularly, that non-natives could gain control over their land and ownership would be lost forever. Further, a whole generation of native Alaskans, those born after 1971, were excluded from any claim to land, and in some respects to their culture. Collective aspirations for governance, land and resource management were not adequately reflected in the ANCSA corporate model. In 1983 the Inuit Circumpolar Conference (ICC) appointed Thomas Berger, an eminent Canadian lawyer, to conduct the Alaska Native Review Commission to review ANCSA. The report, *Village Journey*,<sup>35</sup>

provided the basis for powerful native Alaskan submissions regarding the improvements that should be made to ANCSA and a critique of its ability to meet native Alaskan needs.

In response to such concerns, various amendments to ANCSA were made by the US Congress. The 1987 amendments conferred decision-making regarding such issues on shareholders.<sup>36</sup> That is, the 1971 provisions would remain unless shareholders decided to alter the corporations' articles. Regional and village corporations were able to amend the articles of incorporation to issue stock to native Alaskans born after 1971. They could also aid in maintaining native control of the corporation by imposing further restrictions on stock alienation and by conferring various rights on themselves. One such right entailed the purchase of stock passing on intestacy to non-native Alaskans, although this hinged on the financial capability of the corporation to be able to achieve this and would not always be the most effective way of maintaining control.<sup>37</sup> Further, the tax exemptions were extended indefinitely unless the land was developed or leased. Such undeveloped native corporation lands were protected from being seized as a result of bankruptcy and a range of similar situations.<sup>38</sup>

Even though each corporation was to afford the shareholders' participation in corporate governance and was to facilitate a process by which the appropriate form of economic development was to occur, ANCSA dramatically affected the tribal, social and cultural life of native Alaskans. Significantly, ANCSA also extinguished Aboriginal title to land and Aboriginal rights to hunting.

### *Critique of ANCSA*

ANCSA had wide ranging effects on native Alaskans, politically, economically, socially and culturally. It had direct effect on the villages, regions and individuals, and it affected the native Alaskan subsistence lifestyle and governance systems. ANCSA conferred a degree of economic power on native Alaskans never seen before. There were complaints that many corporations employed a high percentage of non-Indigenous peoples. However, some native Alaskans became corporate executives, bankers and at the very least had the potential to fill corporate roles never filled before and hence a new political influence was gained. However, this opportunity was only available to relatively few.<sup>39</sup> Many corporate jobs went to non-natives.

The theory behind regional corporations was that they would provide shareholders with employment and pay regular dividends. Neither of these has consistently occurred and only a few native Alaskans actually benefited through employment by the corporations. This in itself was a divisive factor amongst native Alaskans. Also, few native Alaskans had the training and expertise required to manage the corporations and related businesses. Bad advice was received, and the process of learning was costly and a legal and administrative burden.<sup>40</sup> Such factors hindered corporate success and the federal government's expectation, that revenues generated would fund community development in native

Alaskan villages, could not be achieved. Health, housing and education may have improved since the introduction of ANCSA but this can largely be attributed to increased state and federal funding. Further, the levels of these are still below average compared with non-native Alaskans, leading to the conclusion that ANCSA has not really met the needs of native Alaskans.

##### *Corporate ethos and Indigenous governance*

It is questionable whether the corporate ethos ever could address such needs. For example, by law, corporations had to make good faith efforts at earning a financial return for native shareholders.<sup>41</sup> Therefore, investments occurred in native and non-native enterprises generally outside rural Alaska. Employment in villages, although a direct native Alaskan need, was not always the most effective means to maximise profits and therefore not a direct concern of the corporate structure. Also, corporate success is measured financially, and in different terms from the way in which native Alaskans measure their needs, mainly, the protection of the land and cultural way of life.<sup>42</sup> Thus the division between corporate and native Alaskan ideals is evident.

The ANCSA model of a corporation was ill conceived even as a profit making entity. Most corporations form around clear economic opportunities or enterprises. These corporations were formed as a vehicle for the ANCSA settlement moneys and land-holding. They were then meant to seek economic development opportunities. Some regions had little experience or had depleted or poor resource bases.

##### *Divisions and conflicts*

Other divisions arose from the very nature of ANCSA. It enhanced 'distinction' among native Alaskans. Villages were now distinct from each other, aligned to particular corporations; regions similarly. Some villages and regions were in conflict over new boundaries. Villages also lost some political and social autonomy through corporate control of them. This significantly affected tribal governance and traditional patterns of leadership within the villages.<sup>43</sup> The nature of decision-making was different—the customs of sharing, subsistence culture and other aspects of native Alaskan ways of life, were ignored.<sup>44</sup> In fact many decisions by regional corporations to gain revenue from the use of natural resources directly conflicted with the native Alaskan subsistence lifestyle.

##### *Subsistence*

There was virtually no connection between ANCSA and the native Alaskan traditional way of life, subsistence. By extinguishing any Aboriginal right to hunt, ANCSA greatly affected the native Alaskan cultural practices, social relationships and native economy based largely on subsistence.<sup>45</sup> Subsistence became dependent on a myriad of federal and state rights. This, coupled with the aim of ANCSA to corporatise culture, meant that native values and the evolution of native culture became largely determined by state and federal law as opposed to being self-determined.<sup>46</sup>

It seems that there was no real attempt to meet the needs of native Alaskan peoples. Even the most basic comparison between subsistence and a corporate economy highlights the difficulty in aligning either process with the other. They are both based on entirely different time frames. Subsistence is based on migratory patterns, on seasonal changes and life cycles of organisms. In contrast, corporate cycles revolve around financial years and plans and profit and there are significant legal compliance costs.<sup>47</sup> These practical difficulties and increased regulation have led to uncertainty as to how subsistence rights can continue and how they now apply.

### **Contemporary strategies relating to subsistence rights, environmental and natural resources management**

In an attempt to deal with the uncertainty of subsistence rights for native Alaskans, various legislative and co-management strategies have been established.

#### **Alaskan National Interest Lands Conservation Act 1980 (ANILCA)**

In enacting ANCSA, Congress assumed that the protection of resources used for subsistence living would become joint federal and state responsibilities. In reality, federal and state policies provided little protection. Land historically committed for native subsistence use became highly regulated. Subsistence was restricted on grounds of biological necessity, management convenience and the increasing demands by non-native Alaskans to wildlife resources, for sporting, recreational and commercial uses.<sup>48</sup>

In 1980 after pressure from environmental and native interests, Congress enacted ANILCA. This Act was to ensure that subsistence hunting and fishing was to be given priority over other uses of fish and wildlife on public lands within Alaska. However, ANILCA had a limited territorial reach. The outer continental shelf was not within the boundary of Alaska and therefore not subject to ANILCA subsistence provisions. Further, subsistence priorities only applied to navigable waters in which the US had reserved water rights<sup>49</sup> and federal agencies were responsible for identifying those waters.<sup>50</sup> However, ANILCA would vest in the state undivided management of fish and wildlife within Alaska with the requirement that the state enact 'laws of general applicability' to ensure subsistence under state law.<sup>51</sup> If the state did not enact such laws, it would lose control of the management of fish and wildlife on land still under federal ownership, representing more than half of the land in Alaska.<sup>52</sup>

Further, the federal government identified the protection of subsistence rights of native Alaskans as legally deriving from the US Constitution. Subsistence rights then derived from partial statutory restoration of Aboriginal hunting and fishing rights (extinguished under ANCSA) and from a centralised regulatory authority. Subsequently, Alaska failed to comply with ANILCA and lost the right to regulate fish and wildlife resources on

federal land.<sup>53</sup> In 1990 the federal government took over. It also adopted a regulatory approach and defined public lands narrowly such that navigable waters were not generally included in the subsistence preference. For many native Alaskan villages, those waters provide the main source for subsistence living.<sup>54</sup>

It has become clear that ANILCA is not an adequate means of protecting the subsistence rights of native Alaskans.<sup>55</sup> Although ANILCA regulates lands set aside for conservation so as to ensure the continuance of subsistence uses, this is not the only priority imposed on those lands.<sup>56</sup> This means that subsistence activities often compete with other uses such as mineral development and tourism. Further, subsistence activities are usually restricted when conflicts occur. These restrictions greatly affect subsistence living and hence native Alaskan culture. These restrictions impose a social affect which is often disregarded. Further, the very nature of restriction, in the form of licenses etc, depletes the communal culture of subsistence living by focusing on individual rights.<sup>57</sup>

Economic circumstances have also caused some native Alaskans to sell their permits, thus increasing further non-native competition with subsistence living. Some villages are no longer capable of resisting intrusions and unable to continue their way of life. This is also often due to the fact that regulation of native Alaskan peoples has become much more complicated. The expansion of government services, division of land and regulation under ANCSA, restrictions on hunting, fishing quotas, competition from commercial fisheries and sporting activities have all imperiled subsistence living and native Alaskan culture.<sup>58</sup>

What has been ignored is the fact that native Alaskans have protected and maintained fish and wildlife resources for centuries through self-governance. Arguably, expansion of outside regulatory processes simply threatens rather than protects subsistence. Native Alaskans may best protect subsistence through their own governance.<sup>59</sup> One such example has been the establishment of the Alaska Eskimo Whaling Commission (AEWC).

### **Inupiat resource management**

#### *The Alaska Eskimo Whaling Commission*

In 1977 the International Whaling Commission imposed a total ban on the taking of bowhead whales. This was later changed to a restriction on catches by quota. However, this had significant ramifications for Inupiat cultural practices which encompassed the use of the Bowhead whale. Socially and economically, people could no longer interact and participate in whaling. Faced with this reality, the Inupiat Community of the Arctic Slope, a region wide Tribe organised under the *Indian Reorganisation Act*, established the AEWC by resolution.<sup>60</sup>

The AEWG was a collective of nine commissioners, with one commissioner from each of the 9 village whaling associations. The voting membership was limited to the registered whaling captains and co-captains who were residents in any of the nine villages.<sup>61</sup> The AEWG is an important institution in many ways:

- the structure preserved the traditional leadership role of the Umialik;
- on 14 March 1981, the AEWG adopted its own bowhead whale management plan;
- it also entered into a co-operative agreement with the National Oceanic and Atmospheric Administration (NOAA), which led to the co-operative enforcement of IWC quotas and to the joint inspection and reporting on the bowhead whale harvest;
- the AEWG negotiated between its own village whaling captains and the federal government;<sup>62</sup>
- the AEWG was responsible for allocating annual whaling quotas among its member villages;<sup>63</sup>
- it was responsible for any dispute resolution;<sup>64</sup>
- it could also impose sanctions on members who violated quota terms;<sup>65</sup>
- the AEWG also became a representative at IWC meetings and could directly participate and negotiate their native rights;<sup>66</sup> and
- the AEWG ensured a separate status for native whaling rights to be considered in any decision relating to the conservation of the bowhead whale.<sup>67</sup>

The political and financial support of the North Slope Borough (a home rule government established under Alaskan law and controlled by a majority of North Slope Inupiat) and funding from taxation of the industrial petroleum development of Prudhoe Bay has also played an invaluable role in this co-management agreement. It has helped sponsor biennial conferences on the bowhead whale, helped to establish the Science Advisory Committee, which advises the AEWG, and has provided direct funding for AEWG representatives to attend IWC meetings. Thus, with a combination of political activity, money and determination, the leadership of the Umialik has been able to assert (nationally and internationally) its own interests and knowledge such that co-management of the bowhead whale would be achieved and the cultural and subsistence practices of the Inupiat could be protected.

### **Polar Bear Management Agreement for Southern Beaufort Sea**

Another example of how co-management may best protect native Alaskan subsistence exists between the Inupiat of Alaska and the Inuvialuit of Canada.

In order to better manage the polar bear population of the Beaufort Sea, the Inuvialuit established a co-operative approach with the Inupiat of Alaska.<sup>68</sup> The Inuvialuit Game Council and the Inupiat North Slope Borough Fish and Game Management Committee signed the agreement in 1988. The main objective of the agreement is to maintain a healthy and viable population of polar bears in the area and to establish the basis for

management in both countries, enacting provisions to maximise the protection of female bears and cubs and the collection of harvest information.

It is estimated that this bottom-up approach, created from the understanding and commitment of the wildlife users, would have taken at least 10 years to progress through the bureaucracies of the two countries. This approach has been much more expedient and cost-effective, even though some doubted that the agreement would work because it was legally unenforceable by either country. On the ground, the agreement does work and is more appropriate to the nature of the landscape which dictates a more flexible approach to such management than would be achieved through the legalistic, conventional approach.

The US Department of Fish and Wildlife presented a Special Commendation for Conservation to the Inuvialuit and Inupiat to recognise the significance of their contribution to the management of the polar bear in the South Beaufort Sea.

#### **The Declaration on the Arctic Environmental Protection Strategy**

The ICC was established in Alaska in 1977 in response to increased oil and gas-based development in the Arctic. The Alaskan Inuit were original participants. In 1992 the ICC published *Principles and Elements for a Comprehensive Arctic Policy* which became a significant factor in the formation of the Arctic Environmental Protection Strategy (AEPS). The AEPS sets out fundamental principles for cooperation among the countries of the circumpolar region and the role of Indigenous peoples.<sup>69</sup> Providing for the monitoring of pollution, it establishes procedures in the event of an environmental disaster and procedures to prevent further environmental degradation of the Arctic and conservation of Arctic flora and fauna. It also recognises the need to involve the concerns of Indigenous people and to encourage their participation. The Arctic Council has taken over the implementation of the AEPS which is constituted with representatives of countries and international Indigenous peoples' organizations. Indigenous people played a formal role in the international agreement which established the council. The council now utilises the knowledge and expertise of the Indigenous people of the Arctic region, is sensitive to their cultural needs and also provides Indigenous people with a stronger status and decision-making position than is present in most other international treaties and forums.

These examples all highlight the potential for Indigenous self-government in dealing with the depletion of wildlife and natural resources. Native communities still struggle with socio-economic problems even though state and federal efforts have attempted to solve them.<sup>70</sup> In the aftermath of ANCSA and ANILCA, native Alaskans are searching for better ways to protect their land, resources and culture.

## Governance

An examination by the Alaskan Federation of Natives in 1998<sup>71</sup> of native self-governance in Alaska concluded that:

- Native Alaskan self-governance was an essential ingredient in overcoming poverty and related social problems in rural Alaska;
- Alaska's current approach to native Alaskan governance, while it offers some useful opportunities to native communities, undermines their ability to deal effectively with their own problems and to develop their resources in ways that improve the socio-economic conditions of rural Alaska;
- Alaska's native peoples are currently engaged in a variety of resourceful and determined efforts to take control of their affairs and resources and to use that control to solve their problems;
- these self-governance efforts deserve close attention and support; and
- there are concrete changes that can be made at all levels—village, regional, state, federal – that could benefit not only native communities, but the state as a whole.

The reality is that native Alaskans demand and expect to be able to govern themselves,<sup>72</sup> as they did effectively before Europeans arrived in Alaska. Further, the loss of governing power has been concurrent with decreasing social and economic standards for native peoples. Although self-governance is not the whole solution to addressing these issues, it is a necessary and effective means to begin to address needs.

Evidence from around the world suggests that asserting local Indigenous control over major decisions affecting native Alaskans must be the first step in addressing their problems.<sup>73</sup> It is likely that in Alaska self-governance will vary from one area to another because of the variety of institutions, state, federal and traditional, which already exist in Alaska and which continue to evolve.<sup>74</sup> Various historical circumstances have led to the variety of governing entities which exist today. They are briefly described below.

### Village governments

The federal government's New Deal in the 1930s led to the creation of governments under the *Indian Reorganisation Act 1934* (IRA).<sup>75</sup> These governments were based on conventional American local governments and overlaid traditional native councils.

Village governments with IRA status are federally chartered Indian governments. They can:<sup>76</sup>

- tax members,
- regulate tribal property,
- establish courts which have jurisdiction over member and non-member natives and in limited circumstances non-natives (eg adoption of native children),



- legislate criminal justice policies,
- establish and enforce membership rules,
- regulate domestic relations of members,
- prevent the sale, disposition, lease and encumbrance of tribal lands without tribal consent,
- negotiate with federal, state and local governments,
- receive federal services provided to Indians,
- contract with federal government to administer federal programs,
- adjudicate ownership of culturally significant artifacts,
- assign land to members,
- enforce native preference in employment,
- assert or waive sovereign immunity,
- refuse to pay local and state taxes on tribal lands, and
- regulate alcohol.

### **Funding**

The main source of funding derives from federal Indian programs and some Tribes have become contractors with federal agencies.<sup>77</sup> However, the *Venetie* decision<sup>78</sup> deemed that any Tribe to which ANCSA applied could no longer consider their land Indian country. Such a Tribe was no longer a reservation or allotment for the purposes of satisfying Indian country nor could it satisfy the alternate definition of a dependant Indian community because it failed to satisfy the two criteria required.<sup>79</sup> ANCSA lands were not set aside by the federal government for the use of Indians alone or under federal superintendence because the lands were conveyed to corporations and to enable some degree of self-determination by native Alaskans and to escape paternalism or 'superintendence'.<sup>80</sup> Practically, this meant that Tribes could not tax activities undertaken on their lands. This lack of taxable economic activity means the villages are at the mercy of federal Indian funding.<sup>81</sup> Theoretically, it has cast confusion as to whether Alaskan native villages or governments are entitled to the sovereign rights that the finding of Indian country would have insured.

The state has also been reluctant to recognise tribal powers and there remains uncertainty as to what rights such governments possess.

### **Traditional governments**

Traditional forms of government have inherent government authority unless the federal government specifically deprived them of it<sup>82</sup> and have the potential to be similar to IRA forms of government. The major difference is that section 16 of the IRA specifically prohibits the alienation of Indian lands without tribal permission. While both traditional and IRA governments can protect land via sovereign immunity, traditional forms do not have the statutory strength or state recognition<sup>83</sup> that IRA governments do. Traditional

governments also vary from being governments similar to IRA ones to virtually non-existent governments, depending on state recognition, funding and history.<sup>84</sup>

### **City governments in rural Alaska**

The next stage was the incorporation of city governments throughout rural Alaska. In a state government initiative, the municipal governments overlaid the IRA and traditional councils in many instances.<sup>85</sup> These types of government have been encouraged as a form of native self-governance. ANCSA attempted to stimulate the formation of such governments by requiring each village corporation to transfer 1,280 acres to a state-chartered local government for village expansion.<sup>86</sup> If one was not created, the state would hold the land in trust. Such a measure has weakened tribal governments in many cases, especially because ANCSA did not include any measure to transfer land to traditional or IRA governments.<sup>87</sup> The major problem with such governance is that of representation. Since Natives and non-natives have membership in such governments, the majority may not favour policies advancing native interests. The municipal governments may also take secondary roles to other organisations within the area, corporations, IRA and traditional governments.<sup>88</sup>

### **North Slope Borough**

The North Slope Borough is an exception, however. It has been incorporated under state law as a home-rule borough that has powers of taxation and zoning.<sup>89</sup> There is the possibility that such a structure could be controlled by non-natives. However, where native Alaskans are the majority of the population, as is the case with the North Slope Borough, this is not a current problem.<sup>90</sup> Such borough structures may also be useful where an area has natural resource wealth because the borough has the power to regulate certain lands outside of town and corporation lands, the ability to tax and the ability to administer state services.

The North Slope Borough has strong ties with the Inuvialuit Inuit of Canada, who negotiated an early Canadian Regional Agreement (Inuvialuit Final Agreement 1984). This Borough has had the benefit of a good resource base (lacking in some of the other Alaskan regions) and effective political and resource management strategies.

### **Corporatism under ANCSA**

For all recognised faults of ANCSA, discussed previously, it did enable new formations of native institutions to develop with native land claims associations, native corporations. It also re-established some tribal governments, as well as giving some native Alaskan villages the opportunity to adapt older federal and state institutions of governance. However, ANCSA did little to assist the overlaps and conflicts that arose with these institutions or to reflect evolving self-government strategies of native Alaskans.

### **Future governance issues**

Governance in Alaska is extremely complex. It seems the more institutions present in a village, the more exhausting the demands that are made on the villages and their leaders.<sup>91</sup> While the diversity of such governing structures means native Alaskans can customise forms to meet community needs and allows significant choice in the exercise of self-determination,<sup>92</sup> such structures are often inadequately funded, too dependent on outside funding and do not reflect the sovereign rights of native Alaskans.

Definite tribal rights to wildlife and the right to regulate it are required.<sup>93</sup> Native Alaskans also need the right to define their own political institutions, which is essential to their tribal character,<sup>94</sup> and to evolve adequate governance structures to deal with their own particular social problems and cultural needs.

### **Conclusion**

In many respects ANCSA, and the legal, institutional and political changes that followed it, can be seen as one of the first modern regional agreements/settlements. The state-wide arrangement was obviously on a larger scale than the earlier Canadian regional agreements, such as the Innuvialuit Final Agreement 1984, but it is comparable to the territory of Nunavut and the Greenland government in some respects. Arguably, the Canadian and Greenland regional agreements involved much more direct negotiation with Indigenous parties and are evolving towards a greater degree of self-determination than Alaskan native peoples.

ANCSA initially appeared to offer considerable gains for Alaskan native peoples. However, the design and implementation of ANCSA failed to provide a significant enough degree of self-determination and culturally appropriate governance structure so that native Alaskans could embrace it, and develop it, to meet their needs and contemporary aspirations.

The lessons from ANCSA were taken seriously across the border in Canada. The Innuvialuit Inuit had long standing ties with the Alaskan Inuit from North West Slope Borough. The Innuvialuit emphasised the need for flexibility in corporate and governance structures and provided numerous management and co-management arrangements for sustainable development. The Innuvialuit Final Agreement 1984 provided that the Innuvialuit would be granted any higher degree of self-governance negotiated in later agreements elsewhere in Canada. They clearly had Nunavut in mind as a long term goal. They did not want to be locked into a static settlement but required a living agreement that allowed Indigenous governance to evolve.

The tragedy of ANCSA appears to be that it was too much of a top down settlement, by the US government, without sufficient real negotiation with the native peoples of Alaska. The assumptions about corporate and governance structures and Indigenous development have not worn well with time.

## Notes

- <sup>1</sup> T Berger, *Village journey: The report of the Alaska Native Review Commission*, Hill and Wang, 1985, p 161.
- <sup>2</sup> DH Getches, CF Wilkinson and RA Williams Jr, *Cases and materials on federal Indian law*, fourth edition West Group, 1998, p 906.
- <sup>3</sup> T Berger, above note 1, p 11.
- <sup>4</sup> *Ibid.*
- <sup>5</sup> Getches, Wilkinson and Williams, above note 2, p 906.
- <sup>6</sup> Treaty of Cession, 30 March 1867, US-Russia, 15 Stat 539.
- <sup>7</sup> Berger, above note 1, p 22.
- <sup>8</sup> J Boyce and MAN Nilsson, 'Interest group competition and the Alaska Native Land Claims Settlement Act' (1999) 39 *Natural Resources Journal* 759.
- <sup>9</sup> Act of 17 May 1884, ch 53, 23 Stat 24.
- <sup>10</sup> Boyce and Nilsson, note 8 above.
- <sup>11</sup> *Tee-Hit-Ton Indians v US* 348 US 272 (1955); Getches, Wilkinson and Williams, above note 2, p 906.
- <sup>12</sup> *Id.*, p 907.
- <sup>13</sup> Boyce and Nilsson, above note 8, p 960.
- <sup>14</sup> Act of 17 May 1906, Pub L No 171, ch 2469, 34 Stat 197.
- <sup>15</sup> Boyce and Nilsson, above note 8, p 760.
- <sup>16</sup> *Id.*, p 761.
- <sup>17</sup> Act of 1 May 1936, Pub L No 538, ch 254, 49 Stat 1250.
- <sup>18</sup> 72 Stat 339.
- <sup>19</sup> Getches, Wilkinson and Williams, above note 2, p 906.
- <sup>20</sup> *Tee-Hit-Ton Indians v US* 348 US 272 (1955); Boyce and Nilsson, above note 8, p 763.
- <sup>21</sup> Getches, Wilkinson and Williams, above note 2, p 907; Boyce and Nilsson, above note 8, p 763.
- <sup>22</sup> Berger, above note 1, p 22.
- <sup>23</sup> Boyce and Nilsson, above note 8, p 763.
- <sup>24</sup> Berger, above note 1, p 23.
- <sup>25</sup> *Id.*, p 43.
- <sup>26</sup> S Dorsett and L Godden, *A guide to overseas precedents of relevance to Aboriginal title*, Aboriginal Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p 120.
- <sup>27</sup> *AFN Final Report, Achieving Alaska Native self-governance – Toward implementation of the Alaska Natives Commission Report*, The Economics Resource Group Inc and the Institute of Social and Economic Research, University of Alaska, 1999, p 23.
- <sup>28</sup> Berger, above note 1, p 21.
- <sup>29</sup> Getches, Wilkinson and Williams, above note 2, p 907.
- <sup>30</sup> Berger, above note 1, p 25.
- <sup>31</sup> This fund comprised \$462.5 million appropriated by Congress over an 11-year period and \$500 million from annual revenues collected by state and federal government from mineral leases on lands in Alaska. Payments from this fund to regional corporations were made pursuant to detailed formulae: Getches, Wilkinson and Williams, above note 2, p 909.

#### 4. Governance by the Indigenous Peoples of Native Alaska

- <sup>32</sup> Ibid.
- <sup>33</sup> AFN Final Report, above note 27, p 24.
- <sup>34</sup> Getches, Wilkinson and Williams, above note 2, p 908.
- <sup>35</sup> Above note 1.
- <sup>36</sup> Getches, Wilkinson and Williams, above note 2, p 910.
- <sup>37</sup> Ibid.
- <sup>38</sup> Ibid.
- <sup>39</sup> Berger, above note 1, p 27.
- <sup>40</sup> Id, p 30.
- <sup>41</sup> AFN Final Report, above note 27, p 24.
- <sup>42</sup> Berger, above note 1, pp 32, 40.
- <sup>43</sup> Id, p 43.
- <sup>44</sup> Ibid.
- <sup>45</sup> DS Case, 'Subsistence and self-determination: Can Alaska natives have a more effective voice?' (1989) 60 *University of Colorado Law Review* 1009.
- <sup>46</sup> Id, p 1010.
- <sup>47</sup> Getches, Wilkinson and Williams, above note 2, p 911.
- <sup>48</sup> Berger, above note 1, p 63.
- <sup>49</sup> Under the reserved water rights doctrine, when the US reserves land for a federal purpose and withdraws land from the public domain, it implicitly reserves appropriate waters to the extent they are needed to accompany the purpose of the reservation. See *Alaska v Babbitt* 72 F 3d 698 (1995).
- <sup>50</sup> Getches, Wilkinson and Williams, above note 2, p 928.
- <sup>51</sup> Berger, above note 1, p 63.
- <sup>52</sup> Case, above note 45, p 1021.
- <sup>53</sup> Getches, Wilkinson and Williams, above note 2, p 926.
- <sup>54</sup> Id, p 929.
- <sup>55</sup> Berger, above note 1, p 65.
- <sup>56</sup> Id, p 66.
- <sup>57</sup> Id, p 67.
- <sup>58</sup> Ibid.
- <sup>59</sup> Id, p 71.
- <sup>60</sup> Case, above note 45, p 1028.
- <sup>61</sup> Id, p 1029.
- <sup>62</sup> Ibid.
- <sup>63</sup> Ibid.
- <sup>64</sup> Ibid.
- <sup>65</sup> Ibid.
- <sup>66</sup> Id, p 1030.
- <sup>67</sup> Ibid.
- <sup>68</sup> L Carpenter, paper presented to First World Conservation Congress of the World Conservation Union (IUCN), Montreal, October 1996.

## Indigenous Peoples and Governance Structures

- <sup>69</sup> For a detailed overview of this Agreement, see Chapter 9.
- <sup>70</sup> AFN Final Report, above note 27, p 1.
- <sup>71</sup> Ibid.
- <sup>72</sup> Alaska Natives Commission, *Final Report*, Alaska Federation of Natives, 1994, Vol II, p 151.
- <sup>73</sup> AFN Final Report, above note 27, p 10.
- <sup>74</sup> Id, p 11.
- <sup>75</sup> Amended in 1936 to include Alaska.
- <sup>76</sup> All proceeding points derived from AFN Final Report, above note 27, pp 14-15.
- <sup>77</sup> Id, p 16.
- <sup>78</sup> *Alaska v Native Village of Venetie Tribal Government et al* 101 F 3d 1286 (1998) (Venetie decision).
- <sup>79</sup> PA Matteoni, 'Alaskan native Indian villages: the question of sovereign rights' (1988) 28 *Santa Clara Law Review* 897.
- <sup>80</sup> (1999) 4(1) *Australian Indigenous Law Reporter* 120, pp 120-21.
- <sup>81</sup> AFN *Final Report*, above note 27, p 17.
- <sup>82</sup> Getches, Wilkinson and Williams, above note 2, p 935.
- <sup>83</sup> Matter of City of Nome P 2d 363 (1989).
- <sup>84</sup> AFN *Final Report*, above note 27, pp 18-19.
- <sup>85</sup> Id, p 14.
- <sup>86</sup> Section 14(c)(3).
- <sup>87</sup> Berger, above note 1, p 144.
- <sup>88</sup> AFN *Final Report*, above note 27, p 21.
- <sup>89</sup> Berger, above note 1, p 145.
- <sup>90</sup> Id, p 148.
- <sup>91</sup> Ibid.
- <sup>92</sup> AFN *Final Report*, above note 27, p 34.
- <sup>93</sup> Berger, above note 1, p 71.
- <sup>94</sup> Id, p 161.

## Chapter 5 ■

# Indigenous Resource Management in Canada: Development and Current Practices

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### Introduction

The British Crown acknowledged the rights of the Indigenous peoples of Canada to occupy and use their traditional lands in the Royal Proclamation of 1763. The Canadian Supreme Court, backed by the Privy Council, recognised the common law right of native title to those lands in 1867. However, those same rights in lands, waters, and resources were largely marginalised in importance until the last quarter of the twentieth century. Beginning in the 1970s, decisions by the Canadian Supreme Court and other Canadian courts, along with political advances, have established a new agenda for Indigenous peoples and Aboriginal rights in Canada. While the courts have often been relatively receptive to the pleas of Canadian First Nations, governmental policies did not turn favourably toward First Nations until those courts began to recognise and articulate the basis for Aboriginal rights.

This Chapter considers the ways in which Canada has approached the task of defining Aboriginal title and allocating the rights associated with that title. Following a brief historical overview of Canadian legal developments in Section 2, Section 3 analyses the theoretical approach utilised by and the decisions of the Canadian courts when faced with Aboriginal title claims, including claims for specific Aboriginal rights of access to, and management of, natural resources. Section 4 addresses what is occurring politically between First Nations and Canadian governments in an effort to resolve Aboriginal land claims.

### A brief overview of native title in Canada

As in the United States (US),<sup>1</sup> the relationship between the colonisers of Canada and its Indigenous peoples has moved in stages from rough equality, negotiation and coexistence, to government efforts to disperse and assimilate Indigenous Canadians, and, finally, to a recognition of their rights to limited self-determination within a federal state. The 1996 Royal Commission on Aboriginal Peoples (the Royal Commission) characterised the three stages of development in Canada as ‘Contact and Cooperation’, ‘Displacement and Assimilation’ and ‘Negotiation and Renewal’.<sup>2</sup>

In the US, treaties were confined to the earliest stages of relations between the federal government and the Tribes.<sup>3</sup> By contrast, treaty making has played a major role throughout the development of Canadian Aboriginal policy. Negotiated land claims settlements, which are effectively modern treaties, are currently the main mechanism for settling Indigenous land claims. This land claim settlement process takes on added significance

given that when the official treaty process concluded in 1921, no agreements had been made in relation to tribal lands in Quebec, the Maritime Provinces, Newfoundland, the Yukon or in most of the Northwest Territories or British Columbia. As Professor Foster of the University of Victoria observes, this means that ‘...unlike the situation in the United States, vast tracts of land in Canada may still be subject to unextinguished aboriginal title’.<sup>4</sup>

### **Rough equality (contact to 1812)**

First contact between Europeans and Indigenous North Americans occurred approximately 1000 years ago when Norse sailors ventured from Iceland to the north-eastern coast of North America.<sup>5</sup> These early contacts were largely commercial involving trade between explorers and Aboriginal people.<sup>6</sup> Beginning in the early seventeenth century, the French and British established settlements in what would become Canada. As the Europeans contested for control of North America, early commercial relations took on a new dimension in the form of military alliances between the Tribes and the British and French.<sup>7</sup>

The earliest treaties in Canada, sometimes called the ‘peace and friendship’ treaties, were ‘undertaken in the context of small groups of settlers living on a small portion of the land mass of the continent and involved such matters as trade and commerce, law, peace, alliances and friendship, and the extradition and exchange of prisoners’.<sup>8</sup> As noted, the treaties rapidly took on a military dimension as the French and British vied for control of North America (the earliest military alliance was that between the French and the Innu, Algonquin and Huron against their enemies, the Haudenosaunee).<sup>9</sup> Military cooperation treaties were also entered into by the British and various Tribes, though with an important difference that the Royal Commission notes had a profound impact on the long term relationship between Aboriginal and non-Aboriginal Canadians. French populations were small with little need to obtain land from the Tribes, while ‘[b]y contrast, from an early period the British colonists found their Aboriginal neighbours in possession of lands they wanted for expanding their settlements and economic activities’.<sup>10</sup>

Despite tension and diverse understandings of the meaning of the early treaties between the British and the Tribes, by the time of the cession of New France to Britain in 1763 following the Treaty of Paris, Aboriginal/English relations ‘had stabilised to the point where they could be seen to be grounded in two fundamental principles’.<sup>11</sup> First, Aboriginal societies were generally recognised as autonomous ‘sovereigns’ capable of making treaties. Second, these Aboriginal nations were entitled to their territories, unless and until they were voluntarily surrendered to the Crown.<sup>12</sup> That understanding set the stage for the most important political document of Aboriginal/non-Aboriginal relations in Canada up to the time of Constitutional amendments in 1982.



The Royal Proclamation of 1763 was the British response to its acquisition of Quebec from the French following the Seven Years War,<sup>13</sup> and is considered a defining document in the relationship between Aboriginal and non-Aboriginal people in North America.<sup>14</sup> The Proclamation issued by King George III provided that:

...whereas it is just and reasonable, and essential to our interests, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Government or Commander in Chief in any of our colonies...do presume, on any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their commissions...or on any Lands whatever, which not having been ceded to or purchased by Us as aforesaid, are reserved to said Indians...

And We do further declare it to be Our Royal Will and Pleasure...to reserve under our Sovereignty, Protection and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new governments or within the Limits of the Territory granted to the Hudson Bay Company, as also the Lands and Territories to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West...

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians to the great Prejudice of our interests and to the great Dissatisfaction of the said Indians...[w]e do...strictly enjoin and require, that no Person do presume to make any Purchase from the said Indians of any lands reserved to the said Indians...but that if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us in Our Name...<sup>15</sup>

The Proclamation was a restatement of the policies and practices followed by the English in their early colonisation of North America.<sup>16</sup> At this time the Indians were far superior in numbers and both the British and French treated them on a basis of rough equality and negotiated for land.<sup>17</sup> Thus, the Proclamation was not a grant of native title but a reaffirmation of the doctrine of Aboriginal title. Its recital of the Crown's obligation to protect the Indians' rights to their traditional lands and declaration of inalienability of land except to the Crown also established the legal foundation for the Crown's fiduciary duty to the Tribes.<sup>18</sup> The Royal Proclamation was effectively a summary of the rules governing English dealings with Aboriginal people.<sup>19</sup> Though no longer viewed as the source of Aboriginal title, the Proclamation retains its importance in Canadian jurisprudence, with the Supreme Court characterising it as 'analogous to the status of the Magna Carta' in delineating the rights of Aboriginal peoples in Canada.<sup>20</sup>

Arguably, the Royal Proclamation represents the highwater mark in acknowledging Aboriginal rights in the first phase of the relationship between the British and Canada's Indigenous peoples. However, it can also be viewed as signalling the end of this stage of that relationship and as the launchpad for a new relationship less favourable to Aboriginal peoples.

### **Displacement, assimilation (and neglect) (1763-1970)**

Over the 50 years from the date of the Royal Proclamation to the end of the War of 1812 between Britain and its former colonies, the US, three fundamental changes foreshadowed an altered relationship between Canada and its Aboriginal peoples. First, there was a dramatic increase in the non-Aboriginal population, particularly following loyalist immigration from the US to Canada after the War of Independence with Britain, which sharply increased the demand for the lands of Aboriginal peoples in Canada. Second, there was a shift in economic activity from fur trading which was compatible with Aboriginal lifestyles to a more intensive use of the land for farming, timber harvesting, fishing and, above all, permanent settlements. These new uses were incompatible with traditional Aboriginal land holding and use patterns. Finally, the conclusion of the War of 1812 ended the need for English military alliances with the Tribes and presaged a transfer of responsibility for Aboriginal affairs to civilian authorities more responsive to the settlers' demands for land.<sup>21</sup>

Treaties were the major tool used by European settlers both prior to and after Canadian confederation to establish a new relationship with Aboriginal peoples. Although treaty making was not a new phenomenon, from the early 1800s it assumed far greater importance. Prior to confederation, a number of treaties were negotiated in the Atlantic Provinces and other parts of Eastern Canada.<sup>22</sup> Following confederation in 1867, the new Dominion of Canada embraced a process of treaty making (the 'numbered treaties' one through eleven) that lasted until the 1920s.<sup>23</sup>

The major feature of the treaty process was the cession of large tracts of Aboriginal territory, in return for retention of small reserves of land, ownership of their resources, preservation of traditional hunting/fishing/gathering rights and promises of non-interference in the governance of tribal affairs.<sup>24</sup> The other signal feature of the treaty process was, as was the case in the US, the failure of governments to implement or otherwise fulfil promises made in the treaties.<sup>25</sup> While the treaty process was an expeditious means for negotiating co-existence, the most critical tools used to displace Aboriginal Canadians from their lands and cultures were the various *Indian Acts* enacted after confederation.

In 1867 the English parliament enacted the *British North America Act* (also known as the *Constitution Act, 1867*)<sup>26</sup> which combined the Eastern Provinces into the Dominion of Canada with its own constitution and parliament. Under the *Constitution Act, 1867* executive government was vested in the British Crown. As in the US,<sup>27</sup> the *Constitution*

*Act, 1867* vests exclusive authority in the federal parliament to legislate for Indians and lands reserved for Indians.<sup>28</sup> However, under section 88 of the *Indian Act* (first enacted in 1876 and periodically amended thereafter), the provinces retained the power to enact laws of general application which did not conflict with federal laws or treaties which were applicable to all, including Indians.<sup>29</sup> The extent to which these provincial laws impinged on Aboriginal rights is discussed later in this Chapter.

The Royal Commission characterises the *Indian Act* (and associated legislation) as ‘the repository of the struggle between Indian peoples and colonial and later Canadian policy makers for control of Indian peoples’ destiny in Canada’.<sup>30</sup> It was the single most important device used by Canadian governments in their efforts to dominate, isolate and assimilate Aboriginal peoples and eliminate their cultures in Canada—‘Indian people chafed within the confines of this legislative straitjacket. It regulated almost every important aspect of their lives...’.<sup>31</sup>

Though reserves were not unknown in early colonial times,<sup>32</sup> the *Indian Act* significantly expanded the reserve system, narrowing the Aboriginal land base and, in some cases, isolating Tribes far from their traditional homelands. The *Indian Act* also provided for Indian Band governance on those reserves, determined who was and was not an Indian, determined the status of Band members, disenfranchised Indian women who married outside the Tribe, limited voting rights in Band matters to men, enabled the removal of Indian children to non-reserve boarding schools, enabled the regulation of traditional cultures by banning certain ceremonies, restricted Indian legal claims, instituted a pass system for travel off reserves and empowered the dislocation of many Tribes from their homelands to secure lands and resource access for non-Aboriginal settlers and interests.<sup>33</sup> In summary, the *Indian Acts* enabled Canadian governments to ignore both the promise of measured separatism/diminished sovereignty made to the Tribes and the promise to protect their interests and cultures contained in the Royal Proclamation of 1763.

### **A new era: Negotiation and renewal (1970 to date)**

The recognition of Aboriginal rights in Canada is largely a post World War Two development.<sup>34</sup> In particular, the modern Aboriginal rights movement owes its impetus to Supreme Court decisions in the 1970s which sparked government action on a much wider front.

Subsequent to the [1889] St Catherine Milling decision, in the wake of government policy designed to assimilate Indians, the Canadian law of native rights went into almost total eclipse. ...[F]rom the 1920s [when the last of the numbered treaties was negotiated] until the early 1970s the issue of native rights ceased to be a major concern of Canadian politicians and ceased to exist in the minds of the legal profession.<sup>35</sup>

After the Proclamation of 1763, the first indication by the Canadian government that it was willing to negotiate land claims was a Statement of Policy on 8 August 1973. As

noted in *Sparrow v The Queen (Sparrow)*, this policy statement articulates the position that, '[t]he government is now ready to negotiate with authorised representatives of these Aboriginal peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to Aboriginal peoples in return for their interest'.<sup>36</sup> The 1973 Policy Statement contrasts with a draft White Paper issued four years earlier which adopted the position that, 'aboriginal claims to land...are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community'.<sup>37</sup> The draft 1969 White Paper had proposed dismantling the Indian Affairs Branch within five years, the repeal of the *Indian Act*, rejected land claims and treaties as regressive and argued for the provision of services to Indians through regular provincial agencies rather than specifically Indian bodies.<sup>38</sup>

The categorical denial in 1969 by the then Prime Minister of the legal viability of Aboriginal rights ushered in the modern era of Aboriginal rights in Canada<sup>39</sup> when, partly in response to the government's unwillingness to acknowledge Aboriginal land rights, the Nishga Nation of British Columbia sought a legal declaration of their Aboriginal title to their traditional lands.<sup>40</sup> That case, along with others in the 1970s (as well as increased political action on the part of First Nations)<sup>41</sup> forced the government to acknowledge the continuing vitality of native title and other Aboriginal rights in Canada, as well as the government's fiduciary responsibility to protect those rights. The resulting negotiated land claims settlement process initiated in the 1970s, partly in response to court decisions and partly due to frontier resource disputes,<sup>42</sup> and a constitutional amendment preserving existing Aboriginal and treaty rights in 1982,<sup>43</sup> as well as subsequent decisions of the Canadian Supreme Court and other courts which elaborate on the content of Aboriginal rights, are the subject of the remainder of this Chapter.

Before moving to that discussion, it is important to acknowledge the potential impact of the Royal Commission on the future development of the Aboriginal/non-Aboriginal relationship in Canada. Involving five years of work, extensive research, testimony and submissions, the five volume Report covers all aspects of Aboriginal/non-Aboriginal relations and, though an in-depth review of the Commission's work is outside the scope of this Chapter, it is safe to say that its recommendations (discussed briefly in Chapter 4) could well shape the future of relations between non-Aboriginal Canadians and Aboriginal peoples and nations in Canada.

## The Canadian courts and Aboriginal rights

### Introduction

Beginning in the 1970s, decisions by the Canadian Supreme Court and other Canadian courts, along with political advances, have established a wide circle of rights for Aboriginal peoples in Canada. This circle of rights potentially includes land claims, hunting and fishing rights, water rights and many other uses of the land and its resources, as well as claims to some form of self-government.

Prior to discussing legal developments in Canada, a note on terminology is necessary. The *Constitution Act, 1867* refers to 'Indians', while the *Constitution Act, 1982* refers to 'the Aboriginal peoples of Canada' defined as including the 'Indian, Inuit and Metis Peoples of Canada'. The Metis are a mixed blood population typically originating from unions between French fur traders and Cree women. The Inuit are the Indigenous peoples of northern Canada, Greenland, Alaska and Russia formerly called 'Eskimo'. Of the three sub-categories of Aboriginal people, it was the Metis and Inuit who received no special recognition or treatment under the original *Indian Acts*.

Additionally, the Indian (First Nation) community was defined by status or non-status. Indians gained or lost status by inter-marriage so that an Indian woman who married a non-Indian lost status. Similarly, a non-Indian woman gained status by marrying an Indian man. The implication of this was that Indian women and children lost the right to participate fully in local Reserve Indian affairs. Further, they were not covered by federal government responsibility otherwise found under section 91(24) of the *Constitution Act, 1867* which is entitled 'Indians and Lands Reserved for the Indians'.<sup>44</sup> Throughout this Chapter, the terms Aboriginal or Indigenous should be taken to encompass all three groups of Canadian Indigenous Peoples.

### The source of Aboriginal title

The first legal decision to significantly affect Aboriginal rights in Canada was *St Catherine's Milling and Lumber Co v The Queen* in which the Supreme Court and Privy Council held that Aboriginal title is a 'personal and usufructuary right, dependent on the good will of the sovereign'<sup>45</sup> arising from the Royal Proclamation of 1763. As noted earlier, in essence, the Royal Proclamation reserved to the 'Indians' of the British colonies in North America all lands in their possession not ceded to or purchased by the Crown. However, the *St Catherine's Milling* decision was by no means a complete victory for Aboriginal Canadian peoples. What remained unclear after the case was whether Aboriginal title and other rights might arise from a source other than the Royal Proclamation of 1763.<sup>46</sup> This ambiguity remained for just over one hundred years.

In the progression of cases since *St Catherine's Milling*, the Canadian Supreme Court has gradually developed the source of Aboriginal rights and articulated principles to determine if the rights still exist. It is interesting to note, however, that even if a court determines that certain rights exist, despite the clear language of the 1982 constitutional amendment preserving those rights, a court has never found these rights absolutely immune from government regulation. As in the US, the government may extinguish or impair those rights under appropriate circumstances (including provision of compensation).<sup>47</sup> Unlike the US where no protection is afforded non-treaty rights, the preservation of existing Aboriginal and treaty rights by the 1982 constitutional amendment,<sup>48</sup> while arguably allowing rights to be impaired, constrains the wholesale extinguishment of both Aboriginal and treaty rights.<sup>49</sup>

### **The modern era dawns: The Calder and Guerin cases**

In the landmark 1973 decision of *Calder v Attorney-General of British Columbia*,<sup>50</sup> the Canadian Supreme Court recognised that the source of Aboriginal title is not the Royal Proclamation of 1763. The *Calder* case arose after a long period of neglect of Aboriginal rights by the legal profession, the courts and the government, a period when any possible existing Aboriginal title to non-treaty lands was assumed to be superseded by law or extinguished by implication.<sup>51</sup> As in Australia, where the High Court in *Mabo v Queensland (Mabo (No 2))* rejected the view that the continuation of Indigenous rights after the acquisition of territory by a new sovereign requires affirmative action by the executive or legislature,<sup>52</sup> the Canadian Court confirmed that Aboriginal (native) title in Canada is not a collection of rights given to Aboriginal peoples by the new sovereign, parliamentary action, any other affirmative act or the common law. As the Court held in *Calder*, where it was forced to find an alternate source of native title, since the plaintiff Tribe was not on lands protected by the Proclamation of 1763, the simple fact of Indian occupancy before the settlers' arrival provided the source of Indian title.<sup>53</sup> While the Court recognised that Aboriginal peoples have inherent title to the land because 'they were here first', it also recognised the 'conquering' nation's right to extinguish that title.<sup>54</sup>

Although the Supreme Court split evenly on the question of whether the Nishga (one of the non-treaty Tribes in British Columbia) retained ownership of their traditional territories, the decision is extremely significant because it established what is generally accepted today as the source of native title, prior occupancy, which will inevitably carry specific rights with it. In support for a legal basis upholding Aboriginal title to land, the most quoted passage in the judgments linked native title/land rights to the existence of established sovereign societies in North America prior to European settlement: '...when the settlers came, the Indians were there, organised in societies and occupying the land as their forefathers had done for centuries. That is what Indian title means...'.<sup>55</sup> More recently, in *Delgamuukw v British Columbia (Delgamuukw)* the Court confirmed that the source of Aboriginal title arises from the prior occupation of Canada and the relationship between the common law and pre-existing systems of Aboriginal law.<sup>56</sup>

*Calder* was followed a decade later by *Guerin v The Queen*, which established that the government owes a fiduciary obligation to Aboriginal peoples to protect their native title rights and interests in land and other Aboriginal rights.<sup>57</sup> In *Guerin*, the Court considered whether a private lease of tribal lands negotiated by the government under much less favourable terms than those approved by the Tribe entitled the Tribe to compensation for the difference. The trial court found that the government had breached the Indians' trust and awarded the plaintiffs \$10 million in damages. This decision was reversed on the initial appeal, but the Supreme Court reinstated the trial court's decision. Seven of the eight members of the Court agreed that the duty of the government arising out of its supervision of Indian lands and the ability to accept the surrender of those lands created a trust or trust-like relationship. The eighth member of the Court couched his concurrence in terms of the laws of agency.<sup>58</sup> Finally, *Guerin* put to rest any ambiguity regarding the existence of native title in Canada created by the split decision in *Calder* and firmly established the principle that Aboriginal rights can only be extinguished by voluntary surrender or appropriate legislation which includes provision for compensation for that extinguishment.<sup>59</sup>

## The Sparrow Doctrine

### *Introduction*

Until the December 1997 decision of the Canadian Supreme Court in *Delgamuukw*, the most significant modern case to elaborate on the theory of Aboriginal title was the 1990 decision of *Sparrow*.<sup>60</sup> The *Sparrow* case provides the contemporary starting point for the analysis of Aboriginal rights undertaken by the Court in a series of cases in 1996 and 1997. *Sparrow* was the first of many cases to set forth the principles necessary to identify Aboriginal rights under section 35(1) of the *Constitution Act, 1982*.

### *Constitution Act, 1982*

One of the most recent political statements addressing Aboriginal rights, and ultimately a political victory for the Canadian First Nations, is the *Constitution Act, 1982*.<sup>61</sup> As the *Sparrow* Court notes, '[s]ection 35(1), at the least, provides a solid constitutional base on which subsequent...[negotiation between First Nations and Canadian governments] can take place. It also gives Aboriginal peoples constitutional protection against provincial legislative power'.<sup>62</sup> Ultimately, section 35(1) of the Act represents 'the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights'.<sup>63</sup> The practical effect of the *Constitution Act, 1982* is to affirm existing Aboriginal and treaty guaranteed rights. It does not, however, extend those rights beyond what was already in existence.<sup>64</sup>

In reaching its decision regarding the legality of a government attempt to regulate Indian fishing rights, the Court found that section 35(1), as with treaties, should be read broadly and in favour of Aboriginal peoples.<sup>65</sup> This purposive approach to constitutional

interpretation arises from the Court's view that the import of section 35 extends beyond the constitutional protection of Aboriginal and treaty rights to include interpretive principles reflecting the overall purpose of the Constitutional amendment—'[w]hen the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous liberal interpretation of the words in the constitutional provision is demanded'.<sup>66</sup>

### *The fiduciary duty of the Crown and courts, and the canons of construction*

As noted, the government's fiduciary duty to Aboriginal peoples arises as a result of the special relationship between the Crown and Aboriginal peoples. This is an important premise because of the inequality of bargaining power between the Crown and the natives, statutes, treaties and now constitutional amendments must be read broadly in light of the fiduciary relationship.<sup>67</sup>

In *Sparrow*, the Supreme Court of Canada applied this concept to instances of extinguishment and impairment of Aboriginal rights. The Court holds that '[t]he test of extinguishment to be adopted, in our opinion, is that the sovereign's intention must be clear and plain if it is to extinguish an aboriginal right'.<sup>68</sup> It is this fiduciary obligation that also imposes a limit on the Crown's ability to regulate the activities of Aboriginal peoples. For example, a claim of a violation of fiduciary duty against the Crown, although it does not arise from a true trust, is a legally enforceable duty emerging from the concept of Aboriginal title.<sup>69</sup>

As previously observed, the consequence of this fiduciary duty is that statutes, treaties and regulations need to be interpreted broadly and liberally and ambiguities in them must be resolved in favour of Aboriginal peoples.<sup>70</sup> It also means that to extinguish Aboriginal title or Aboriginal rights there needs to be a clear, plain statement to that effect.<sup>71</sup> Pro-actively, the fiduciary duty obligates the government to protect the rights of Aboriginal peoples from arbitrary decision-making or actions by its departments and ministries. In *Blueberry River Indian Band v Canada*,<sup>72</sup> *Halfway River First Nation v British Columbia (Ministry of Forests)*,<sup>73</sup> *Semiahmoo Indian Band v Canada*,<sup>74</sup> and *Union of Nova Scotia Indians v Canada*<sup>75</sup> the courts found a recognised fiduciary duty which the Crown had breached.

### *The Sparrow test*

While *Calder* recognised the source of Aboriginal title, *Sparrow* articulated the steps for determining if government interference with an existing Aboriginal right is justified. In *Sparrow*, the appellant was convicted of violating a section of the *Fisheries Act* for fishing with a length of net longer than that allowed by his Indian food fishing licence.<sup>76</sup> On appeal, he argued that the restriction violated his Aboriginal right to fish for food.<sup>77</sup> The Supreme Court of Canada first recognised that the Crown, because of its special relationship with Aboriginal peoples, must make a clear statement of its intent to extinguish



an Aboriginal right.<sup>78</sup> Inherent in this power is the government's (unquestioned?) ability to limit or impair native title at any time, as long as it does so clearly.<sup>79</sup> The Court found that there was clear intent to extinguish Aboriginal fishing rights in this area.<sup>80</sup> Next, the Court turned to whether, in light of existing Aboriginal rights to fish for food, the regulation was valid.

Essentially, the Court articulated a four-part test to determine if a law or regulation validly interferes with an Aboriginal right. The first question is whether the legislation or regulation *prima facie* 'interferes with an existing aboriginal right'.<sup>81</sup> Factors that may indicate interference include the unreasonableness of the limitation, whether it causes undue hardship for Aboriginal peoples, or whether it denies to the 'holders of the right their preferred means of exercising that right'.<sup>82</sup>

Second, if a court determines that there is *prima facie* interference with an Aboriginal right, it must then look to whether there is any compelling justification for the infringement.<sup>83</sup> Valid legislative purposes may include resource management regimes to preserve Aboriginal constitutional rights, resource management or conservation regimes to limit the exercise of Aboriginal constitutional rights that would harm the general public (such as protecting endangered species) or other 'compelling and substantial' objectives.<sup>84</sup> In all instances the legislation or regulation must be applied non-discriminatorily to Aboriginal and non-Aboriginal peoples.<sup>85</sup>

The third relevant factor is whether the law or regulation was enacted without regard to the trust relationship.<sup>86</sup> In the recent decisions of *Nunavut*,<sup>87</sup> *Halfway River*<sup>88</sup> and *Delgamuukw*,<sup>89</sup> the courts have interpreted this as an obligation to consult the affected peoples. Finally, the government needs to demonstrate that it has addressed other factors such as minimising interference, fair compensation and consulting with the Aboriginal people.<sup>90</sup> If this test is met, the government legislation or regulation is valid.

In summary, the *Sparrow* Court establishes a purposive approach to the resolution of conflicts over Aboriginal rights protected by section 35 of the Canadian Constitution. Given the remedial nature of the 1982 amendment and the command of the Court that the amendment is to be read broadly and liberally in favour of Aboriginal peoples, that purpose can be read as threefold: first, to preserve existing Aboriginal and treaty rights; second, to comply with the fiduciary obligation owed by government to Aboriginal peoples; and, third, to reconcile Aboriginal rights with those held by the larger society. The effect is that the government can, non-discriminatorily, regulate Aboriginal land and resource use rights but must take into account the appropriateness of regulation giving full consideration to the historical and cultural patterns of the exercise of Aboriginal rights.<sup>91</sup>

### The Van der Peet trilogy: The question of commercial rights in resources

In 1996 the Supreme Court of Canada elaborated on the *Sparrow* test in a trilogy of cases determining whether native title rights in resources can encompass rights to exploit the resource commercially. The principal case in the trilogy, *R v Van der Peet*,<sup>92</sup> answered the question of how Aboriginal rights should be defined in light of section 35(1) of the *Constitution Act, 1982*. Specifically, to be an Aboriginal right, 'an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right'.<sup>93</sup> This test is derived from the concept that Aboriginal peoples are distinguishable from other minorities on the basis that the Aboriginal peoples were the first inhabitants of Canada. This status 'mandates their special legal, and now constitutional status. ...[T]heir own practices, traditions and cultures are acknowledged and reconciled with the sovereignty of the Crown'.<sup>94</sup>

Chief Justice Lamer, writing for the majority, articulates a number of considerations relevant to determining if a particular activity is an Aboriginal right:

- the perspectives of the Aboriginal peoples, while still recognising the value of the common law,
- the precise nature of the claim,
- whether the activity is of 'central significance' to the Aboriginal people making the claim (for example, whether it is a distinctive feature of that society),
- the continuity of the practice,
- the evidentiary difficulties in establishing the existence of a right,
- whether it is a custom, practice, or tradition of the particular Aboriginal group making the claim,
- whether the practice is of 'independent significance' to the group or merely incidental to another practice,
- if the practice is distinctive (yet not necessarily distinct),
- if the practice existed before European contact, and continues to exist after contact (then European influence is not relevant), and
- the relationship of Aboriginal peoples to the land and their distinctive cultures.<sup>95</sup>

The Court in *Van der Peet* (in addition to the decisions in *R v NTC Smokehouse Ltd* and *R v Gladstone*) applied the facts of each case in reference to the principles set forth in *Van der Peet* to determine if a particular practice is an Aboriginal right. First, the precise activity must be defined. For example, in *Van der Peet*, the accused sold ten salmon for \$50. According to the Court, this did not constitute enough volume to be considered a commercial sale of fish, so it characterised the claim as 'the exchange of fish for money or other goods'.<sup>96</sup> Relying on the findings of fact of the lower court, the Supreme Court determined that this practice, while certainly existing at the time of contact, was not a 'significant, integral or defining feature of [the Sto:lo] society'.<sup>97</sup> This determination was reinforced by the lack of a recognisable system of trade or exchange for salmon by the Sto:lo.<sup>98</sup>

Justices McLachlin and L'Heureux-Dube dissented in *Van der Peet*, raising concerns about the test for commercial rights articulated by the majority. The dissent by Justice L'Heureux-Dube differs from the majority's opinion on two main points. First, she places greater emphasis on the perspective of the Aboriginal peoples and less on the common law, rather than giving equal weight to both.<sup>99</sup> Second, Justice L'Heureux-Dube focused on the broad notion of Aboriginal rights rather than a specific practice.<sup>100</sup> She argued that the liberal canons of construction applied in Aboriginal rights cases require a broad approach.<sup>101</sup> Under such a flexible approach, Aboriginal rights would be recognised that 'are sufficiently significant and fundamental to the culture and social organisation of a particular group of aboriginal people'.<sup>102</sup> Her approach would also recognise the potential evolution of Aboriginal practices. Ultimately, Justice L'Heureux-Dube recognised that the appellant was not trying to make a profit in selling the fish, but was simply attempting to provide for her family, and that providing for one's family is certainly an Aboriginal right.

Justice McLachlin observed that '...the critical question is not whether the sale of fish is commerce or non-commerce, but whether the sale can be defended as an exercise of a more basic right to continue the Aboriginal people's historic use of the resource'.<sup>103</sup> He noted that one potential outcome of requiring any sale, exploitation or trade to be based on historic practices may be to eliminate virtually any Aboriginal claim to commercial rights in resources.<sup>104</sup>

The next case in the trilogy also elaborates on the first step of the *Sparrow* test. In *NTC Smokehouse* the Court found that the Aboriginal defendants had sold enough fish for the transaction to be classified as a commercial exchange. Therefore the Tribe needed to show that prior to contact it engaged in a commercial exchange of fish. In *Van der Peet*, for example, the nature of the claim was the right to exchange fish for food or money; ten salmon were sold for fifty dollars. In *NTC Smokehouse*, over 119,000 pounds of salmon were sold by 80 people. The Court found that this amount constituted a commercial sale.<sup>105</sup> The Court then found that the Tribe had not, prior to contact, sold salmon commercially.<sup>106</sup> To demonstrate the ultimate importance of defining the claim, the dissent by Justice L'Heureux-Dube in *Van der Peet* would have defined the activity as the 'right to sell, trade and barter fish for livelihood, support and sustenance purposes'.<sup>107</sup> The dissent opined that the evidence demonstrated that the sale was not for economic gain, but basic survival needs, and questioned whether the majority had put the canons of Indian construction<sup>108</sup> to full use.<sup>109</sup>

In the last case in the trilogy, *Gladstone*, the Tribe attempted, contrary to provincial regulations, to sell herring spawn. The Court found that it did not matter whether this was trading fish for food or for commercial gain because there was ample evidence that the Tribe traditionally engaged in both activities.<sup>110</sup> This case also elaborated on whether native title had been extinguished. The Court observed that *Sparrow* requires that the

sovereign's intent to extinguish native title be clear and plain.<sup>111</sup> Furthermore, past regulation of a right does not equal (or constitute evidence of) extinguishment.<sup>112</sup> In this case, the Court did not find plain and clear intent, only a 'widely varying regulatory scheme'.<sup>113</sup>

Finally, the Court examined whether the regulation is justified. It reiterated two principles set forth in *Sparrow*. First, the government must have been acting pursuant to a valid legislative objective; and second, the actions must be consistent with its fiduciary duty.<sup>114</sup> In summary, the Court held that the impugned regulation is a *prima facie* infringement of the Aboriginal right, because it directly conflicts with the sale of fish which was a traditional practice. Although the regulations were enacted for conservation reasons, there was insufficient evidence at trial to establish whether the infringement was justified.<sup>115</sup>

Ultimately, the culmination of the trilogy of cases starting with *Van der Peet* resulted in a situation where it appears fairly easy for the government to enforce regulations that adversely affect Aboriginal peoples. First, Aboriginal peoples have the burden of demonstrating that Aboriginal title or a specific Aboriginal right exists. This burden may be particularly onerous because of the potential evidentiary problems.<sup>116</sup> Consequently, it is important for courts to consider and compensate for this difficulty by applying a liberal construction to agreements entered into by Aboriginal peoples. For example, in *Delgamuukw* Chief Justice Lamer held that proving Aboriginal rights demands a unique approach to the treatment of evidence. In keeping with this command, the courts must come to terms with the oral histories of Aboriginal societies. Oral evidence is to be accommodated and placed on an equal footing with the other types of historical evidence that courts are familiar with, namely, historical documents.<sup>117</sup>

A criticism of the tests set forth by the Supreme Court is the lack of flexibility in reference to the subsistence and cultural activities of Aboriginal peoples. Aboriginal customs and practices inevitably would have evolved despite contact with Europeans. Consequently, courts should recognise this inevitability and account for it. Finally, as expressed by the dissents in the trilogy, defining the particular Aboriginal activity/right can make the difference between recognition and non-recognition. This ties in with the previous criticism. Certainly an activity of Aboriginal peoples prior to contact with Europeans was providing for their general sustenance. In defining the particular activity of a group, the courts should take this into account and realise that Aboriginal subsistence economies were not static prior to contact and should not be required to be so today.

There is a danger, as both dissenting judges in *Van der Peet* note, of applying the Court's test too narrowly without regard to the canons of construction. The requirement that to be a protected Aboriginal right the activity must comprise 'an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right' is clearly subject to an overly literal interpretation, especially given the

majority's admonition that the custom must be 'independently significant to the Aboriginal community claiming the right'.<sup>118</sup> Given that no monetary economy existed in Aboriginal pre-contact societies, the exchange of resources for money may almost always be problematic, as would Justice McLachlin's concern regarding attempts to establish the scale or volume of the activity.

While the *Van der Peet* dissenting judges' equating of livelihood activities with Aboriginal (native) title rights is, perhaps, the preferable approach, the dangers posed by a too literal reading of the majority opinion in *Van der Peet* regarding commercial native title rights may, in practice, be less likely to occur (particularly after the *Delgamuukw* decision, discussed below, which distinguishes possessory native/Aboriginal title from Aboriginal rights and confines the *Van der Peet* trilogy to the latter). Moreover, as suggested in an earlier work:

[t]he regularity (not the scale) of a particular traditional practice seems to be the essential element in the Canadian court's analysis. [A review of the Court's decisions suggests that], if a particular practice rises to the level of tradition or custom, that is regular rather than episodic behavior, then that practice will be protected as a native title right. 'Scale' in this reading is thus equated with community rather than individual behavior, as well as with seasonal, ceremonial, historical, and socio-cultural practices as opposed to occasional events. This is arguably, more in step with the "purposive" reasoning in *Sparrow* and with the views expressed by the United States Supreme Court...<sup>119</sup>

## **Delgamuukw: A jurisprudential definition of the content of Aboriginal title**

### ***Introduction***

The *Delgamuukw* case began officially on 11 May 1987. The trial involved 318 days of evidence and 56 days of oral argument, lasting until 30 June 1990. The British Columbia trial court delivered its judgment on 8 March 1991.<sup>120</sup> The British Columbia Court of Appeals delivered its judgment two years later.<sup>121</sup> The case ended when the Canadian Supreme Court delivered its judgment in December 1997. After over 10 years of litigation, '[i]n the end the Court ordered a new trial. The case would start again. This is because at trial McEachern J [erred because he] did not accept the oral histories...' of the Aboriginal plaintiffs offered in support of their claims to Aboriginal title to their traditional lands.<sup>122</sup>

The case was brought by two First Nations peoples claiming Aboriginal title to 58,000 square kilometres of territory in northern British Columbia.<sup>123</sup> As the Supreme Court noted, the Gitskan and Wet'suwet'en peoples' 'claim was originally for "ownership" of the territory and "jurisdiction" [sovereignty] over it...[but] [a]t this Court, this was transformed into, primarily, a claim for Aboriginal title over the land in question...'.<sup>124</sup>

The significance of *Delgamuukw* lies not in any ultimate victory for the plaintiffs, as they need to retry the case, but rather in the articulation of a theory of Aboriginal title which

encompasses specific rights and which distinguishes between the judicial treatment of Aboriginal possessory title to land and other Aboriginal rights which may or may not be related to any specific land. In summary, the Court articulated a jurisprudential definition of the content of Aboriginal title/rights. That definition will clearly advance the rights of Indigenous peoples in Canada and may influence the development of native title law in Australia.

*The weight accorded oral histories*

Before moving to a review of the Court's decision on the content and scope of Aboriginal title, the basis on which the Court reversed the decisions of the lower courts is an important consideration for future Aboriginal rights litigation.<sup>125</sup> Given the substantial need to rely on oral records of Aboriginal use and occupation of lands to establish Aboriginal title/rights (including native title rights in Australia), the weight accorded traditional evidence is crucial for the success of these claims.

Chief Justice Lamer noted that, '[n]otwithstanding the challenges created by the use of oral histories as proof of historical fact, the laws of evidence must be adapted in order that this evidence can be accommodated and placed on an equal footing with other types of historical evidence that courts are familiar with, which largely consists of historical documents'.<sup>126</sup> The justification for such an approach is twofold. First, it comports with the liberal, purposive approach of interpreting treaties, statutes and constitutional provisions designed to reconcile Aboriginal and non-Aboriginal Canadians.<sup>127</sup> Second, given the lack of written records, the failure to give equal weight to oral histories would impose an insurmountable burden on Aboriginal plaintiffs asserting Aboriginal rights claims.<sup>128</sup>

In respect of oral histories used by the plaintiffs to establish the existence of land tenure systems as proof of their historical use and occupation of the land and as evidence of the land's significance to their culture, the Court noted that the trial judge failed to give these oral histories any independent weight.<sup>129</sup> Chief Justice Lamer observed that:

Although he framed his ruling on weight in terms of the specific oral histories before him... the trial judge in reality based his decision on some general concerns with the use of oral histories as evidence in Aboriginal rights cases. In summary, the trial judge gave no independent weight to these special oral histories because they did not convey historical truth, because knowledge about those oral histories was confined to the communities whose histories they were and because those oral histories were insufficiently detailed. However... these are features, to a greater or lesser extent, of all oral histories, not just the adaawk and kungax. The implication of the trial judge's reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in Aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of Aboriginal peoples would be consistently undervalued by the Canadian legal system, in contradiction of the express instruction to the contrary in *Van der Peet*...<sup>130</sup>

The trial court also erred by discounting personal recollections of Aboriginal life. The Chief Justice noted:

In my opinion, the trial judge expected too much of the oral history of the appellants, as expressed in the recollections of Aboriginal life of members of the appellant nations. He expected that evidence to provide definitive and precise evidence of pre-contact Aboriginal activities on the territory in question. However, as I held in *Van der Peet*, this will be almost an impossible burden to meet. Rather, if oral history cannot conclusively establish pre-sovereignty (after this decision) occupation of land, it may still be relevant to demonstrate that current occupation has its origin prior to [assertions of Canadian] sovereignty. This is exactly what the appellants sought to do.<sup>131</sup>

Finally, the trial court rejected the use of territorial affidavits filed by the Gitsken and Wet'suwet'en Chiefs which relied on the declarations of deceased tribal members to adduce internal boundaries. In the trial Court's view, these affidavits failed as 'reputation evidence' because the reputation was unknown outside the immediate Aboriginal community.<sup>132</sup> However, as Chief Justice Lamer observed:

Many of the reasons relied on by the trial judge for excluding the evidence contained in territorial affidavits are problematic because they run against...[the] fundamental principal [requiring the ordinary rules of evidence to be adapted in light of the inherent difficulties associated with adjudicating Aboriginal rights claims]. The requirement that a reputation be known in the general community, for example, ignores the fact that oral histories, as noted by the Royal Commission on Aboriginal Peoples, generally relate to particular locations, and refer to particular communities and families...unknown outside of that community. ...Excluding the territorial affidavits because the claims to which they relate are disputed does not acknowledge that...[Aboriginal title/rights] claims are almost always disputed and contested. Indeed, if those claims were uncontroversial, there would be no need to bring them to the courts. ...Casting doubt on the reliability of the territorial affidavits because land claims had been actively discussed for many years also fails to take account of the special context surrounding Aboriginal claims, in two ways. First, those claims have been discussed for so long because of British Columbia's persistent refusal to acknowledge the existence of Aboriginal title. ...It would be perverse, to say the least, to use the refusal of the province to acknowledge the rights of its Aboriginal inhabitants as a reason for excluding evidence which may prove the existence of those rights. Second, this rationale for exclusion places Aboriginal claimants whose societies record their past through oral history in a grave dilemma. In order for the oral history of a community to amount to a form of reputation, and to be admissible in court, it must remain alive through the discussion of members of that community. ...But if those histories are discussed too much, and too close to the date of litigation, they may be discounted as being suspect, and may be held to be inadmissible. The net effect may be that a society with such an oral tradition would never be able to establish a historical claim through the use of oral history in court.<sup>133</sup>

In summary, the Court concluded that:

The trial judge's treatment of the oral histories did not satisfy the principles...laid down in *Van der Peet*. ...They [Aboriginal appellants] used those histories in an attempt to establish their occupation and use of the disputed territory, an essential requirement for Aboriginal title. The trial judge, after refusing to admit, or giving no independent weight to these oral histories, reached the conclusion that the appellants had not demonstrated the requisite degree of occupation for 'ownership'. ...In the circumstances, the factual findings can not stand. ...A new trial is warranted.<sup>134</sup>

### *The content of Aboriginal title*

While unable to reach a decision on the merits of the Gitskan and Wet'suwet'en claims, the Court notes that the opposing parties 'have a more fundamental disagreement over the content of Aboriginal title itself'.<sup>135</sup> To provide guidance to future litigants, the remainder of Chief Justice Lamer's opinion sets out the Court's view on this issue.

The plaintiffs argued that Aboriginal title is tantamount to an inalienable fee simple, constitutionally protected by section 35(1), conferring the freedom to use Aboriginal lands as they see fit. The Province argued that Aboriginal title is no more than a bundle of rights to engage in specific activities and that the Constitution merely protects those individual rights, 'not the bundle itself...[because it] has no independent content' or, alternatively, that constitutionally protected Aboriginal title, 'at most, encompasses the right to exclusive use and occupation of land...to engage in those activities which are Aboriginal rights themselves...'.<sup>136</sup> The Court accepted neither proposition. Chief Justice Lamer held that:

...Aboriginal title, in fact, lies somewhere in between these positions. Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves Aboriginal rights. Rather, it confers the right to use the land for a variety of activities, not all of which need to be aspects of practices, customs and traditions...integral to the distinctive culture of Aboriginal societies. These activities do not constitute the right per se; rather they are parasitic on the underlying title.<sup>137</sup>

However, the uses of the land are not unlimited. The Chief Justice opined that the uses of the land must not be irreconcilable with the nature of the attachment to the land which forms the basis of an Aboriginal group's Aboriginal title, and that this limitation is founded in the nature of Aboriginal title as a *sui generis* interest in land.<sup>138</sup> The *sui generis* nature of Aboriginal title rests on the common law's recognition that the foundation of that title is a special physical and cultural relationship with particular lands. Consequently, the common law holds that those lands may not be alienated outside the community except to the Crown. In Chief Justice Lamer's view, the inalienability of Aboriginal lands reinforces the limitation on the use of Aboriginal lands articulated by the Court, though the limitation is not intended to unduly restrict the use of the land by Aboriginal title holders. As he noted, '[i]f Aboriginal people wish to use their lands in a



way that Aboriginal title does not permit', they may surrender that title and convert the lands into a title that will allow other uses.<sup>139</sup>

In large part, the limitation on Aboriginal title also flows from the government's fiduciary duty to protect the rights of Aboriginal peoples. Those rights arise, as Chief Justice Lamer observed, not just from prior occupation of land, but from prior occupation based on 'pre-existing systems of Aboriginal law'.<sup>140</sup> He notes that the common law seeks not only to determine Aboriginal rights based on prior occupation of the land, but to afford protection to that occupation in the present, and '[i]mplicit in the protection of historical patterns of occupation is a recognition of the continuity of the relationship of an Aboriginal community to its land over time'.<sup>141</sup> The Chief Justice was clear that the limitation should not be read as a legal strait jacket on legitimate Aboriginal claims to land, thereby limiting their uses of the land to traditional Aboriginal rights and activities but, rather, as a means to protect the special relationship Aboriginal people have with their lands, a relationship which provides the foundation for the common law recognition of Aboriginal title.<sup>142</sup>

Canvassing the Canadian jurisprudence from *St Catherine's Milling* through to the Court's most recent judgments, Chief Justice Lamer articulated a comprehensive view of the concept (and content) of Aboriginal title/rights. Critically important for the argument that the Canadian (and US) jurisprudence is applicable to and informative for the development of native title law in Australia is the Chief Justice's reiteration of the point made in *Calder*, *Van der Peet* and other cases that neither the Royal Proclamation, subsequent treaties and statutes, nor the *Constitution Act, 1982* created Aboriginal title; rather Aboriginal title existed prior to European settlement and was recognised by the common law.<sup>143</sup> This view was accepted explicitly in *Mabo*. Justice Brennan observed that native title rights and interests in land are not created by the common law but are pre-existing rights and interests in land that are acknowledged and protected by the common law.<sup>144</sup>

In an earlier essay, the author suggested that native title generally encompasses three broad categories of rights:

In sum, native title may encompass the exclusive right to occupy certain lands...or it may include a lesser interest, either exclusive or shared...such as the right to use or cross certain lands for religious or food gathering purposes, and [finally] it may include the rights to the profits of the land, ie, hunting and fishing rights.<sup>145</sup>

The *Delgamuukw* Court adopts an analogous position, articulating what amounts to a three-prong approach to defining the scope and content of Aboriginal title. Chief Justice Lamer wrote:

The picture that emerges...[from the Canadian jurisprudence] is that Aboriginal rights which are recognized...fall along a spectrum with respect to their degree of connection to the land. At one end, there are those Aboriginal rights which are practices, customs

and traditions that are integral to the distinctive Aboriginal culture of the group claiming the right. However, the 'occupation and use of the land' where the activity is taking place is not 'sufficient to support a claim of title to the land'. ...In the middle, there are activities which, out of necessity, take place on the land and, indeed might be intimately related to a particular piece of land. Although an Aboriginal group might not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. ...At the other end of the spectrum, there is Aboriginal title itself...[which] confers more than the right to engage in site-specific activities. ...What Aboriginal title confers is the right to the land itself.<sup>146</sup>

This refined definition of the content of Aboriginal title/rights requires a modification of the *Van der Peet* test for determining Aboriginal rights, one that emphasises both aspects of the prior presence of Indigenous peoples on territory acquired under the common law: 'first, the occupation of the land, and second, the prior social organisation and distinctive cultures of Aboriginal people on that land'.<sup>147</sup> While the tests for determination of Aboriginal title and Aboriginal rights share broad similarities, the Chief Justice noted that the test for Aboriginal title emphasises occupation of land over distinctive cultural practices.<sup>148</sup> The major distinctions in the two tests are that, 'first, under the test for Aboriginal title, the requirement that land be integral to a distinctive culture of the claimants is subsumed by the requirement of occupancy and, second, where the time for the identification of Aboriginal rights is the time of first contact, the time of identification of Aboriginal title is the time at which the Crown asserted sovereignty over the land'.<sup>149</sup>

The test for proof of Aboriginal title is equivalent to that adopted by the Australian High Court in *Mabo*.<sup>150</sup> To make out a claim for Aboriginal title, a group must show its exclusive occupancy of the land prior to assertions of British sovereignty, and 'if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation'.<sup>151</sup> It should be noted that the Canadian Court used the words 'if present occupation is relied on'. Thus, a direct physical, continuous connection is not necessarily required. Instead, proof of occupancy is grounded in both the common law requirement of presence on the land and Aboriginal law reflecting the patterns of land use/ownership under their law.<sup>152</sup> In essence, as Justice Toohey notes in *Mabo*,<sup>153</sup> and as endorsed in *Delgamuukw*, Aboriginal occupancy of the land is to be understood in reference to the ways in which the land was held and used, that is, taking into account the character of the land and the size and lifestyle of the group claiming Aboriginal title.<sup>154</sup>

With respect to the requirement for exclusivity, it is important to note that the Court did not adopt the view that access to the land could not be shared, nor did it deny the potential for joint exclusive possession.<sup>155</sup> Moreover, in regard to the continuity of the occupation of the land, the Canadian Supreme Court held, relying on the *Mabo* Court's

requirement for a ‘substantial maintenance of the connection’ to the land,<sup>156</sup> that ‘there is no need to establish “an unbroken chain of continuity” between present and prior occupation’.<sup>157</sup> To do so, noted Chief Justice Lamer, would fail to acknowledge that in many instances the connection to the land was broken by removal from the land or other manifestations of the failure of European settler governments to acknowledge Aboriginal title to the land.<sup>158</sup> Moreover, such an approach would contradict the Crown’s fiduciary obligations to Aboriginal peoples and the purposive approach to reconciliation, as well as perpetuate the historical injustices suffered by Indigenous peoples in Canada.<sup>159</sup>

The ruling in *Delgamuukw* on the content of Aboriginal title clearly sets the stage for a reinvigorated role for Aboriginal peoples to control and manage their lands and resources in Canada. The Court’s definition of Aboriginal title should also inform the debate about the content of native title in Australia. The *Delgamuukw* decision has already had some impact on Australian law with one Federal Court decision adopting Chief Justice Lamer’s definition of native title.<sup>160</sup>

### Specific rights in natural resources

#### *Fishing, hunting and gathering rights*

Historically, most of the conflict over Aboriginal hunting and fishing rights (as well as other rights in resources) in Canada has concerned the application of provincial laws and regulations which may potentially curtail or extinguish those particular rights.<sup>161</sup> As noted earlier, these conflicts arise because section 88 of the *Indian Act* allows the provinces to pass general legislation, including fish and game laws, applicable to all citizens subject, of course, to the overriding provisions of treaties, federal legislation implementing those treaties or unextinguished Aboriginal rights preserved by the 1982 Constitutional Amendment.

It may be useful to consider the historical treatment of hunting and fishing rights (in particular) in two categories: on-reserve rights and off-reserve rights. Additionally, the pre-section 35 treatment of off-reserve rights can be considered from the vantage point of treaty guaranteed rights and unextinguished Aboriginal rights.

The vast majority of cases considered in relation to on-reserve hunting and fishing rights have determined that the exclusive power in relation to Indian affairs granted to the federal government by the *Constitution Act, 1867* ‘insulates on-reserve hunting [and fishing] rights from provincial regulation’.<sup>162</sup> As in the US,<sup>163</sup> federal conservation laws, applied reasonably and non-discriminatorily, may still curtail the exercise of Aboriginal hunting and fishing rights. As the *Sparrow* Court noted, the federal government retains constitutional power to legislate on Indian affairs, but such power must be reconciled with both its fiduciary obligations and, since 1982, with the section 35 constitutional guarantee to preserve existing treaty and Aboriginal rights.<sup>164</sup> ‘The best way to achieve

that reconciliation', the Court noted, 'is to demand the justification of any government regulation that infringes on or denies aboriginal [or protected treaty] rights'.<sup>165</sup>

Following the *Sparrow* case, decisions by the Supreme Court like *Adams*<sup>166</sup> and *Cote*,<sup>167</sup> and application of their principles by lower courts,<sup>168</sup> indicate that claims of off-reserve Aboriginal rights are more likely to receive equal treatment with treaty protected rights and rights exercised on reserve lands. This was not always the case, however, as analysis of pre-*Sparrow* cases suggests that on-reserve and treaty protected rights received more favourable treatment than claims of unrecognised Aboriginal rights when raised as a defence to the application of provincial laws and regulations.<sup>169</sup> Though these off-reserve claims will be less difficult now, problems persist in presenting (non-treaty protected) claims/defences in criminal trials where difficulties associated with the proof of such claims are likely to arise because, while an individual defendant may be on trial, claims to these rights are really claims to a collective right often requiring production of considerable anthropological and historical evidence beyond the reach of any one defendant.<sup>170</sup>

In 1996, prior to delivering its judgment in *Delgamuukw*, the Canadian Supreme Court confirmed in *Adams v The Queen* that Aboriginal rights are not necessarily tied to Aboriginal title in land—'while claims to aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aboriginal title has been made out'.<sup>171</sup> Consequently, as the Court determines in a companion case, a particular tradition or custom does not need to be linked to a particular tract of land, but rather the activity, such as hunting or fishing within a particular area, must be an element of a practice, custom or tradition integral to the distinctive culture of the people claiming particular rights in an area.<sup>172</sup> This conclusion flows from the fact that many Tribes were nomadic, but still had customs and traditions such as fishing and hunting (in usual hunting and fishing grounds) that were necessary to their culture and survival.<sup>173</sup> Once Aboriginal people establish that a particular activity is an aspect of their traditional and customary practices, despite the lack of title to a particular land base, the claim of right needs only to survive any proof of extinguishment by the government for the group to continue the practice.<sup>174</sup>

In summary, fishing, hunting and gathering rights, as an integral part of pre-contact culture, will almost always be found to be within the circle of constitutionally protected Aboriginal rights. What may vary is the scope of the right, such as fishing or hunting for sustenance, or fishing or hunting for commercial purposes. Aboriginal peoples do not need to show Aboriginal title over land to establish an Aboriginal right to hunt or fish. As *Delgamuukw* makes clear, native title rights can exist separately from Aboriginal title; they are just one aspect of the full circle of Aboriginal rights.<sup>175</sup>

The post-*Delgamuukw* jurisprudence is still in its developmental stage. However, the decision in *Delgamuukw* assures that, at the very least, hunting and fishing rights associated with Aboriginal land claims, acknowledged by the courts or the government, will be treated equally with rights arising on reserves which include the full beneficial use of associated resources.<sup>176</sup>

### *Water rights*

Canadian Aboriginal water rights have developed in a manner similar to US law. In fact, US legal doctrines established in seminal cases such as *Winters*<sup>177</sup> and *Winans*<sup>178</sup> have influenced Canadian Aboriginal law.<sup>179</sup> Presumably, then, First Nations and other Aboriginal peoples would have the water rights necessary to implement projects for which reserved land was intended as well as the ability to protect the quantity (and, potentially, the quality) of water flows.<sup>180</sup> However, the full implications of the developing Canadian Aboriginal policy and jurisprudence for water quality and quantity have yet to be answered by Canadian law. Aboriginal peoples may also have water rights not specifically reserved, but which the Tribes 'intended' to reserve when making the treaties, using the liberal (that is, purposive) canons of treaty construction for Aboriginal peoples.<sup>181</sup>

Water rights, like hunting and fishing rights, would appear to be included in the realm of Aboriginal rights, but could be limited to historical uses of the water and the amount of water necessary to sustain other historical uses, such as fishing (though the decision in *Delgamuukw* suggests that expanded, contemporary uses which do not destroy the nature of the connection to the land may fall within the ambit of protected Aboriginal title). As Bartlett observes, '[a] right to water is accordingly an integral part of aboriginal title. It [Aboriginal title] includes and does not distinguish between land and water. Both were central to traditional aboriginal life'.<sup>182</sup> Traditional uses such as fishing and transportation thus would seem to be within the scope of Aboriginal rights, but irrigation and hydro-electric power generation may not.<sup>183</sup> As Bartlett also notes, 'the common conclusion [is] that aboriginal title includes water rights, but rights which are limited by traditional and historic uses...[which] suggests that the aboriginal peoples could not reserve rights to contemporary uses because aboriginal title does not include these rights'.<sup>184</sup> It should be noted, however, that Professor Bartlett was writing pre-*Delgamuukw* and that decision may, as noted above, expand the potential uses of Aboriginal water rights.

For claims to water rights on an Indigenous group's land base, that is, reserved lands or lands subject to full Aboriginal title,<sup>185</sup> there may be more potential for modern water uses. Canadian water law has established that water rights are connected to land and can not be severed.<sup>186</sup> Therefore, Aboriginal peoples owning or occupying land could also have riparian water rights.<sup>187</sup>

*Other resources (oil, gas, timber, minerals)*

Traditionally, the interests of developers have prevailed in Canada despite the existence of native title rights.<sup>188</sup> Consequently, Aboriginal Canadian claims to resources have generally been met with a land claims settlement and development of resources has proceeded.<sup>189</sup> Today, because of the *Constitution Act, 1982*, if Aboriginal title, associated native title rights and treaty rights have not been extinguished, the government must acknowledge Aboriginal title and other protected rights where it plans for resource development.<sup>190</sup> The Crown's duty to consider the implications of development on Aboriginal rights implies that Aboriginal title includes resources on the land.

In treaties with Aboriginal peoples timber rights and rights to proceeds from minerals were either reserved or the Aboriginal peoples were compensated when they agreed to allow development of the resources by non-Aboriginals.<sup>191</sup> As Bartlett notes, '[t]he application of the principles of statutory construction favoured by the Supreme Court of Canada dictates that the treaty land entitlement extends to the full resource interest of the land, including minerals and timber'.<sup>192</sup>

The *Delgamuukw* decision that Aboriginal title lands are to be treated comparably with reserve lands (that is, to include the right to full beneficial use) clearly supports the proposition that Aboriginal title includes rights to minerals, timber and other resource wealth. Chief Justice Lamer noted that under the *Indian Act* resources are set aside for the full use and benefit of the Indian Bands who occupy those reserve lands.<sup>193</sup> That view is supported by the Court's interpretation of other natural resources laws relating to reserve lands.<sup>194</sup> The Canadian position with respect to reserve (and now Aboriginal title) lands is similar to that of the US in relation to Indian reservations where, unless specifically excluded in a treaty, the Tribes own the full beneficial use of reservation lands and their resources including minerals, timber and foraging resources.<sup>195</sup>

## Summary

As in the US, First Nations and other Indigenous Peoples in Canada retain considerable authority to manage their own affairs on Indian Reserves, lands made available to Aboriginal peoples via negotiated settlements and, following *Delgamuukw*, on lands held pursuant to Aboriginal title. In the latter case, *Delgamuukw* makes clear that the Indigenous holders of Aboriginal title have the full beneficial use of the land, subject to the limitation that the land may not be used in a manner that destroys the traditional connection to the land of the particular Aboriginal group holding title. This limitation is similar to the supervisory responsibility exercised by the US government pursuant to its fiduciary duty to protect tribal rights. Similarly, Aboriginal peoples in Canada also possess Aboriginal rights (analogous to off-reservation rights in the US), which allow them to pursue their traditions and customs on lands (and waters) not associated with reserves or held pursuant to Aboriginal title. Finally, both Supreme Courts have

acknowledged that acceptance of common law Aboriginal title includes acceptance of a fiduciary responsibility to preserve and protect the rights associated with Aboriginal title.

## Political developments

### Introduction

Historically, there have been two types of land/Aboriginal rights claims in Canada. The first, considered in the *Calder* decision (and more recently in *Delgamuukw*), is generally referred to as a comprehensive claim, that is, a claim of Aboriginal title to the land, and occurs when there is no past treaty with the Aboriginal inhabitants.<sup>196</sup> Where dealt with politically, rather than through the courts, these claims form the basis of negotiated regional settlements. The other type of claim is the type litigated in the *Guerin* case. These claims may arise from alleged violations of the terms of a treaty or lease for a specific area of land,<sup>197</sup> as a general allegation of breach of fiduciary obligations as in *Guerin*, or as defences to alleged violation by Aboriginal people of government laws and regulations as in *Sparrow*. (Arguably, specific Aboriginal rights claims in areas such as hunting and fishing rights or commercial rights claims, like those litigated in the *Van der Peet* trilogy, also fall within this latter category.) Recently, in response to claims that this distinction is unfair, the Chrétien government issued a 'Red Book' that promises to end the distinction and instead create a Claims Commission designed to handle all Indian claims.<sup>198</sup>

### Negotiated land settlements

In the early 1970s following the *Calder* case, the Canadian government initiated a negotiated land claims settlement process.<sup>199</sup> Very generally, these negotiated agreements usually provide an Aboriginal group a land base, compensation for land ceded to the government or lost access to resources and (particularly in the most recent agreements) some form of self-government if the Tribe can establish that it has unextinguished Aboriginal title to an area, that is, that there has not been a treaty ceding the land to the Crown.<sup>200</sup> The earliest agreements have been characterised by one commentator as 'co-management regimes' whereby the Indigenous group and the government share power to manage an area's natural resources.<sup>201</sup> Later settlements, however, have progressively given the Indigenous Nations greater rights, including more extensive self-government powers.

The 1975 James Bay and Northern Quebec Agreement and the 1978 Northeastern Quebec Agreement were the first modern comprehensive land claims agreements. These 'gave the 19,000 Cree, Inuit and Naskapi of northern Quebec over \$230 million in compensation, ownership over 14,000 square kilometres of territory, and exclusive hunting and trapping rights over another 150,000 square kilometres'.<sup>202</sup> The next agreement contained a slight expansion on the settlement of the Aboriginal peoples in Northern

Quebec. The Inuvialuit Final Agreement of 1984 contained similar provisions with respect to the land base, hunting and fishing rights and a trust. The Inuvialuit First Nation also received the ability to participate equally in environmental and conservation issues.<sup>203</sup> The co-management regime between the government and Inuit applies to both public and Inuit lands. The intent is that everything concerning fisheries, wildlife, land use and the environment be reviewed and consented to by the co-management body and therefore by the Inuit. Ultimate authority remains with the government, but in practice co-management board decisions are seldom overridden.<sup>204</sup>

The next two agreements, the Gwich'in and Nunavut Land Claims Agreements, gave these First Nations peoples increased participation in the management of the environment and natural resources as well as the usual provisions.<sup>205</sup> They also gave the First Nations resource royalties, and subsurface rights in the Gwich'in Agreement.<sup>206</sup>

In a significant step towards Indigenous Sovereignty, the Final Nunavut Agreement divides the Northwest Territories, creating the new Territory of Nunavut, approximately 2 million square kilometres of land presided over by a Territorial Parliament elected largely by an Inuit majority of 175,000 people in a total population of 27,000.<sup>207</sup> The Territory of Nunavut, covering 20 percent of Canada (a land area the size of Western Europe),<sup>208</sup> came into being on 1 April 1999 and is 'effectively an Inuit State and a great adventure in Indigenous self-government'.<sup>209</sup> Under the Final Agreement the Inuit have absolute title to 350,000 square kilometres of land within the Territory, mineral rights to 10 percent of the Territory and will receive nearly \$1.5 billion (Can) to fund businesses, scholarships and otherwise assist subsistence economic practices, as well as a share of federal oil, gas and other mineral resource development.<sup>210</sup> Additionally, the Inuit will comprise half the membership on key boards and institutions which control wildlife management and environmental affairs throughout the Territory.<sup>211</sup>

Two other recent agreements also increased Aboriginal peoples' participation and rights in their resources. The Sahtu Bene and Metis agreement of 1994 enabled the Aboriginal peoples to retain mineral rights, resource royalties and wildlife harvesting rights, and participate in the management of renewable resources, land-use planning, environmental impact assessment and review, and land and water use regulations.<sup>212</sup>

The Yukon First Nations negotiated settlement includes an umbrella final agreement that increased the land and resource base.<sup>213</sup> It set out a framework for self-government providing greater control over land use on settlement lands and greater authority in areas such as language, health care, social services and education.<sup>214</sup> Most importantly, for the first time the Agreement did not require a blanket extinguishment of Aboriginal title.<sup>215</sup> Similarly, the Nisga'a Agreement-in-Principle initialled on 15 February 1996 (and finalised in 1998)<sup>216</sup> includes the establishment of the Nisga'a central government that



will own and govern a large land base (1,900 square kilometres).<sup>217</sup> The Nisga'a will also own surface and subsurface resources on their land and be entitled to certain salmon stocks and wild life harvests.<sup>218</sup>

As the Royal Commission notes, these negotiated agreements offer an opportunity for Aboriginal peoples to build partnerships with government and industry that will ensure their future well-being and that of the land and resources.<sup>219</sup> Adequate lands, resources and political powers enable Aboriginal people to build their own communities and expand their economic interest beyond the region and settlement area.<sup>220</sup> Despite concerns regarding costs, time and adequate protection of resources during negotiations for these agreements, the Commission is clear in its recommendations: '[t]he cost of doing nothing, or of doing too little, could far outweigh the benefits of proceeding with development before issues of Aboriginal title are responsibly addressed'.<sup>221</sup>

### **The Royal Commission report**

The most recent political statement regarding Aboriginal policy is the Report of the Royal Commission on Aboriginal Peoples. The Report is a response to a 16-point mandate set out by the Canadian government in 1991,<sup>222</sup> the main thrust of which is that past Canadian policy towards First Nations has wrongly focused on assimilation. The Report emphasises the distinct cultures of Canada's Indigenous peoples and their ability to retain their cultures despite the continuous efforts of assimilation by the Canadian government.<sup>223</sup> The Royal Commission ultimately concluded that the survival of First Nations peoples depends on a larger land-base to implement political programs.<sup>224</sup> The Report makes it clear that without an adequate land base and access to and control of resource wealth, Indigenous groups will be unable to build their communities or structure employment and other opportunities necessary to achieve self-sufficiency. Given their current status on the margins of Canadian society, the failure of the Canadian government to act means that Aboriginal Nations will be pushed to the edge of economic, cultural and political extinction.<sup>225</sup>

The Royal Commission set out four principles necessary for an improved relationship among the 'sovereigns'. First, reconciliation requires recognition not only that the Aboriginal peoples were the first inhabitants of the land and have cultures distinct from European settlers but also that non-Aboriginal peoples currently inhabit the area.<sup>226</sup> The second principle implores Canadians to respect each other's cultures and acknowledge that the sum of these cultures makes up the entirety of Canada.<sup>227</sup> These principles suggest the importance of respect by both Aboriginal and non-Aboriginal peoples of one another. The third and fourth principles call for sharing of benefits and resource-responsibility by the various governments, including good faith and honesty in mutual dealings.<sup>228</sup> The Commission acknowledged that the First Nations peoples' right to

self-governance is inherent and not a right given by the Canadian government, stating that 'Aboriginal governments are one of three orders of government in Canada—federal, provincial/territorial and Aboriginal'.<sup>229</sup>

With these basic principles laid out, the Commission then focused on the division of powers among governments and addresses possible solutions for implementing settlements. First, the Royal Commission recognised that membership in Aboriginal societies is not based on race, but on political affiliation.<sup>230</sup> Second, it noted that the likely elements of Aboriginal jurisdiction include, but are not limited to, lands, waters, sea-ice and natural resources, protection and management of the environment, economic life (along with commercial trapping and fishing), property rights (including succession and estates) and other governmental functions.<sup>231</sup> However, the Commission also recognised that there are certain issues, such as pollution control and wildlife protection, that may require co-management and co-operation among governments.<sup>232</sup>

The Royal Commission observed that negotiated settlements are the preferred method for resolving land and resource claims because of the sensitivity of the issue. In negotiations, the Crown needs to recognise that Aboriginal title includes the rights of occupancy and use of land (as well as its management) exceeding what they currently have, that there needs to be negotiations to work out these issues before Aboriginal peoples can utilise or occupy the land and that the Crown is a fiduciary and is obliged to protect Aboriginal interests in the land.<sup>233</sup>

The Report includes a number of criticisms of the current land claims settlement process. For example, the existing process requires an Aboriginal group to prove particular Aboriginal rights to particular land.<sup>234</sup> Instead, Aboriginal rights should be presumed on vacant Crown lands, placing the burden on the Crown to show Aboriginal rights do not exist.<sup>235</sup> Furthermore, the Report criticises the fact that the government controls the process and 'considers itself a "loser" when a claim is settled in favour of Aboriginal people'.<sup>236</sup>

The Royal Commission recommended that the government set up a treaty process including three categories of land distribution: lands belonging solely to and under the sole control of First Nations; lands belonging to both Aboriginal nations and non-Aboriginal governments that would be jointly managed; and land controlled by the Crown on which Aboriginal peoples would have special rights in sacred sites. The Commission predicted that this last category would be the largest.<sup>237</sup> Finally, the Commission called for federal aid to First Nations by increasing their land base through steps such as returning lands owed to them under existing treaties or purchases and helping them purchase other land, encouraging First Nation participation in resource industries and using more co-management arrangements.<sup>238</sup>

The solutions proposed by the Royal Commission also included the creation of bodies to address the grievances of Canada's Indigenous peoples. It recommended the creation of regional treaty commissions and a forum for settlement of Aboriginal lands claims and treaties to ensure that the negotiations are carried out in good faith.<sup>239</sup> For example, the Commission proposed the creation of an Aboriginal Lands and Treaties Tribunal that would provide interim relief in the form of injunctions while negotiations were in process.<sup>240</sup> It would also offer services such as arbitration and monitoring of the bargaining process to ensure good faith and would address specific claims for breaches of treaties and other agreements.<sup>241</sup> This type of solution, that is, negotiation, has also been encouraged by the courts which recognise that section 35(1) of the *Constitution Act, 1982* may suffice to protect existing rights, such as hunting and fishing, but also acknowledge that many other problems will not be solved by the provision.<sup>242</sup>

As noted earlier, the scope of this Chapter does not allow for an in-depth consideration of either the negotiated lands settlements process in Canada or the work of the Royal Commission. One can, however, say with confidence that the Royal Commission will have a significant impact on the development of Indigenous land rights policy in Canada. Moreover, the admonition of the courts that negotiated settlements are critical, combined with the cost of litigation, will add impetus to the increased pace of such settlements in Canada. The success of this process may also have a positive impact in Australia where the *Native Title Act 1993* (Cth) includes enhanced provisions for the development of negotiated settlements and regional native title agreements.<sup>243</sup> Again, the cost of litigation may well compel greater openness to negotiation by state and territory governments in Australia.<sup>244</sup>

## Conclusion

Whether the rights developed in the context of Canadian-Aboriginal relations are applicable to or can inform the future understanding of native title law in Australia is a question that is addressed fully in Chapter 7. In the author's view, the answer depends on identifying and understanding the source of those rights. Arguably, that source is the same in Canada and all other common law jurisdictions (including Australia)—the common law's historical acknowledgment of the pre-existing rights of Indigenous peoples which arises from their prior occupation of the land in organised societies.

The native title jurisprudence articulated in the Marshall trilogy established that native title rights to land and resources, as well as the rights of Indigenous peoples to govern their affairs and manage their lands, arise out of their prior occupancy of European-settled lands and the English common law's historical recognition of those rights. By assuming a paramount sovereignty, the new sovereign accepts responsibility for protecting the Indigenous Nations in their rights to occupy their lands, manage their natural

resources and exercise lesser rights of self-government.<sup>245</sup> The Marshall trilogy and the development of Indian law in the US has played a significant role in informing Aboriginal rights jurisprudence in Canada.<sup>246</sup> While the Canadian jurisprudence is more recent and Canadian Aboriginal policy is undergoing rapid change, thus making the final outlines of both law and policy less clear than in the US, the similarities are far more prominent than any differences in their legal treatment of Indigenous peoples.

While the *Delgamuukw* Court declined to rule definitively on the issue of self-government,<sup>247</sup> given the analogous position of lands subject to Aboriginal title with Indian reserves, recent developments in the negotiated settlements process which increasingly provide substantial measures of self-government to First Nations and other Indigenous peoples and the willingness of the Court to consider afresh self-government claims,<sup>248</sup> such diminished sovereignty claims are surely within the ambit of rights associated with Aboriginal title.

The *Delgamuukw* Court's ruling that Aboriginal title carries with it the full beneficial use of the land, subject to the limitation that the land not be used in ways contrary to a people's traditional connection to the land and the limitation that Aboriginal title/rights may be diminished only by a 'compelling government purpose' that does not violate the fiduciary duty owed an Aboriginal group,<sup>249</sup> strongly suggests that Aboriginal title encompasses self-government rights. Moreover, the Court's observation that the Royal Commission Report 'devotes 277 pages to the issue' is an acknowledgment of the fact that self-government, in a variety of guises, is clearly on the policy agenda in Canada.

The confirmation in the trilogy of cases beginning with *Van der Peet* of commercial Aboriginal rights in resources, whether associated with reserves or Aboriginal title lands or exercised as independent rights, and the acknowledgment of independent Aboriginal rights in *Adams* and *Cote*, as well as the Court's ruling that government must consult with Aboriginal groups prior to actions which affect Aboriginal title/rights, supports the proposition that recognition of Aboriginal title/rights includes a measure of self-management of those areas and resource interests.<sup>250</sup> As Chief Justice Lamer noted, in rare instances when the effects of proposed actions on Aboriginal rights are minimal, all that is required is good faith consultation by government to address Aboriginal concerns, but in most cases a significantly deeper consultation is required. In some cases, consultation will rise to the level of 'the full consent of an Aboriginal nation, particularly where provinces enact hunting and fishing regulations in relation to Aboriginal lands'.<sup>251</sup>

In the author's view, the fundamental principles of native title law that arise from the Canadian (as well as the US) jurisprudence and experience are mirrored by judicial treatment and policy developments in New Zealand. They find support in Australian jurisprudence and, arguably, form part of the common law of Australia with respect to the recognition and treatment of Indigenous rights.

## Notes

- <sup>1</sup> GD Meyers and B Landau, *Environmental and natural resources management by Indigenous peoples in North America: Inherent rights to self government; Part I—The US experience*, UNSW, 1998, pp 3-8.
- <sup>2</sup> See Royal Commission on Aboriginal Peoples Vol 1, *Looking forward, looking back*, Canadian Communications Group – Publishing, 1996, Chs 5-7 (Royal Commission Vol 1).
- <sup>3</sup> Meyers and Landau, above note 1, pp 2-9.
- <sup>4</sup> H Foster, 'Canadian Indians, time and the law' (1994) 7(1) *Western Legal History* 69, p 75.
- <sup>5</sup> Royal Commission Vol 1, above note 2, p 99.
- <sup>6</sup> Id, pp 100-01.
- <sup>7</sup> Id, pp 113, 122-23.
- <sup>8</sup> Id, p 122.
- <sup>9</sup> Ibid.
- <sup>10</sup> Id, p 113.
- <sup>11</sup> Id, p 114.
- <sup>12</sup> Ibid.
- <sup>13</sup> M Jackson, 'The articulation of native rights in Canadian law' (1984) 18 *UBC L Rev* 255, p 259.
- <sup>14</sup> Royal Commission on Aboriginal Peoples, *People to people, nation to nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples*, Minister of Supply and Services, 1996, p 10.
- <sup>15</sup> Royal Proclamation of 1763 made at the Court of St James on 7 October. Reprinted in M Boldt, JA Long and L Little Bear (eds), *The quest for justice: Aboriginal peoples and Aboriginal rights*, University of Toronto Press, 1985, pp 357-58.
- <sup>16</sup> Jackson, above note 13, p 259.
- <sup>17</sup> B Slattery, 'Understanding Aboriginal rights' (1987) 66 *Can Bar Rev* 727, p 733.
- <sup>18</sup> See GD Meyers, 'Different sides of the same coin: A comparative view of Indian hunting and fishing rights in the United States and Canada' (1991-92) 10 *UCLA J Env L and Pol'y* 67, pp 92-93; and Justice Dickson's analysis in *Guerin v The Queen* [1984] 2 SCR 335 at 376.
- <sup>19</sup> Royal Commission, above note 14, p 10.
- <sup>20</sup> *Calder v Attorney General of British Columbia* (1973) 34 DLR 3d 145 at 203.
- <sup>21</sup> Royal Commission Vol 1, above note 2, pp 137-39.
- <sup>22</sup> Id, pp 141-61.
- <sup>23</sup> Id, pp 161-73 and see particularly figure 6.1 p 162 for a map (with dates) of both pre and post confederation treaty areas.
- <sup>24</sup> Id, pp 141-76. See also Jackson, above note 13, p 261.
- <sup>25</sup> Royal Commission Vol 1, above note 1, pp 176-78.
- <sup>26</sup> *British North America Act, 1867* 30 and 31 Vict ch 3 reprinted in *Can Rev Stat* app II No 5 (1970).
- <sup>27</sup> *US Constitution* art VI, cl 2. The 'Commerce Clause' gives Congress the exclusive power '[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes'.
- <sup>28</sup> Section 91(24).
- <sup>29</sup> *Can Rev Stat* ch I-6 (1970).
- <sup>30</sup> Royal Commission Vol 1, above note 2, p 256.
- <sup>31</sup> Id, p 257.

- <sup>32</sup> Royal Commission on Aboriginal Peoples, *Restructuring the relationship (part two)*, Canadian Communications Group – Publishing, 1996, pp 472-73 (Royal Commission Report Vol 2 Pt 2).
- <sup>33</sup> Royal Commission Vol 1, above note 2, pp 255-314.
- <sup>34</sup> Foster, above note 4, p 84.
- <sup>35</sup> Jackson, above note 13, p 267.
- <sup>36</sup> (1990) 70 DLR (4th) 385 at 405-06.
- <sup>37</sup> Id at 405.
- <sup>38</sup> Foster, above note 4, p 85.
- <sup>39</sup> WB Henderson and DT Ground, 'Survey of Aboriginal land claims' (1994) 26(1) *Ottawa L Rev* 187, pp 212-13.
- <sup>40</sup> Ibid.
- <sup>41</sup> A number of First Nations in British Columbia, Alberta and Manitoba responded to the Draft White Paper with their own position papers arguing for a much stronger voice in Indian affairs. The most notable of these responses is the 'Red Paper' prepared by Indigenous people in Alberta: Foster, above note 4, pp 85-86. As other commentators note, this organised response increased both the political awareness and effectiveness of Indigenous Nations in Canada, and arguably marks the beginning of modern Aboriginal politics in Canada: Henderson and Ground, above note 39, pp 212-13.
- <sup>42</sup> See Foster, above note 4, pp 94-95 re the James Bay Hydro Project; and Jackson, above note 13, pp 269-79 re the McKenzie Valley Pipeline Project.
- <sup>43</sup> Ibid.
- <sup>44</sup> The *Indian Act* discriminated on the basis of sex in defining who was an Indian. In *AG Canada v Lavell* [1974] SCR 1349, the Supreme Court allowed the sexual discrimination to stand. The issue was then taken to the UN Human Rights Commission in *Lovelace v Canada* [1983] *Can Hum Rts YB* 305 but the Commission also avoided the sexual discrimination question. This was resolved in 1985 when women and children who had lost status were re-instated under *An Act to Amend the Indian Act, 1985*.
- <sup>45</sup> *St Catherine's Milling and Lumber Co v The Queen* [1889] 13 SCR 577.
- <sup>46</sup> RH Bartlett, *Resource development and Aboriginal land rights*, Canadian Institute of Resources Law, 1991, p 4.
- <sup>47</sup> Meyers, above note 18, pp 67, 71-73.
- <sup>48</sup> *Constitution Act, 1982* s 35 confirms those Aboriginal and treaty rights existing at the time of passage of the Act.
- <sup>49</sup> See Meyers, above note 18, pp 109-14; Foster, above note 4, p 97; and K McNeil, 'Envisaging constitutional space for Aboriginal governments' (1993) 19 *Queens L J* 95, pp 104-10.
- <sup>50</sup> (1973) 34 DLR (3d) 145.
- <sup>51</sup> Foster, above note 4, p 76.
- <sup>52</sup> (1992) 175 CLR 1 per Brennan CJ at 54-58 and per Deane and Gaudron JJ at 63. See Project Discussion Paper 4: F Way (with S Beckett), *Land holding and governance structures under Australian land rights legislation*, UNSW, 1999, pp 3-4.
- <sup>53</sup> *Calder* at 156. The Court ultimately found that the sovereign had extinguished Indian title to the land when it opened the land up for settlement: at 167.
- <sup>54</sup> Id at 145.
- <sup>55</sup> Id at 160.
- <sup>56</sup> [1998] 1 CNLR 1 at 58, 69.

- <sup>57</sup> [1984] 2 SCR 335.
- <sup>58</sup> Id at 364-91.
- <sup>59</sup> Id per Dickson J at 367-78, per Hall J at 349. See also Slattery, above note 17, pp 730-31, 748-49.
- <sup>60</sup> (1990) 70 DLR (4th) 385.
- <sup>61</sup> Id at 406.
- <sup>62</sup> Ibid.
- <sup>63</sup> Ibid.
- <sup>64</sup> MA Donohue, 'Aboriginal land rights in Canada: A historical perspective on the fiduciary relationship' (1990) 15 *Am Indian L Rev* 369, p 383.
- <sup>65</sup> *Sparrow* at 409. See also *R v Van der Peet* (1996) 137 DLR (4th) 289 at 302, in which Lamer CJ held that where any doubt or ambiguity exists with regard to s 35(1), it must be resolved in favour of Aboriginal peoples. Ultimately, however, he limited the application of *Sparrow's* broad interpretation of Aboriginal rights, declaring that such rights should be defined 'in relation to Canadian society as a whole': at 312. Lamer CJ's concept of reconciliation was legitimacy in the transfer of sovereignty rather than current and ongoing recognition and acceptance of Aboriginal rights and customs.
- <sup>66</sup> *Sparrow* at 407.
- <sup>67</sup> The Court has also recognised that the canons of constitutional construction and the 'purposes behind the constitutional provision itself' are reasons for the construction of s 35(1): *Van der Peet* at 301. The Court essentially adopted the US Marshall Court's notion of domestic dependent nations: see *Cherokee Nation v Georgia* 30 US 1 (1831).
- <sup>68</sup> *Sparrow* at 401.
- <sup>69</sup> *Guerin* [1984] 2 SCR 335. Moreover, a Aboriginal group must first surrender land to the Crown before it can be alienated because the Crown has an interest in preventing exploitation of Aboriginal peoples: at 340.
- <sup>70</sup> *Nowegijick v The Queen* (1983) 144 DLR (3d) 193 at 198. In interpreting s.87 of the *Indian Act*, the Court said that 'treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian'. See also *Simon v The Queen* (1985) 24 DLR (4th) 390 ('Indian treaties should be given a fair, large and liberal construction in favour of the Indians' (at 402) and '[g]iven the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises' (at 405)).
- <sup>71</sup> *Calder* at 210.
- <sup>72</sup> *Blueberry River Indian Band v Canada* [1996] 2 CNLR 25. The Band had surrendered land to the Crown who then sold the land rather than leased it. Of particular note was the Crown's failure to reserve associated mineral rights of the land or to sell for full value. The Band claimed this breached the Crown's fiduciary obligation. The Court held compensation was due but rejected the notion of a general fiduciary obligation. Specific undertakings which create a vulnerability and corresponding control give rise to a fiduciary obligation: at 40.
- <sup>73</sup> *Halfway River First Nation v British Columbia (Ministry of Forests)* [1997] 4 CNLR 45. The Ministry approved a forest company's application to log in land adjacent to the reserve. The First Nation sought judicial review and an order to quash the approval. They argued that the Ministry owed a fiduciary duty to consult with them regarding land integral to their traditional culture, or any decisions affecting treaty or Aboriginal rights. The Court agreed and the logging approval was quashed.

<sup>74</sup> *Semiahmoo Indian Band v Canada* [1998] 1 CNLR 250. The Band alleged a breach of fiduciary duty by the Crown in relation to the absolute surrender of part of its reserve in 1951. The Court held that the Crown owed a fiduciary duty to the Band to avoid an exploitative bargain in the 1951 surrender. Further, the Crown was under a post-surrender fiduciary duty to correct the error for as long as it remained in control of the land.

<sup>75</sup> *Union of Nova Scotia Indians v Canada* [1997] 4 CNLR 280. The Band and five other Bands applied for judicial review of Ministry decisions affecting fish habitat in their locale. The Court affirmed that the Bands have an existing Aboriginal right to fish for food in the areas concerned. The Crown's fiduciary duty to the Bands was breached when it failed to address the Aboriginal interest.

<sup>76</sup> *Sparrow* at 385.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Id* at 401.

<sup>79</sup> There was considerable debate over whether a province could extinguish Aboriginal title. One commentator has determined that 'federal authority to extinguish aboriginal title is exclusive': W Pentney, 'The rights of the Aboriginal peoples of Canada in the *Constitution Act, 1982*, Part II, Section 35: The substantive guarantee' (1988) 22 *UBC L Rev* 236, p 239. However, the author acknowledges that there are arguments for the legality of provincial extinguishment of Aboriginal rights. See for example, *Hamlet of Baker Lake v Minister of Indian Affairs* (1979) 107 DLR (3d) 513 at 549. On the other hand, 'Aboriginal title has been determined to be "an interest other than that of the province" ...and this interpretation is strong evidence in favour of exclusive federal competence': Pentney at 242. Also, s.37 of the *Indian Act* states that land cannot be sold or leased unless title first passes to the Crown: *ibid.* *Delgamuukw* at 83-85 answers the question, confirming that provincial laws of general application cannot extinguish Aboriginal rights but may infringe those rights in appropriate circumstances. The federal government alone, under s.91(24) of the *Constitution Act, 1867*, has power to legislate in relation to Aboriginal title.

<sup>80</sup> *Sparrow* at 386.

<sup>81</sup> *Id* at 411.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Id* at 412.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Id* at 413.

<sup>87</sup> In *Nunavut Tunngavik Inc v The Minister of Fisheries and Oceans* [1997] 4 CNLR 193, the Indigenous corporation applied to set aside the Minister's decision on turbot quotas affecting an area within the Nunavut Land Claims Agreement. The Court held that the Minister infringed the sole authority of the Nunavut Wildlife Management Board (constituted under the Agreement) to establish fishing levels. The Minister also failed to consider the advice of the Board in light of the standard of consultation and consideration required under the Agreement.

<sup>88</sup> *Halfway River* at 78 holds that consultation is an integral component of the Crown's fiduciary obligation and is vital to procedural fairness.

<sup>89</sup> In *Delgamuukw* at 79, Lamer CJ observed that '[t]here is always a duty of consultation...it is relevant to determining whether the infringement of Aboriginal title is justified. ...[T]he nature and scope of the duty of consultation must be in good faith and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue'.

<sup>90</sup> *Sparrow* at 416-17.



- <sup>91</sup> Meyers, above note 18, p 115.
- <sup>92</sup> *Van der Peet* at 289.
- <sup>93</sup> *Id* at 310.
- <sup>94</sup> *Id* at 309-10.
- <sup>95</sup> *Id* at 311-20.
- <sup>96</sup> *Id* at 321.
- <sup>97</sup> *Id* at 324.
- <sup>98</sup> *Id* at 325.
- <sup>99</sup> *Id* at 340.
- <sup>100</sup> *Id* at 341.
- <sup>101</sup> *Id* at 342.
- <sup>102</sup> *Id* at 350.
- <sup>103</sup> *Id* at 258
- <sup>104</sup> *Ibid*.
- <sup>105</sup> *R v NTC Smokehouse Ltd* (1996) 137 DLR (4th) 528 at 537.
- <sup>106</sup> *Ibid*.
- <sup>107</sup> *Van der Peet* at 365.
- <sup>108</sup> These ‘canons of construction’ are the guides used to interpret the words within treaties. Development of these interpretive principles reflects the different legal concepts brought to negotiations by the Indians and non-Indigenous negotiators: Jackson, above note 13, p 262.
- <sup>109</sup> *Van der Peet* at 339.
- <sup>110</sup> *R v Gladstone* (1996) 137 DLR (4th) 648 at 661-62.
- <sup>111</sup> *Id* at 663.
- <sup>112</sup> *Id* at 667.
- <sup>113</sup> *Id* at 664.
- <sup>114</sup> *Id* at 673.
- <sup>115</sup> *Id* at 650.
- <sup>116</sup> In *Mabo*, Brennan J acknowledges that there could be difficulties with proof of boundaries or membership of a group, but that this does not affect recognition of common law native title (at 36).
- <sup>117</sup> *Delgamuukw* at 49-50.
- <sup>118</sup> *Van der Peet* at 318.
- <sup>119</sup> GD Meyers, CM Piper and HE Rumley, ‘Asking the minerals question: Rights in minerals as an incident of native title’ (1997) 2 AILR 203, p 231.
- <sup>120</sup> *Delgamuukw v The Queen in Rights of British Columbia* [1991] WWR 97, [1991] 5 CNLR 1. See R Blowes, ‘*Delgamuukw v British Columbia*: A case of fundamental importance to understanding native title and to the conduct of native title cases in Australia’, paper presented at conference, The *Delgamuukw* decision: The case and its implications for native title in Australia, Australian National University, 4 October 1998, p 3.
- <sup>121</sup> (1993) 104 DLR (4th) 470; [1993] 5 CNLR 1.
- <sup>122</sup> L Mandell, ‘The *Delgamuukw* decision’ paper presented at conference, The *Delgamuukw* Decision: The case and its implications for native title in Australia, Australian National University, 4 October 1998, p 1.

<sup>123</sup> *Delgamuukw* at 22. Delgamuukw is the name of one of the Chiefs as well as one of the plaintiff houses into which both peoples divide their clans. See Blowes, above note 120, p 2.

<sup>124</sup> *Delgamuukw* at 22.

<sup>125</sup> See, generally, G Neate, 'Three lessons for Australians from *Delgamuukw v British Columbia*' paper presented at conference, The Delgamuukw decision: The case and its implications for native title in Australia, Australian National University, 4 October 1998.

<sup>126</sup> *Delgamuukw* at 49-50.

<sup>127</sup> Id at 47-48.

<sup>128</sup> Id at 50.

<sup>129</sup> Id at 52-53.

<sup>130</sup> Id at 53.

<sup>131</sup> Id at 54.

<sup>132</sup> Id at 54-55.

<sup>133</sup> Id at 55-56.

<sup>134</sup> Id at 56.

<sup>135</sup> Id at 57.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Id at 64.

<sup>140</sup> Id at 63.

<sup>141</sup> Ibid. Examples of impermissible uses of the land, according to the Court, would be the destruction of traditional hunting grounds by strip mining or destruction of ceremonial places by turning them into parking lots.

<sup>142</sup> Id at 65.

<sup>143</sup> Ibid. The US Supreme Court has taken a similar position with respect to treaties and executive agreements, acknowledging that the treaties and treaty substitutes reserved existing rights to the Tribes, they did not create those rights: *Washington v Washington State Commercial Passenger Fishing Vessel Association* 443 US 658, 678 (1979); *US v Winans* 198 US 371, 381-82 (1905).

<sup>144</sup> *Mabo* at 59-61.

<sup>145</sup> GD Meyers, 'Aboriginal rights to the "profits of the land": The inclusion of traditional fishing and hunting rights in the content of native title' in RH Bartlett and GD Meyers (eds), *Native title legislation in Australia*, Centre for Commercial and Resources Law, 1994, pp 222-23.

<sup>146</sup> *Delgamuukw* at 67.

<sup>147</sup> Id at 68.

<sup>148</sup> Id at 68-69.

<sup>149</sup> Ibid.

<sup>150</sup> *Mabo* at 59-60.

<sup>151</sup> *Delgamuukw* at 69.

<sup>152</sup> Id at 70.

<sup>153</sup> *Mabo* at 188-92.

<sup>154</sup> *Delgamuukw* at 71.

<sup>155</sup> *Id* at 74-75.

<sup>156</sup> *Mabo* at 59-60

<sup>157</sup> *Delgamuukw* at 72.

<sup>158</sup> *Ibid*.

<sup>159</sup> *Ibid*.

<sup>160</sup> In *Ward (on behalf of the Miriuwung Gajerrung People) v State of Western Australia* (1999) 159 ALR 483, in determining that Aboriginal plaintiffs held native title to lands in the north of Western Australia and in the Northern Territory, Justice Lee adopted the Canadian Court's definition of native title. Quoting *Delgamuukw*, he noted that: 'Aboriginal title is a right in land...more than the right to engage in specific activities which may themselves be aboriginal rights. Rather it confers the right to use the land for a variety of activities. ...Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the [group's] attachment to the land...' (at 505). Justice Lee went on to observe, again citing *Delgamuukw*, that native title is a communal right to land arising from prior occupation of land by an Indigenous community living under its customs: '[i]t is not a mere "bundle of rights"' (at 508). Justice Lee is clear in his order that native title in Australia is as expansive a concept as Aboriginal title in Canada. It is more than a permissive right to occupy the land. The title includes the rights to possess, use and occupy the area, to make decisions about the area's uses, to access and control others' access to the area, to use and enjoy the area's resources, to trade in those resources, to receive royalties from the use of those resources and to protect important cultural sites and knowledge (at 644-45).

<sup>161</sup> Meyers, above note 18, p 103.

<sup>162</sup> *Id*, p 104 and see cases cited therein.

<sup>163</sup> *Id*, pp 98-102.

<sup>164</sup> *Sparrow* at 409.

<sup>165</sup> *Ibid*.

<sup>166</sup> *Adams v The Queen* (1996) 138 DLR (4th) 657.

<sup>167</sup> *Cote v The Queen* (1996) 138 DLR (4th) 385.

<sup>168</sup> See for example, *R v Marin* [1998] 1 CNLR 182, in which s 35 defences to charges of illegal fishing in several provincial lakes brought under Saskatchewan fishing regulations were accepted by the trial court and upheld on appeal by the Saskatchewan Court of Queen's Bench. The courts accepted that the Metis defendants were exercising an Aboriginal right to fish for food, unconnected to an claim of Aboriginal title in land.

<sup>169</sup> See Meyers, above note 18, pp 104-09. Compare *R v White and Bob* (1965) 52 DLR (2d) 481 and *Simon v The Queen* [1985] 2 SCR 387 in which defences to provincial charges of violating game laws were upheld on the basis that defendants were exercising treaty-based or on-reserve rights with *Kruger and Manuel v The Queen* [1978] 1 SCR 104, *Dick v The Queen* [1985] 2 SCR 309 and *Jack and Charlie v The Queen* [1985] 2 SCR 332 in which all the defendants' convictions for violating provincial game laws were upheld after they had raised non-treaty or Aboriginal rights defences to those charges. See also D Ginn, 'Indian hunting rights: *Dick v R, Jack and Charlie v R and Simon v R*' (1986) 31 *McGill LJ* 527.

<sup>170</sup> On the other hand, in the Australian decisions of *Mason v Tritton* (1994) 34 NSWLR 572 and *Sutton v Dershaw* Lib No 950427 (unreported) Supreme Court of Western Australia, 15 August 1995 the courts accepted the existence of Aboriginal fishing rights as a general proposition, but the defendants were convicted for violating state fishing regulations due to a lack of proof of their native title. See GD Meyers, M O'Dell, G Wright and SC Muller, *A sea change in land rights law: The extension of native title*

to Australia's offshore areas, AIATSIS, 1996, pp 24-27. See also *Eaton v Yanner* (unreported) Queensland Court of Appeal, 27 February 1998 in which a magistrate's decision dismissing charges of illegally taking protected fauna on the basis of the defendant's native title rights was overturned and remitted for trial.

<sup>171</sup> *Adams v The Queen* (1996) 138 DLR (4th) 657 at 667.

<sup>172</sup> *Cote* at 408.

<sup>173</sup> *Adams* at 667-68.

<sup>174</sup> *Id* at 675-76; *Cote* at 399-419.

<sup>175</sup> *Delgamuukw* at 57.

<sup>176</sup> *Delgamuukw* at 59-61.

<sup>177</sup> In *Winters v United States* 207 US 564 (1908) the court held that, where the US set aside an Indian reservation, it implicitly reserved enough water to accomplish the purposes of the Indian reservation.

<sup>178</sup> In *United States v Winans* 198 US 371 (1905) the court held that the treaty right of taking fish in usual and accustomed places in common with white settlers is a reserved right and imposes a servitude on lands relinquished to the US.

<sup>179</sup> RH Bartlett, *Aboriginal water rights in Canada: A study of Aboriginal title to water and Indian water rights*, Canadian Institute of Resources Law, 1988, p 10.

<sup>180</sup> See generally, the discussion of US water rights in Meyers and Landau, above note 1.

<sup>181</sup> Bartlett, above note 179, p 52.

<sup>182</sup> *Id*, p 7.

<sup>183</sup> *Id*, p 13.

<sup>184</sup> *Ibid*.

<sup>185</sup> In *Delgamuukw* Lamer CJ, relying on *Guerin*, stated that 'lands held pursuant to aboriginal title, like reserve lands, are also capable of being used for a broad variety of purposes' (at 61). In *Guerin* Dickson J noted that '[i]t does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognised aboriginal title in traditional tribal lands. The Indian interest in the lands is the same in both cases' (at 379).

<sup>186</sup> *Burarra Power Co v The King* [1911] AC 87 (PC) at 94-95 cited in Bartlett, note 179, p 48.

<sup>187</sup> *Id*, pp 52-53.

<sup>188</sup> Royal Commission Report Vol 2 Pt 2, above note 31, pp 642, 683.

<sup>189</sup> For example, in the Northwest Territories where there was significant oil and gas development, once the Dene asserted Aboriginal title to the area, the government entered into negotiations which resulted in a land claims agreement. Likewise, the James Bay Agreement was the result of a hydro project in the area. The Inuit in the Northwest Territories signed an Agreement-in-Principle resulting from mineral exploration that had potential adverse impacts on wildlife. Finally, the Lubicon Band in Alberta entered into an Agreement after a judge refused to enter an injunction on gas and oil exploration, despite the existence of a 'serious question to be tried': Bartlett, above note 45, pp 29-32.

<sup>190</sup> *Id*, p 35.

<sup>191</sup> *Id*, p 46.

<sup>192</sup> *Id*, p 48.

<sup>193</sup> *Delgamuukw* at 60-61.

<sup>194</sup> In relation to the *Indian Oil and Gas Act* see *Blueberry River Indian Band v Canada* [1996] 2 CNLR 25. In relation to treaty protected rights in forest resources see *R v Paul* [1998] 1 CNLR 209 in which the New Brunswick Court of Queens Bench Trial Division held that treaty rights in Crown lands, while not providing exclusive access to Aboriginal people, include the right to harvest trees on all Crown lands.

## 5. Indigenous Resource Management in Canada: Development and Current Practices

- <sup>195</sup> Meyers and Landau, above note 1, pp 43-44.
- <sup>196</sup> Henderson and Ground, above note 39, p 196.
- <sup>197</sup> Ibid.
- <sup>198</sup> Id, p 193.
- <sup>199</sup> See id, pp 192-93; M Asch, 'Wildlife: Defining the animals the Dene hunt and the settlement of Aboriginal rights claims' (1989) 15 *Can Pub Policy* 205. For a review of the process to date, see Royal Commission Report Vol 2 Pt 2, above note 32, pp 533-44.
- <sup>200</sup> Henderson and Ground, above note 39, p 196.
- <sup>201</sup> DS Case, 'Subsistence and self-determination: Can Alaska Natives have a more effective voice?' (1989) 60 *U Colo L Rev* 1009, p 1012.
- <sup>202</sup> Department of Indian Affairs and Northern Development, *Comprehensive claims (modern treaties) in Canada*, <<http://www.inac.gc.ca/pubs/information/treaty.html>> on 8/11/98.
- <sup>203</sup> Ibid.
- <sup>204</sup> Royal Commission Report Vol 2 Pt 2, above note 32, p 668.
- <sup>205</sup> The management board may approve management plans, the establishment of conservation areas and management zones, and the designation of rare, threatened and endangered species. It may provide advice to management and to other agencies with respect to wildlife and fisheries management and research, mitigation and compensation resulting from damage to wildlife habitat and wildlife education: *ibid.* The Nunavut Water Board (created under the agreement) has responsibilities and powers over the regulation, use and management of water in the Nunavut settlement areas: *id*, p 664.
- <sup>206</sup> *Comprehensive Claims*, above note 202, p 3.
- <sup>207</sup> *Ibid.* See also 'Icy homeland gives Inuit hope of new pride', *The West Australian*, 1 April 1999, p 19.
- <sup>208</sup> *Ibid.*
- <sup>209</sup> C Forbes, 'Brave new world', *The Weekend Australian Review*, 3-4 April 1999, p 6.
- <sup>210</sup> *Ibid.*
- <sup>211</sup> *Id*, p 7.
- <sup>212</sup> *Comprehensive Claims*, above note 202, p 3.
- <sup>213</sup> Financial benefits of \$79,895,515 and a land settlement of 17,235 square kilometres were provided in the agreement: *ibid.*
- <sup>214</sup> *Ibid.*
- <sup>215</sup> *Ibid.*
- <sup>216</sup> *Nisga'a Final Agreement in Brief* (1998) 3 AILR 562; <<http://www.aaf.gov.bc.ca/aaf/treaty/nisgaadocs/newsbrief.htm>>. Full text at <<http://www.aaf.gov.bc.ca/aaf/treaty/nisgaal-nisga-agreement.html>>.
- <sup>217</sup> *Comprehensive Claims*, above note 202, p 3.
- <sup>218</sup> *Ibid.*
- <sup>219</sup> Royal Commission Report Vol 2 Pt 2, above note 32, p 680.
- <sup>220</sup> *Id*, p 681.
- <sup>221</sup> *Id*, p 684.
- <sup>222</sup> Royal Commission, above note 14, p vii.
- <sup>223</sup> *Id*, p x.
- <sup>224</sup> *Id*, p 32-38.

- <sup>225</sup> P Macklem, 'What's law got to do with it? The protection of Aboriginal title in Canada' (1997) 35 *Osgoode Hall L J* 125, p 126.
- <sup>226</sup> Royal Commission, above note 14, p 20.
- <sup>227</sup> *Id.*, p 20.
- <sup>228</sup> *Id.*, pp 33-34.
- <sup>229</sup> *Id.*, p 25.
- <sup>230</sup> *Id.*, p 26.
- <sup>231</sup> *Id.*, p 30. The complete list of Aboriginal rights includes: citizenship and membership; government institutions, elections and referendums; access to and residence in the territory; regulation of businesses, trades and professions; management of public monies and other assets; taxation; family matters, including marriage, divorce, adoption and child custody; health; social welfare, including child welfare; education; language, culture, values and traditions; some aspects of criminal law and procedure; administration of justice; policing; housing; and public works.
- <sup>232</sup> *Ibid.*
- <sup>233</sup> *Id.*, p 35.
- <sup>234</sup> *Id.*, p 36 (this is consistent with current case law).
- <sup>235</sup> A similar argument in relation to the native title process in Australia is made by N Pearson, 'Concept of native title at common law', paper presented to Land Rights – Past, Present and Future International Conference, Canberra, 16-17 August 1996, p 123.
- <sup>236</sup> Royal Commission, above note 14, p 36.
- <sup>237</sup> *Id.*, p 37.
- <sup>238</sup> *Id.*, p 38.
- <sup>239</sup> *Id.*, p 37.
- <sup>240</sup> Macklem, above note 225, pp 131-32.
- <sup>241</sup> *Ibid.*
- <sup>242</sup> WIC Binnie, 'The *Sparrow* doctrine: Beginning of the end or end of the beginning?' (1990) 15 *Queen's L J* 217.
- <sup>243</sup> Sections 24B-D.
- <sup>244</sup> The recent *Miriuwung Gajerrung* case, in which the Aboriginal plaintiffs were awarded native title over 7000 sq km of land, cost the state of Western Australia and the Northern Territory government \$4.7 million, and that is only a portion of the plaintiffs' cost of the trial. The figure does not include either the state's or territory's own legal costs. It is also not the end of the costs as the case is now on appeal: (1999) 159 ALR 483; 'State gets \$4.7m land rights bill', *The West Australian*, 7 May 1999, p 15. See note 160 above.
- <sup>245</sup> V Deloria Jr and CM Lytle, *American Indians, American justice*, University of Texas Press, 1983, p 33.
- <sup>246</sup> See *Calder* per Judson J at 151.
- <sup>247</sup> *Delgamuukw* at 80-81.
- <sup>248</sup> *Id.* at 80.
- <sup>249</sup> *Id.* at 78-79 (emphasis added).
- <sup>250</sup> *Id.* at 79.
- <sup>251</sup> *Ibid.* This ruling is analogous to the position in the US where Indian Tribes control game laws on their reservations and are immune from state regulation: Meyers and Landau, above note 1, pp 23-25.

## Chapter 6 ■

# Environmental and Natural Resources Management by the Maori In New Zealand

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### Introduction

This Chapter provides an overview of the legal developments affecting Maori customary law, Maori land tenure and the consequential effects on environmental and natural resources management by Maori. While an in depth survey of the legal history of Maori customary law and the European (Pakeha)<sup>1</sup> settlement of New Zealand is outside the scope of this Chapter and has been admirably addressed elsewhere,<sup>2</sup> Section 2 begins with a brief exploration of the traditional Maori relationship with the land and considers the historical context in which that traditional relationship has been acknowledged by the non-Indigenous settlers of New Zealand. As in the United States (US)<sup>3</sup> and Canada,<sup>4</sup> the relationship between the European settlers and Indigenous New Zealanders (and the consequential acknowledgment of Maori rights by Pakeha governments) has moved in stages from rough equality to denial and assimilation to a recognition of the special place of Maori culture in New Zealand and limited rights to self-determination and management of land and resources.

Section 3 reviews the operations of the Waitangi Tribunal. In particular, this Section focuses on the impact of Waitangi Tribunal reports on the development of Maori land and resource management rights. Finally, Section 4 considers the sources and contemporary scope of Maori powers to manage and use tribal natural resources.

### Historical overview: The development of Indigenous rights in New Zealand

It begins first with a brief review of the period of settlement by the Maori up to European contact. It then considers the development of the relationship between the first peoples of New Zealand and its European colonisers in three stages: first, the period of early settlement, which includes recognition of Maori rights in the Treaty of Waitangi, from 1800 to 1860; second, the period of large scale dispossession of Maori lands from 1860 to the 1970s; and finally, the present era in which the courts, legislature, and Waitangi Tribunal have revitalised Maori rights to use, govern and participate in the management of their traditional lands, waters and other resources.

## **The Maori settlement of and relationship with the land of New Zealand (800 to 1800)**

The first settlement of New Zealand is generally believed to have begun about 800AD.<sup>5</sup> These 'first discoverers' and 'first colonizers' of New Zealand came from Eastern Polynesia, the West Pacific region which includes the Society Islands, Cook Islands and the Marquesas.<sup>6</sup> The Polynesian colonization of New Zealand was the final stage, beginning some 2000 years ago, of the peopling of Western Pacific islands which probably began close to 4000 years ago.<sup>7</sup>

While there is considerable debate about whether the Polynesians settled New Zealand accidentally or purposely (that is by crediting their ability to make two-way voyages to find new islands and then return to settle those lands),<sup>8</sup> there is little doubt that Polynesian peoples intentionally 'set out into the unknown to find new land; only thus could the plants and animals on which they depended have been transplanted throughout Polynesia'.<sup>9</sup>

Whether intentional or accidental, the archaeological and anthropological evidence suggests that New Zealand was peopled over a few centuries between 800 and 1200 AD in a succession of voyages by Polynesians who brought with them their traditional life style, culture and social organization.<sup>10</sup> While these Polynesian/Maori settlers had a significant impact on the land of New Zealand, with the introduction of new plant and animal species (including the introduction of the human predator), it is equally clear that the land—with its topography, climate, soils, and native fauna and flora different from that of most of the islands in the Western Pacific—also shaped Maori lifestyle.<sup>11</sup> With few or no continuing contacts with their home islands, what developed on the north and south islands of New Zealand/Aotearoa (land of the long white cloud) was a new Maori culture, a distinct variant of Polynesian culture.<sup>12</sup>

Like other Polynesian peoples, the Maori developed a communal culture. The critical organizational construct of Maori culture was the Tribe, an extended kinship organization comprising sub-Tribes and extended family groups, which was further stratified in a population consisting of slaves (prisoners of war), commoners and nobles (classes of chiefs).<sup>13</sup>

The most important communal resource for the Maori was the land held by each Tribe. As Ranginui Walker explains, coastal Tribes:

aspired to incorporate a stretch of coastline in [their] territorial boundaries, some arable land for horticulture, and interior forest land for hunting and as a source of timber and other raw materials. Inland Tribes sought to control territories around lakes and along riverbanks. Land was a Tribe's turangawaewae, the essence of its identity and existence as a Tribe.<sup>14</sup>



At first contact with Europeans there was no concept of Maori identity in the sense of cultural or national similarity. 'Maori' meant usual or normal. Groups distinguished themselves by their tribal (*iwi*) affiliations and association with physical features of the natural environment such as mountain ranges or rivers.<sup>15</sup> Thus, as Durie explains, Maori tribal identity 'reflected historical, social and geographic characteristics'.<sup>16</sup> The tribal identity was and is the *iwi*. The tribal institutions of *whanua* (extended family or kin group), *hapu* (sub-Tribe), *hui* (meeting of the *iwi*) and *marae* (ceremonial centre) remain key features of contemporary Maori culture.<sup>17</sup> The Maori relationship to the land involves a guardian (*kaitaki*) role or obligation to oversee the environmental quality of their ancestral lands.<sup>18</sup>

Traditionally, Maori land was held by the Tribe/sub-Tribe<sup>19</sup> rather than by individuals. These areas of land were quite well defined although there were tracts of disputed land between some tribal territories. Within each Tribe, the principal unit to hold land was the *hapu* (family or kin group), while particular families or individuals used parts of the tribal land.<sup>20</sup> The use rights of the tribal lands were determined by the authority of the Chief (*rangatiratanga*).<sup>21</sup> A Tribe based its claim to land upon a right (take) which generally had to be supported by the Tribe's occupation of the land.<sup>22</sup> Take existed in different forms, depending on how the right to the land had been acquired: by ancestry, by conquest or by gift.

All Maori land was under the control and care of an associated ancestral descent group and by custom could not pass outside the blood descent group; 'land and ancestors were fused'.<sup>23</sup> For all Maori land, occupation was a pre-condition to entitlement.<sup>24</sup> This customary law continued to regulate title to tribal land even after British colonization of New Zealand.<sup>25</sup>

### **European settlement and the alienation of Maori land from 1800 to 1860**

When Europeans first arrived in New Zealand, they found a fully established society, developed over a thousand years, in possession of the islands. Initially, the 'newly discovered' New Zealand territory was administered by the Colonial authorities in the Australian Colony of New South Wales.<sup>26</sup> As Owens notes, from the late eighteenth century, the Maori experienced the impacts of successive groups of Europeans:

all of whom brought different kinds of influences: the explorers, mostly in the late eighteenth century; the sealers, whalers, and traders from the 1790s onwards; the missionaries, present from 1814 but effective only from the mid-1820s; and finally the more permanent settlers who began arriving in numbers in the late 1830s.<sup>27</sup>

From the start of contact, both the Colonial Office in London and Europeans on the ground in New Zealand, including traders, missionaries, and settlers 'all conducted their affairs on the understanding that the Maori held title to their land'.<sup>28</sup> McHugh notes that the recognition of Maori title to the land actually worked to the advantage of Colonial

interests, 'for it provided a basis for the passage of rights from Tribe to European'.<sup>29</sup> Thus, from the beginning of the nineteenth century the Maori entered into transactions with European settlers with the result that Maori customary land holdings were, over time, steadily eroded.<sup>30</sup>

From the outset, settlers to the new colony purchased land from the Maori, while the British Home Office considered how to deal with the New Zealand frontier. In the early 1830s the British Resident James Busby complained of the difficulties of keeping order as he lacked local authority to enforce the peace.<sup>31</sup> Busby also faced a threat from the French.<sup>32</sup> The added impetus of the New Zealand Company compounded the problem. The New Zealand Company was preparing a ship to sail for the frontier with settlers who were contracted to their own system of government.<sup>33</sup> In response, Captain Hobson was sent to New Zealand, instructed by the British government to acquire the sovereignty of New Zealand, which ultimately became acquisition of almost all Maori lands.<sup>34</sup>

At the instigation of the British Resident a confederation of thirty-five hereditary Chiefs or heads of North Island *iwi* assembled at Waitangi in 1835 and signed or made their mark on the Declaration of Independence of New Zealand.<sup>35</sup> The hereditary Chiefs' exclusive sovereign power and authority was asserted. An annual meeting at Waitangi was declared for the purpose of framing laws for all Maori. It was further declared to send a copy of the Declaration to King William IV to entreat him to protect 'their infant state' from all threats to its independence.<sup>36</sup> This assertion of sovereignty and independence by the Chiefs motivated the British to respond with a mechanism to assume governance of New Zealand.<sup>37</sup>

The British Colonial Office practice in the 1830s was to recognise the sovereignty of non-Christian societies.<sup>38</sup> To assert territorial sovereignty over the Maori, principles employed in the colonisation of North America were applied, requiring the consent of the Maori Chiefs to any derogation of their sovereignty.<sup>39</sup>

The mechanism by which the British asserted sovereignty over New Zealand was the Treaty of Waitangi.<sup>40</sup> Article Two of the Treaty gave the Crown the exclusive right of pre-emption (first right of purchase of the land). An active period of land purchases by Crown Land Purchase Officers commenced and continued up until the 1860s. The Crown Land Purchase Officers were also instructed to regularise land purchases and inquire into earlier land dealings which settlers had transacted directly with the Maori.<sup>41</sup> Instructions from Lord Normanby to Captain Hobson specified that each Tribe should be left a sufficient economic land base for its future.<sup>42</sup>

### *The Treaty of Waitangi*

The Treaty of Waitangi was signed in 1840 by a number of Maori Chiefs and representatives of the British Crown. The Treaty was prepared in both an English and Maori

version, both being surprisingly brief by contemporary standards.<sup>43</sup> Not all the Maori chiefs who signed the Maori version, *Te Tiriti O Waitangi*, also signed the English version.<sup>44</sup> The Treaty of Waitangi presupposed the legal and political capacity of the Chiefs of New Zealand to enter into a binding agreement that was valid by contemporary international law.<sup>45</sup> Due to the haste in which it was drafted and executed, no attention was paid to authorisation of the signatories, definition of the land over which the Chiefs had authority or to the definition of the groups represented by the signatories.<sup>46</sup>

Without (for the moment) descending into the controversy that engulfs the interpretation of the Treaty, by Article One the Maori signatories ceded *kawanatanga* (governance). In return, Article Two reserved to the Maori signatories *te tino rangatiratanga* (the highest chieftainship or 'full authority status and prestige with regard to their possessions and interests').<sup>47</sup>

The ostensible purposes of the Treaty of Waitangi were threefold: to protect Maori interests, to promote the settlers' interests in acquiring land and to secure the Crown's position in New Zealand to the best advantage. However, the almost immediate effect of the Treaty of Waitangi was to separate Maori from their land base and culture.<sup>48</sup>

The right of pre-emption in Article Two was intended to validate titles and protect the Maori from exploitation. The right of pre-emption was waived by Governor FitzRoy in 1844, allowing for direct sales of land by Maori to Pakeha settlers, subject to Crown approval.<sup>49</sup> The next Governor, Grey, resumed the right of pre-emption and undertook an active Maori land purchase policy. Still the rate of availability of land for sale to settlers lagged behind demand and the Crown's remedy was the *Native Land Act 1862* and subsequent legislation which largely did away with customary land titles and freed up Maori land for sale to settlers.<sup>50</sup>

### *Interpretation of the Treaty of Waitangi*

There are semantic differences between the English version and the Maori version of the Treaty of Waitangi which have caused considerable controversy in the interpretation of the Treaty and application of treaty principles.<sup>51</sup> In the English version of Article One, the reference to the transfer of 'all the rights and powers of Sovereignty' purports to cede more than the terminology of the Maori version which cedes '*kawanatanga*', something lesser, interpreted as governance.<sup>52</sup> *Kawanatanga*, asserts Mason Durie amongst other commentators, failed to capture the concept of absolute power, while the use of '*Tino Rangatiratanga*' in Article Two converted the Maori version into an acknowledgement of continuing Maori authority.<sup>53</sup> The word 'guarantee' in Article Two has been given particular emphasis by both the Waitangi Tribunal and the Court of Appeal as denoting that the Crown's obligations are active rather than passive.<sup>54</sup>

Apart from the interpretation of the two versions of the Treaty of Waitangi, there is the paradoxical situation arising from the validity of the Treaty as between two sovereign nations. The treaty extinguished the identity of the Confederation of Chiefs of New Zealand as a sovereign nation, causing the enforcement of the reciprocal promises to move from the jurisdiction of international law to domestic public law.<sup>55</sup> At common law international treaties do not bind the Crown for internal purposes until incorporated by legislation.<sup>56</sup> Recent attempts to have an express reference to the Treaty of Waitangi in the New Zealand Bill of Rights did not succeed.

The first case involving the interpretation of the Treaty of Waitangi is found in *R (on the prosecution of CH McIntosh) v Symonds*.<sup>57</sup> In this case, McIntosh sought to set aside a Crown grant of land to Symonds on the basis that his purchase of land from the Maori had been authorised by a Crown waiver of its right of pre-emption. The Court held that the waiver was procedurally ineffective. In the process of considering McIntosh's claim, the High Court of the young country recognised the legal right of the Maori to their traditional lands. Justice Chapman held the Treaty of Waitangi did not assert anything new but rather guaranteed native title and secured the Crown's pre-emptive right. Relying upon early cases decided by the US Supreme Court,<sup>58</sup> he also held that the common law principles of Aboriginal title, although inferior to those associated with fee simple tenure, existed as a recognised right of customary use and possession, inalienable and subject to the exclusive right of the Crown to extinguish. Justice Chapman found that the legal doctrine of the exclusive right of the Queen to extinguish native title arose from 'our peculiar relations with the Native race and our obvious duty of protecting them...'.<sup>59</sup>

With the Treaty of Waitangi in place and the Crown's right of pre-emption secured,<sup>60</sup> the power of the exclusive right to acquire Maori lands was exercised under the aegis of Land Purchase Officers.<sup>61</sup> Large areas of Maori land, including much of the South Island, thus passed into European hands.<sup>62</sup>

By the mid 1850s the Maori Chiefs were concerned with the effect of these increasing land sales on their authority. The Land League or King Movement arose and gained momentum with the Chiefs using their power of veto (the *akiri* system) to prevent the sale of further tribal lands.<sup>63</sup> The resulting conflict over access to land led inevitably to the Maori Land Wars.<sup>64</sup>

In summary, the early period of colonization of New Zealand by Europeans which began so promisingly with the European acknowledgment of Maori sovereignty over their lands, followed by the signing of the Treaty of Waitangi in 1840, ended in civil war.

### Dispossession by the courts and the legislature 1860-1970s

As Litchfield notes, there was no single land war or unified rebellion, rather there was a series of battles with various North Island Tribes in conflict with the New Zealand authorities.<sup>65</sup> The Land Wars or Maori Rebellion of 1860–65<sup>66</sup> resulted in the confiscation of large tracts of Maori land.<sup>67</sup> In 1860 the Maori still controlled 21 million acres of land; by the conclusion of the Land Wars, a further 3.25 million acres of land had been confiscated.<sup>68</sup>

In the wake of the Land Wars, the British recognised that New Zealand could not be effectively governed from London.<sup>69</sup> In 1862 the Colonial Assembly was given power to pass laws over Maori land and the Native Land Court (later the Maori Land Court), was created by the *Native Land Acts* of 1862 and 1865.<sup>70</sup> Maori freehold title, signified by certification of the Native Land Court, was freely alienable. The Court had three functions in the period 1865-1900: to identify the customary Maori land owners, to convert Maori land rights into a title recognisable in English law and to assist peaceful colonisation.<sup>71</sup> As Maori freehold became available for purchase, Crown (pre-emptive) purchases were no longer required.<sup>72</sup> Maori freehold title was a tenancy-in-common, as communal title was not recognised. A ten name only rule limited the number of names on a certificate of Maori freehold for Maori land under 5,000 acres.<sup>73</sup> The effect of reconstituting traditional, communal ownership of Maori land to Maori freehold title was to displace tribal ownership, fragment legal title to the land, displace the custom of *turangawaewae* (that ownership depended on occupation)<sup>74</sup> and, as was the intent in the US during the 50 year period of allotment (privatization) of Indian tribal lands, to facilitate the transfer of Indigenous land holdings to non-Indigenous interests.<sup>75</sup>

The legislative diminution of Maori rights was also facilitated by the New Zealand Courts. Following the *Symonds* case and *Re Landon and Whitaker Claims* which reconfirmed the doctrine of Aboriginal title as part of New Zealand common law,<sup>76</sup> the next notable interpretation of the Treaty of Waitangi was the case of *Wi Parata v Bishop of Wellington*.<sup>77</sup> In this case the applicants relied on the Treaty of Waitangi to contest the Crown grant of land to the Bishop without prior extinguishment of Maori title to the land. The Supreme Court dismissed the case on the grounds that the applicants had no legal basis, as the Court doubted that the Maori had the legal capacity to enter into a treaty. The Treaty of Waitangi was regarded as a legal nullity, and consequently the Maori had mere permissive rights to occupy the land.<sup>78</sup> This narrow approach, based upon the refusal to recognise Maori customary law, provided a long standing precedent for Maori property rights to be unenforceable in courts of law, except for those customary land rights transformed into Maori freehold by the Maori Land Court.<sup>79</sup>

Notwithstanding the Privy Council elucidating for the New Zealand Courts the error of the *Wi Parata* position in the successful appeal of *Wallis v Solicitor General*, the narrow view of the Treaty of Waitangi prevailed.<sup>80</sup> To ensure that there were no more further challenges by the Maori, sections 84 and 86 of the *Native Land Act 1909* were enacted to prohibit proceedings against the Crown to enforce 'native customary title'.<sup>81</sup>

Despite the attempt to codify the *Wi Parata* position in the *Native Land Act*, the case *Taminhana Korokai v Solicitor-General* held that although the Treaty was not embodied in a statute and thus non justiciable, statutes could however recognise customary law and the *Native Land Act 1909* had done just that.<sup>82</sup> Sir Robert Stout held that for the Crown to claim title to land recognised by statute, the Crown had to show formal extinguishment and also that the Native Land Court had jurisdiction to identify the customary owners.<sup>83</sup>

In 1941 *Hoani Te Heu Heu Tukino v Ateu District Maori Land Board* gave the Privy Council another opportunity to apply the presumption of continuity of property rights.<sup>84</sup> Common law Aboriginal title rights were conceded; however, the Privy Council confined the Court of Appeal decision in that case to the principle of Parliamentary supremacy, holding that whatever rights existed at common law were subject to statutory modification.<sup>85</sup> What was significant in *Hoani Te Heu Heu Tukino v Ateu District Maori Land Board* was that the Court of Appeal did not dismiss the Treaty of Waitangi as irrelevant.<sup>86</sup>

In *Re the bed of the Wanganui River*, the Maori Land Court heard and dismissed a 1938 claim for Maori freehold title to the bed of the Wanganui River.<sup>87</sup> Ultimately, in 1962, the Court of Appeal held that there was no native title right to the river bed.<sup>88</sup> Another unsuccessful claim was *In re an Application for investigation of Title to the Ninety Mile Beach*, which claimed rights to the foreshore.<sup>89</sup> The case attempted to assert Maori title to the foreshore, arguing that the Maori Land Court had jurisdiction over the foreshore and could issue Maori freehold titles over the foreshore.<sup>90</sup> The claim failed in the Supreme Court and was appealed to the Court of Appeal.<sup>91</sup> The Court of Appeal held that once the Maori Land Court had inquired into the title of a coastal location and Maori freehold title to the foreshore was not granted, customary rights to the foreshore were extinguished.<sup>92</sup>

In summary, the middle phase of European settlement in New Zealand ushered in the era of the alienation of the Maori from their traditional lands by government purchases, by confiscation of land from those involved in the Maori Wars and by the conversion of commercial lands to Maori freehold enabling the sale of those lands to non-Maori. By 1896, only 11 million acres of New Zealand remained in Maori ownership. In less than a century 55.5 million acres of Maori land had been alienated by one means or another.<sup>93</sup> The erosion of the land base affected both the economic welfare and social cohesion of the *hapu* (kin group) and *iwi* (Tribe) infrastructure.<sup>94</sup> This dispossession continued in the

twentieth century. By 1920, the amount of land under Maori control was reduced to 4.7 million acres, and by the time of the *Treaty of Waitangi Act 1975* Maori controlled land amounted to only 3 million acres.<sup>95</sup>

The case law in the century from the 1860s to the 1970s strictly enforced the view that no native title rights were enforceable without statutory recognition in municipal law. In response to the failure of Maori claims in respect of land before the courts, the Maori turned their attention to increased political activism. Following a heightened period of political protests and an increased concern with international human rights issues, a new Labour government enacted the *Treaty of Waitangi Act* in 1975.<sup>96</sup>

### **The modern era (1970s to the present): The Waitangi Tribunal, Judicial reinvigoration of the doctrine of common law native title and statutory guarantees of Maori rights**

The *Treaty of Waitangi Act 1975* established the Waitangi Tribunal, consisting of three members, to hear and inquire into claims by Maori arising from the Treaty of Waitangi.<sup>97</sup> Originally limited to claims arising from 1975, the *Treaty of Waitangi Act* was amended in 1985 to enlarge its jurisdiction to include investigation and reporting on historic claims back to 1840. The Tribunal has powers to inquire into claims and make non-binding recommendations to the government if it is of the opinion that the claim is supported by the evidence and requires redress by the Crown. Alternatively, the Waitangi Tribunal may refer the claim to another body or decline to hear a claim.

Ironically, the Crown expected that the Waitangi Tribunal would not hear many claims, meet very often or be an expensive body to fund.<sup>98</sup> This expectation was turned on its head by a confluence of events starting with the appointment of ETJ Durie as the first Maori judge of the Maori Land Court and consequently Chairperson of the Waitangi Tribunal.<sup>99</sup> Other factors raising the Waitangi Tribunal's profile included the Motunui-Waitara claim, a claim by the Te Ati Awa that the Crown was responsible for pollution of traditional fishing grounds.<sup>100</sup>

Even prior to the enlargement of its jurisdiction, the Waitangi Tribunal, although strictly unable to 'investigate' pre 1975 events, did 'consider' historical events.<sup>101</sup> The overall effect of the 1985 amendments was to allow investigations back to 1840 resulting in more claims and more complexity in the investigations. The Waitangi Tribunal membership was expanded, research and administrative staff were increased and authority was given to appoint counsel, both for the Tribunal and claimants.<sup>102</sup>

A further stimulus to the development of the law of native title in New Zealand was the reinvigoration of the common law doctrine of native title by the judiciary in the mid-1980s. In three important cases, the courts reversed the *Wi Parata* case, acknowledged the continuance of common law native title as part of the law of New Zealand, and declared

that the Crown owes a fiduciary duty to the Maori to protect their rights and interests in land and other resources.

### *Interpretation of native title rights in the 1980s*

A radical departure from the land claims discussed earlier was made in the fisheries prosecution case *Te Weehi v Regional Fisheries Officer*.<sup>103</sup> In this case, Te Weehi was charged with taking undersized shellfish contrary to prevailing fisheries regulations. In defence, he argued that he had a customary right to harvest the shellfish from the sea shore. As Dorsett and Godden note, to prevail, Te Weehi's counsel had to overcome two obstacles: first, provisions of the *Maori Affairs Act 1953* prohibited customary claims to land against the Crown; second, long standing case law prevented exclusive Maori claims to the foreshore. Thus to succeed, 'Te Weehi had to establish a non-territorial, non-exclusive customary right to take *paua*'.<sup>104</sup> Justice Williamson, in a landmark judgment, rejected the restrictive view of Maori customary title and applied the principle of continuity of private property rights upon the assertion of sovereignty, citing amongst other decisions the Canadian cases of *Calder v Attorney-General of British Columbia*<sup>105</sup> and *Guerin v the Queen*.<sup>106</sup>

The practical effect in *Te Weehi v Regional Fisheries Officer* was to restore *R v Symonds*, reverse the *Wi Parata* narrow view of native title and acknowledge the common law as a source of the native title right to fish, apart from any statutory recognition of Maori fisheries.<sup>107</sup> The case confirmed a Maori property right in coastal fisheries and has been interpreted as acknowledging a 'legal pluralism directly into the New Zealand judicial system without the aid of any ushering statute'.<sup>108</sup> The decision in *Te Weehi's Case* did not, however, affect the statutory bar against the enforcement of native title to land, as fishing rights are not within the ambit of Part XIV of the *Maori Affairs Act 1955* which prohibited customary claims to land.<sup>109</sup>

In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*,<sup>110</sup> the New Zealand Court of Appeal confirmed that the common law doctrine of native title was part of New Zealand law and applied to lands as well as fisheries. In this case, the Maori lodged a claim to a riverbed with the Waitangi Tribunal and sought an interim injunction from the Court blocking the transfer of ownership of a dam on the Wheao River from the Bay of Plenty Electrical Board to newly constituted private energy companies. Seeking to forestall a recommendation by the Minister for Energy favoring the transfer, the Maori claimed that the transfer would prejudice existing rights in the river bed based on Aboriginal title.

While the Court denied the requested relief, it concluded that Aboriginal title was part of New Zealand law. Citing both the 1847 *Symonds* case and the decision of the Australian High Court in *Mabo v Queensland* in 1992, President Cooke, on behalf of the Court held that Aboriginal title (or, interchangeably, Maori customary title) includes



rights in lands and waters held by the Indigenous Tribes of an area up to the time of colonial annexation, upon annexation/colonisation the Crown acquires the radical title to the land burdened by or subject to Indigenous rights and that the scope and nature of those (generally collective) rights depends upon the uses of those lands in a particular case.<sup>111</sup>

*Fiduciary duty of the Crown: Principles of the Treaty of Waitangi*

The year after the decision in *Te Weehi's* case, the Court of Appeal handed down another landmark decision in *New Zealand Maori Council v Attorney-General*.<sup>112</sup> The Court of Appeal was unanimous in rejecting the long standing notion of the Treaty of Waitangi as a nullity.

The interpretation of the Treaty of Waitangi was squarely before the Court since section 9 of the *State Owned Enterprises Act 1986* provided that nothing in the *State Owned Enterprises Act* permitted the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi. The Crown contemplated transferring Crown land, amounting to 10 million hectares (37 percent of the land surface of New Zealand) to the State Owned Enterprises and the Maori Council mounted a challenge. The Court accepted the Maori Council's argument that the Treaty of Waitangi created responsibilities for the treaty partners. The Crown was held to be in a position analogous to a fiduciary relationship and the parties were required to deal with each other in good faith. After examining the *State Owned Enterprises Act*, the Court of Appeal found that there was no provision for the consideration of whether a proposed Crown asset transfer would be inconsistent with the principles of the Treaty of Waitangi, hence any such transfers would be unlawful.

The principles of the Treaty of Waitangi that can be extracted from the case require the Maori and government, as treaty partners, to act towards each other reasonably and with the utmost good faith.<sup>113</sup> The treaty relationship gives rise to responsibilities analogous to fiduciary duties which are not merely passive. The President of the Court, Sir Robin Cooke stressed that the fiduciary duty included active protection by the Crown of the Maori in the use of their land and water 'to the fullest extent reasonably practicable'.<sup>114</sup> Other members of the Court asserted the Crown's obligations to remedy past breaches.<sup>115</sup> However, it was held that the principles of the Treaty of Waitangi do not authorise the right of unreasonable restriction on the elected government in its policy decisions.<sup>116</sup>

As a result of the decision in the *New Zealand Maori Council v Attorney-General* the government entered into negotiations with the New Zealand Maori Council which led to the *Treaty of Waitangi (State Enterprises) Act 1988*.<sup>117</sup> This legislation requires that Crown land the subject of recommendations by the Waitangi Tribunal be acquired or reacquired through the mechanism of the *Public Works Act*.

Further changes to the Waitangi Tribunal's method of operation were also introduced by the *Treaty of Waitangi (State Enterprises) Act 1988* and the *Crown Forests Act 1989*. The *Treaty of Waitangi (State Enterprises) Act 1988* provided that if the Tribunal found the evidence supported a claim and recommended that Crown land that had been transferred to a State Owned Enterprise be returned to the Maori owners, the Tribunal recommendation would legally bind the Crown.<sup>118</sup> The *Crown Forest Act 1989* gave the Tribunal the power to make recommendations on the return of Crown Forest lands. Again the Tribunal recommendations would legally bind the Crown.<sup>119</sup> To date these provisions are the only binding recommendations that the Waitangi Tribunal can make for the return of Crown land to Maori claimants.<sup>120</sup> It is not uncommon, however, for claimants to request the Tribunal to only make findings of fact and state the relevant principles of the Treaty of Waitangi, and then use the report as a basis for negotiating a settlement with the Crown.<sup>121</sup>

In summary, the modern era of Maori/non-Indigenous relations can be said to begin with the adoption of the *Treaty of Waitangi Act* in 1975. Originally limited to considering post-1975 claims, the 1985 amendments extending the Waitangi Tribunal's jurisdiction to historical claims dating since 1840 significantly expanded the reach and consideration of Maori claims in New Zealand. Judicial reinvention of the doctrine of Aboriginal title and the accompanying fiduciary duty of the Crown to protect Maori rights gives further impetus to a rapidly changing relationship.

Additionally, legislative enactments, including the *State Owned Enterprises Act 1986* and other laws acknowledging Maori rights to use, manage, benefit from and be consulted regarding the uses of resources have expanded Aboriginal rights. Throughout this period, the Tribunal's reports and recommendations have played an increasingly important role in redefining the place of the Maori within contemporary New Zealand society. The Tribunal's role is specifically considered in the next Section of this Chapter.

## **Waitangi Tribunal reports**

As observed earlier, the Waitangi Tribunal became the focus of Maori hopes for justice and restitution of breaches of the Treaty of Waitangi. A few of the many reports of claims published by the Tribunal are discussed below to identify the issues raised, some of the Tribunal's recommendations and most importantly the interpretation principles of the Treaty of Waitangi as 'the foundation for a developing social contract'.<sup>122</sup> The most important Tribunal reports consider fisheries and land claims.

## Fishing claims

### *Motunui report*

The Motunui-Waitara claim protested against the destruction of the Tribe's traditional shellfish gathering ground by an existing sewage outfall and the proposed creation of an additional outfall for industrial waste.<sup>123</sup> It was argued that the Crown had permitted pollution of their traditional resources in breach of the Treaty of Waitangi. The Waitangi Tribunal found that the evidence supported the Tribe's claims to the right to traditional food sources of the *hapu* (kin group) over sections of the reef, for their own use, for hospitality and for *mana* (authority).<sup>124</sup>

The Tribunal accepted that traditional values as well as tribal rights were protected by the Treaty of Waitangi. Moreover, the Tribunal declared that those rights and values should be considered in planning decisions made by Crown authorities. The Tribunal condemned the failure of the planners to pay any attention to 'the Maori approach to the water as source of food'.<sup>125</sup> The principles of the Treaty of Waitangi were discussed for the first time to the extent of interpreting that the *rangatiratanga* guaranteed protection of the fisheries. The promise of protection in the Treaty was interpreted to encompass protection from pollution.<sup>126</sup> As the Treaty of Waitangi was a social contract, the Tribunal was of the view that both the Maori and the Crown should be ready to compromise.

Ultimately, the Tribunal recommended that the Motunui outfall not be built and the industrial effluent be discharged elsewhere.<sup>127</sup> The Tribunal recommended that the legislation should be amended to protect Maori fishing grounds and empower the Maori Land Court to declare specific Maori fishing grounds as reserves.<sup>128</sup>

### *Muriwhena fishing report*<sup>129</sup>

The Muriwhena fisheries claim was prompted initially by plans to create a marine reserve which would have the effect of prohibiting fishing along the North Coast of the North Island.<sup>130</sup> Subsequently the State Owned Enterprises Bill 1986 proposed to remove Crown land from the jurisdiction of the Waitangi Tribunal, by vesting the land in the State Owned Enterprises. Another reason for the claim was the announcement of the Ministry of Fisheries and Agriculture's plans to introduce fishing quotas under a new quota management scheme. To expedite the report, the fishing issues were separated from the rest of the claim and heard on an urgent basis.<sup>131</sup> The Tribunal was not in a position to report on the claim but prepared a memorandum to the Minister of Fisheries in support of the Muriwhena claimants.<sup>132</sup> During the urgent fifth hearing of the claim before the Tribunal, the High Court restrained the issuing of further fishing quota in the Muriwhena district.<sup>133</sup>

This first offshore fisheries claim raised wider issues, since the detailed historical evidence of the commercial fisheries related to Maori generally and was not limited to Muriwhena district. The crucial issue was the introduction of a new system of resource management, the Quota Management System, and its relationship to the Maori fishing rights protected under the Treaty of Waitangi. The Tribunal considered the principles of the Treaty and stated that the principles relevant to the claim were, in particular, the notions of partnership, fiduciary duties and reciprocal obligations.<sup>134</sup> The Tribunal then turned to the question of whether the new system accommodated Maori fishing interests and then considered the scheme as a whole. The Quota Management System was found to be in fundamental conflict with the Treaty's principles and terms.<sup>135</sup>

In stating its specific findings, that *inter alia* the Crown had omitted to provide any adequate protection for Maori fishing interests, the Tribunal referred to President Cooke's judgment in *New Zealand Maori Council v Attorney-General* that '...the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.<sup>136</sup> The Tribunal then noted that in its 1985 *Manuka Report*, it had stated authoritatively that to 'omit to provide protection for rights is as much a breach of the Treaty as a positive act that removes them'.<sup>137</sup>

The Tribunal found that the Crown failed to make any provision for tribal interests in promoting the fishing industry.<sup>138</sup> The Tribunal also addressed the advancement in international human rights law of a general right of development and observed that there was a long list of prejudice to the Maori claimants including the loss of control of the exploitation, management and conservation of their fish resources.<sup>139</sup> As one New Zealand commentator notes, despite the lack of any reference to modern developments in the international law of Indigenous rights, 'the New Zealand courts have adopted the approach of the Waitangi Tribunal...and applied it to the definition of Maori rights...', thus extending both the substantive reach of Maori rights to resources as well as the permissible methods for acquiring those resources.<sup>140</sup>

The Tribunal determined that the Government's Quota Management System in its existing form was in conflict with the Treaty as it apportioned 'to non-Maori the full, exclusive and undisturbed possession of the property in fishing that to Maori was guaranteed; but the Quota Management System need not be in conflict with the Treaty, and may be beneficial to both parties, if an agreement or arrangement can be reached'.<sup>141</sup> The claimants requested that the Tribunal defer making any recommendations other than that the Crown meet the costs of the Maori in the negotiations to come.<sup>142</sup> The negotiations that followed led to the interim *Maori Fisheries Act 1989* and the *Treaty of Waitangi (Fisheries Claim) Settlement Act 1992*.<sup>143</sup>

## Land claims

### *The Orakei report*<sup>144</sup>

The Orakei claim was made on behalf of the Ngati Whatua who sought redress for Crown actions, since 1840, which deprived the Tribe of their traditional lands in the vicinity of Auckland.<sup>145</sup> The claim area had been the subject of protests, the occupation of Boston Point and conviction of the protestors.<sup>146</sup>

The Tribunal considered the interpretation and principles of the Treaty of Waitangi, including the principles as determined by the Court of Appeal in *New Zealand Maori Council v Attorney-General*.<sup>147</sup> The treaty principles relevant to the Ngati Whatua claim included obligations on the part of the Crown to leave the Maori sufficient land for economic and cultural purposes, the recognition of the right to manage and control their land according to their cultural preferences and to refrain from purchasing land the Maori wished to retain.<sup>148</sup> The Tribunal findings were that the Crown had failed in its duty by allowing the Native Land Court and other bodies to contrive to facilitate Maori land sales which were inconsistent with the Treaty.<sup>149</sup> Furthermore, and with far reaching consequences, the Tribunal found that the Crown's right to govern in the public interest is restricted by its treaty obligations.<sup>150</sup>

The Tribunal recommendations included providing land for a sufficient economic base and other actions to restore the Ngati Whatua to their mana (authority/prestige).<sup>151</sup> Specific recommendations involved restoring some Housing Trust land to the Tribe, vesting public park land in the Tribe and providing for a joint administration of the parks by the Ngati Whatua of the Orakei Maori Trust Board and the Auckland City Council.<sup>152</sup>

### *Ngai Tahu report*<sup>153</sup>

The Ngai Tahu, of the South Island, had long standing grievances for the loss of their traditional lands. Their claim was complicated by a counterclaim by other Tribes.<sup>154</sup> The Ngai Tahu had sold land to the Crown under the Kaikona and Arahura Deeds of Purchase of 1859.

The claims covered land, fisheries and mahinga kai (traditional food source) losses arising from the Crown purchases. In reporting on nine specific aspects of the land claim, the Tribunal drew upon the treaty principles it had interpreted in the earlier Orakei and Muriwhena reports. The Tribunal again found that the Crown had an obligation at the time of the Ngai Tahu land purchases to ensure the Ngai Tahu had a sufficient land base with which to meet their needs.<sup>155</sup> The Tribunal determined that neither the unequal bargaining position of the parties nor the Crown's obligations to protect Maori interests in land had been taken to account sufficiently during the various purchases.<sup>156</sup>

As in the *Muriwhena Report*, the Tribunal was requested not to make specific recommendations as the parties had requested that the issues be left open for further negotiations.<sup>157</sup>

### *The Taranaki Report*<sup>158</sup>

The Taranaki Report was released as an interim report on twenty-one claims in the Taranaki district. The claims arose from grievances in respect of land confiscations which followed the 1860 Land Wars and subsequent expropriations.<sup>159</sup> Without coming to any final conclusions or recommendations, the Tribunal issued its interim report as an aid to the negotiation process. In late September, 1999, the New Zealand government and two northern Taranaki Tribes signed an agreement worth NZ\$29 million to settle their claims. The agreement, subject to tribal member ratification, will provide for an apology for the confiscation of land, access to traditional food gathering areas and mandatory consultation by government with Maori over the use of conservation areas.<sup>160</sup>

The Tribunal did identify two foundations for the claim: the loss of traditional tribal lands and loss of autonomy.<sup>161</sup> Amongst the Tribunal's considerations was the applicability of the general principle, first stated in the *Orakei Report*, that claimants should be restored to an economic land base which recognises their tribal authority.<sup>162</sup>

In summary, the Waitangi Tribunal findings and recommendations, even though not totally acted upon, have progressed Maori claims considerably in the last decade.<sup>163</sup> The parties have come to the negotiating table over specified grievances and have had the benefit of the support of various Tribunal's reports on the individual claims and treaty principles. Many of the Tribunal's recommendations have been implemented, although there is criticism of the number of recommendations that remain outstanding.<sup>164</sup>

The Waitangi Tribunal interpretation of the principles of the Treaty of Waitangi have been referred to by the courts and have the potential to influence government attitudes and policy.<sup>165</sup> The Tribunal Chairperson has identified issues which require greater clarity in the future claim resolution processes: entitlement to lands and other resources, representation on management boards, comparative equities in service provision, Maori input into and limitations on their abilities to affect resource decision making.<sup>166</sup> There is still much work ahead for the Tribunal, since by March 1997, there were 633 outstanding claims.<sup>167</sup>

## **The sources and contemporary scope of powers to govern, manage and use tribal natural resources**

The sources of Maori authority to govern, manage and use tribal lands, forests, waters and *taonga* (treasured things) arguably have as their foundation the common law doctrine of Aboriginal title, the Treaty of Waitangi, the equitable fiduciary duties which arise from

the Treaty of Waitangi (and the common law), and references to the Treaty of Waitangi/Maori rights in New Zealand statutes. This Chapter first considers the sources of Maori rights and then turns to the practical resource management powers that flow from those sources.

### **Sources of Maori authority to govern, manage and use tribal lands and resources**

#### *The common law and the doctrine of Aboriginal title*

Paul McHugh has identified what he considers the important treaty rights as encountered by the common law: first, property rights, especially those associated with tribal land and maritime areas; second, rights of self-regulation according to Maori customary law (*te tino rangatiratanga*); third, the Crown's duties under the Treaty of Waitangi, especially the duty of protection of common law Aboriginal rights; and fourth, Maori obligations as well as their rights and privileges as British subjects.<sup>168</sup>

With the *Symonds* case in 1847, New Zealand became the second common law jurisdiction, following the US, to judicially acknowledge the continuing native title rights of its Indigenous Tribes. Rejected or ignored from the 1880s through most of the twentieth century, the reinvigoration of the common law doctrine of native title which began in *Te Weehi's* case (as applied to customary fishing rights)<sup>169</sup> and which was confirmed as applying to both land and waters in the *Te Runanganui* case, reaffirms the role of common law Aboriginal title in New Zealand. As to the extinguishment of Aboriginal title, Justice Williamson in *Te Weehi* expressly adopted the North American model and held that any extinguishment of Maori customary title required specific legislation that had a clear and plain intention to extinguish.<sup>170</sup> The distinction between extinguishment and regulation of Aboriginal title had not been considered by the New Zealand courts until *Te Runanga O Muriwhena v Attorney-General*.<sup>171</sup> In that case, President Cooke, speaking for the Court, referred to *R v Agawa*, a Canadian authority on licensing regulations and the need to balance the interests and values involved in the rights of others.<sup>172</sup>

It remains to be seen whether the New Zealand Courts will follow the Canadian test for regulation of Aboriginal rights as determined by the Supreme Court of Canada in *R v Sparrow*.<sup>173</sup>

#### *Maori rights, the Treaty of Waitangi and statutory law*

The Treaty of Waitangi, as a treaty and a potential source of power to govern, remains subject to the 'Huakina Principle': that is, it requires recognition in a domestic statute before it can be enforced in municipal law. The necessity for the domestic enforceability of the Treaty has given way to the judicial interpretation of the spirit of the Treaty, aided by the reports of the Waitangi Tribunal and its non-binding interpretation of the principles of the Treaty.

## The State Owned Enterprises Act 1986

### *Crown land transfers*

The express reference to the 'Principles of the Treaty of Waitangi' in section 9 of the *State Owned Enterprises Act 1986* has proven to be an indirect but effective source of Maori power over natural resources in possession of the Crown. In *New Zealand Maori Council v Attorney-General*, the Court of Appeal interpreted those principles of the Treaty of Waitangi that were relevant to the government's legislation providing for transfer of Crown lands, some of which were subject to Waitangi Tribunal claims, to state owned enterprises.<sup>174</sup> Although the Crown had protected land claims lodged with the Waitangi Tribunal before 18 December 1986, the *State Owned Enterprises Act 1986* did not protect Crown land subject to Maori claims after that date.

In this landmark judgment the court determined that the proposed land transfers were inconsistent with treaty principles and consequently that the Act was unlawful. In interpreting section 9, the Court of Appeal, unanimously, but in separate judgments, found that the principles of the Treaty of Waitangi created a partnership in which the Crown's role was not passive but active in its protection of Maori land.<sup>175</sup> The Court of Appeal's recognition of the Crown's fiduciary-like obligations was a catalyst for the further negotiations between the parties which resulted in the inclusion of the claw-back mechanism in the *Treaty of Waitangi (State Enterprises) Act 1988*.<sup>176</sup>

### *Mineral rights*

The government plan to transfer mines to Coalcorp, a state owned enterprise, was challenged by the Tainui, as the land and minerals in question were subject to their claim before the Waitangi Tribunal.<sup>177</sup> However, the Crown proposed to sell the coal rights and not the land, the Crown's view being that mining rights were not subject to the *State Owned Enterprises Act 1986*.<sup>178</sup>

The Court of Appeal held unanimously, in *Tanui Maori Trust Board v Attorney-General*, that coal rights were interests in land, that the Tainui had an interest in coal mining in the land which had been confiscated and which formed part of their claim before the Waitangi Tribunal.<sup>179</sup> It was significant that the claw-back provisions of the *Treaty of Waitangi (State Enterprises) Act 1988* were not yet in place.<sup>180</sup> The Court of Appeal did not decide the issue of ownership of the coal or the land. Ultimately, it was held the Crown assets were not to be transferred until claw-back mechanisms were operative.<sup>181</sup> This result would allow any Tainui land transferred to Coalcorp to be returned to the Tainui if they were successful with their claim before the Waitangi Tribunal.<sup>182</sup> President Cooke at 529 acknowledged there was evidence that coal was a *taonga* (treasured thing) and advocated a negotiated solution to the matter.



### *Forests*

The judgment of the Court of Appeal in the seminal *New Zealand Maori Council v Attorney-General* case affected the Crown's intended sale of Crown forests to Forestcorp.<sup>183</sup> In 1988 the Crown proposed an alternative scheme to sell the timber and milling rights as opposed to the land which was encumbered by the claw-back provisions of the *Treaty of Waitangi (State Enterprises) Act 1988*.<sup>184</sup>

To protect their interests the Maori Council exercised the option of returning to the Court of Appeal to utilise the leave reserved in the orders handed down in *New Zealand Maori Council v Attorney-General* and seek protection of their treaty rights under section 9 of the *State Owned Enterprises Act 1986*.<sup>185</sup> The parties entered into negotiations, as ordered by the Court of Appeal.<sup>186</sup> The resulting Crown/Maori Agreement 1989 did not resolve any claims, leaving that issue to the Waitangi Tribunal, but did agree to the Crown sale of the trees, with the land to be put in trust to protect Maori claims.<sup>187</sup>

The terms of the Crown/Maori Agreement are embodied in the *Crown Forest Assets Act 1989*.<sup>188</sup> This legislation provided for the establishment in 1990 of the Crown Forest Rental Trust, with both Crown and Maori trustees, to collect rental proceeds from forestry licences and hold the proceeds on trust until ownership of the land is confirmed.<sup>189</sup>

### *Other statutes acknowledging the principles of the Treaty of Waitangi or Maori interests*

A number of resource and planning statutes expressly or indirectly recognise Maori interests to a lesser extent than the overriding section 9 of the *State Owned Enterprises Act 1986*, which provides that '[n]othing in this Act permits the Crown to act in a manner inconsistent with the Principles of the Treaty of Waitangi'.<sup>190</sup> It is this recognition of the Maori dimension, as well as the application of the treaty principles, that can be used to influence government policy or action.<sup>191</sup> To examine the ability of each statute to effect the governance, management and use of natural resources is outside the scope of this Chapter.<sup>192</sup> Instead, the Maori dimension for participation in the management of commercial and non-commercial traditional fisheries will be reviewed as will provisions of the *Resource Management Act 1991*.<sup>193</sup>

### *Fishing rights: Non-commercial*

The history and extent of Maori customary fishing is well documented by the Waitangi Tribunal.<sup>194</sup> At the time that the Maori were guaranteed exclusive use and possession of their fishery by Article Two of the Treaty of Waitangi, the non-Maori settlers' interest in fishing was recreational and personal.<sup>195</sup> In 1866 the first fisheries law was enacted. The *Oyster Fisheries Act 1866* was intended to save the oyster fishery from depletion.<sup>196</sup> The assumptions in the *Oyster Fisheries Act 1866* were seen by the Waitangi Tribunal to have been perpetuated over the century: the assumption of the unrestricted right of the Crown

to the foreshore,<sup>197</sup> the assumption that no regard to the Treaty of Waitangi was required, the assumption of no commercial use of the fisheries by the Maori, the assumption that even reserves for Maori fisheries were to be regulated by the Crown, and the creation of a regime where non-Maori interests in the fisheries could be licensed for commercial use and Maori interests provided for by non-commercial reserves.<sup>198</sup>

Crown regulation of freshwater, coastal and offshore fishing did not recognise Maori rights to participate in the control and management of their fisheries.<sup>199</sup> Historic fishing rights saving provisions, most currently as enshrined in section 88(2) of the *Fisheries Act 1983*,<sup>200</sup> were not supported by the courts until the decision in *Te Weehi v Regional Fisheries Officer*.<sup>201</sup> By recognising an Aboriginal right to fish and interpreting section 88(2) as protecting customary fishing rights, the *Te Weehi* case was instrumental in empowering the Maori negotiations with the government on Maori fisheries claims.<sup>202</sup>

The outcome of the negotiations was the *Maori Fisheries Act 1989*. Section 74 of the *Maori Fisheries Act 1989* provides for the establishment of customary fishing reserves in a Taiapure-local model.<sup>203</sup> The aim of the Taiapure is to allow greater Maori participation in management and consultation of the non-commercial fishery.<sup>204</sup>

The next legislative attempt to resolve Maori fisheries claims and the decline in the fishery resource was the *Treaty of Waitangi (Fisheries Claim) Settlement Act 1992*.<sup>205</sup> This legislation provided for a Maori share of the resource, the repeal of section 88(2) of the *Fisheries Act 1983* and for Maori to play a role in the regulation of Maori customary non-commercial fisheries. This aspect of the governance of non-commercial fisheries will be discussed below in the Section on Practical Resource Management Powers.

#### *Fisheries: Commercial interests*

As noted, the New Zealand government did not historically recognise the Maori traditional commercial fisheries and continued in this manner until 1986 when the government embraced a radical change in conservation of the declining fisheries in the guise of a Quota Management System.<sup>206</sup> The Crown assumption of ownership and control in the *Fisheries Amendment Act 1986* put the Quota Management System in place. Maori litigants succeeded in enjoining the distribution of commercial fishery quotas under the new Quota Management System.<sup>207</sup> In each case, the Memorandum preliminary to the *Muriwhena Report*, released by the Tribunal on an urgent basis on 30 September 1987, was referred to in support of the Maori applicants.<sup>208</sup> In both the *New Zealand Maori Council and Ngai Tahu Maori Trust Board* cases,<sup>209</sup> Justice Greig took note of the historical Maori fisheries over the whole coast of New Zealand and found there was no statute that had extinguished the customary right. Section 88(2) of the *Fisheries Act 1983* was pivotal in the ratio of each case, as the Quota Management System was found to be contrary to section 88(2) in that it affected Maori fishing rights.

This interpretation of section 88(2) of the *Fisheries Act 1983* has been instrumental in bringing about a negotiated settlement of the Maori commercial fisheries claim. Wishing to retain the Quota Management System but also recognising Maori interests, the government commissioned working parties to report on 'How Maori fisheries may be given effect'.<sup>210</sup> The result was the Maori Fisheries Bill 1988 which provided for Maori to earn up to 50 percent of the quotas over 20 years.<sup>211</sup> The sting in the tail was the proposed clauses repealing section 88(2), cancelling the injunction orders of Justice Greig and curtailing the jurisdiction of the Waitangi Tribunal for 20 years.<sup>212</sup> The Maori responded with more legal proceedings to protect their rights to the commercial fishery.<sup>213</sup> It was during this litigation that the opportunity for the purchase of 25 per cent of the quotas arose, by means of the purchase of Sealord Fisheries Ltd.

There has been much criticism of the process by which agreement was reached in what has become known as the 'Sealord Deal': failure to get a Maori consensus; that the agreement was pan-Maori and not with *iwi* (Tribes), the extinguishment of the treaty right to the fisheries, repeal of section 88(2) and the unanswered questions of the allocation of the newly acquired resource and profit distribution.<sup>214</sup> On the positive side of the ledger, the *Treaty of Waitangi (Fisheries Claim) Settlement Act 1992* provided for a share in the national resource, the administration of the Maori quota by the Treaty of Waitangi Fisheries Commission and for Maori management and advisory positions in the fisheries resource agencies. These developments are discussed below in the section on Practical Resource Management Powers.

### *The Resource Management Act 1991*

The background to the *Resource Management Act 1991* was the government's comprehensive resource management review project which absorbed an earlier review of coastal management law.<sup>215</sup> Early in the review project, the government decided upon an active role in regard to Maori interests in resource management and that the new legislation should provide for *iwi* participation and for the protection of Maori cultural and spiritual values. All of this arose from government recognition that resource management law should take account of the Treaty of Waitangi.<sup>216</sup> This new Maori dimension to administration related more to the *te tino rangatiratanga* (full sovereignty) aspect of the Treaty rather than the property guarantees.<sup>217</sup>

The *Resource Management Act 1991* brought together for the first time New Zealand laws governing land, air and water resources with a new decentralised approach to environmental management. This new approach owed much of its spirit to environmental concerns raised in various claims before the Waitangi Tribunal throughout the 1980s.<sup>218</sup> The Ministry of the Environment published guidance on the consultation requirements to clarify for the Maori, planners and local councils that Maori concerns were to be taken into account, and identified at least 30 provisions of the Act where Maori concerns were relevant.<sup>219</sup>

A clear purpose of the *Resource Management Act 1991*, as expressed in the long title, is to ensure that in the management of natural and physical resources, full and balanced account is taken of '(iii) The principles of the Treaty of Waitangi'. Indicative of the new approach is the use of many Maori words and phrases in the Act.<sup>220</sup> Mason Durie identifies several inferences from the incorporation of Maori terms: first, Maori customary law is now part of several statutes; second, those who interpret the law will require an understanding of Maori customary law; third, there is an inherent difficulty in translating Maori terms into English without recourse to a wider spiritual context; and finally, there is the risk of diminishing the meaning of the Maori words.<sup>221</sup>

Maori interests are expressly acknowledged in sections 6(e), 7(a) and 8. The wording in section 8 require the principles of the Treaty of Waitangi to be taken into account in the performance of functions.<sup>222</sup> Section 7(a) requires all persons exercising powers and functions under the Act to recognise, among other matters of importance, the concept of *kaitiakitanga* (guardianship/stewardship) and the ethic of stewardship.<sup>223</sup> Under the new decentralised management model, local and regional councils must develop policies and plans in accordance with the principles of the national policy.

No specific powers over resources are granted to the Maori under the *Resource Management Act 1991*; rather, as constituents of the public in a given area, the Maori benefit from the detailed procedures for public participation set out in the First Schedule of the Act.<sup>224</sup> Maori and non-Maori alike may apply to the Planning Tribunal for a declaration or an enforcement order to enforce statutory obligations.<sup>225</sup>

Interpretation of the section 8 requirement that authorities take into account the principles of the Treaty of Waitangi by consulting with the tangata whenua (people of a given place) has varied.<sup>226</sup> The approach to consultation expected by the Environment Court has been clarified in *Otaraua Hapu of Te Atiawa v Taranaki Regional Council and Petrocorp Ltd.*<sup>227</sup> A distinction has been made between consultation and notification of district and regional plans, and the decision as to whether to notify a resource consent application and notified applications where the Council will be acting in a quasi-judicial body.<sup>228</sup> The right of the Maori to be consulted and submit policy documents for consideration by district and regional Councils is augmented by provision for *iwi* (tribal) management plans.<sup>229</sup> The plans are given statutory recognition and can be submitted to local authorities who are required by the *Resource Management Act 1991* to take the management plans into account.<sup>230</sup> The failure to involve Maori in the decision-making of resource consents has been criticised as missing an opportunity for recognition of Maori *rangatiratanga* (sovereignty).<sup>231</sup>

### *Practical resource management powers*

The 1980s and 1990s have encompassed an era in which litigation to protect and recognise Maori interests, major government policy changes and large scale law reform have all contributed to a redistribution of Maori and non-Indigenous resource management powers. These events have affected the management and conservation of New Zealand resources with regard to recognition of Maori interests and Maori participation.<sup>232</sup> This Section of the Chapter reviews developments in relation to the management of commercial and non-commercial fisheries, the management of lands returned in negotiated settlements and practical resource management powers offered to the Maori under the *Resource Management Act*.

### *Commercial Fisheries Management*

The controversial Deed of Settlement which foreshadowed the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* was reviewed by the Waitangi Tribunal and found to be inconsistent with the principles of the Treaty of Waitangi.<sup>233</sup> The terms of the Deed included Crown financial support for the joint venture purchase of Sealord Fisheries Ltd and an additional 20 percent of new species quotas, bringing Maori ownership of quotas to 30 percent.<sup>234</sup> The Sealord Deal returned to the Maori substantial ownership of the New Zealand commercial fisheries subject to government regulation of the fishery resource.

Aside from the highly politicised issues of consensual extinguishment of the treaty right to their fisheries, barring litigation and the repeal of section 88(2) of the *Fisheries Act 1983*, the *Treaty of Waitangi (Fisheries Claim) Settlement Act 1992* provides tangible gains for the Maori in the management and control of New Zealand fisheries.<sup>235</sup> The Maori have gained a voice in the national fishing industry. Maori nominated by the Treaty of Waitangi Fisheries Commission Board/Te Ohu Kai Moana are appointed to two positions on the Fishing Industry Board, which promotes the interests of the industry on a national basis.<sup>236</sup> Maori are also entitled to participate on fisheries advisory boards, namely the Fisheries Advisory Committee, the Fishery Authority and the Conservation Authority and Board.<sup>237</sup> Also, the Treaty of Waitangi Fisheries Commission must be consulted by the Crown whenever the Crown has a statutory obligation to consult with the Fishing Industry Board.<sup>238</sup> Lastly and most significantly, the Maori have management over their commercial fishing interests in Sealord Fisheries Ltd through the Treaty of Waitangi Fisheries Commission/Te Ohu Kiamoana, a larger Maori role in commercial fisheries management than previously acknowledged in this century.<sup>239</sup>

The Deed of Settlement addressed neither the issues of allocation to coastal Tribes and the position of urban and inland Maori nor the nature of the management structure. As

a result of this uncertainty there has been much criticism and ongoing litigation.<sup>240</sup> It is a point of contention that having established a right to the resource, Te Ohu Kiamoana is appointed by the Crown and not directly answerable to the Maori, diminishing the Maori governance and control of their fishery.<sup>241</sup>

To consider the achievements of the Sealord Deal, the Treaty of Waitangi Fisheries Commission/Te Ohu Kiamoana has involved over 50 *iwi* in the fishing industry and has been determining how the fish quotas will be allocated, developing management practices, providing scholarships and training and considering aquaculture initiatives and private sector assistance for the Maori commercial fishing right, which has been transformed into a prosperous commercial venture.<sup>242</sup>

#### *Non-commercial fisheries management*

Maori have also been given an opportunity for a greater say in the management and conservation of their coastal fisheries with the adoption of the *taiapure*-local fisheries model established under the *Fisheries Amendment Act 1989*.<sup>243</sup> Upon establishment of a *taiapure*, a management committee is appointed upon recommendations from the local Maori community and by-laws can be made for the customary taking of fish and seafood.<sup>244</sup> The powers of the management committee to regulate the fisheries are, however, limited to an advisory role to the Minister.<sup>245</sup> Only two management committees had been established by 1998.<sup>246</sup> The *taiapure* is a more explicit recognition of customary fishing rights but less effective than the now repealed section 88(2) of the *Fisheries Act 1983*.

In *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* the Court of Appeal remarked that the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* has some 'apparently conflicting provisions about the customary or traditional food gathering, some speaking of regulations to recognise and provide for this, others seeming to say that there will no longer be any legislative or regulatory recognition'.<sup>247</sup>

The Waitangi Tribunal in its review of the Deed Of Settlement called it a 'confusing deed' that, while not expressly extinguishing non-commercial fishing rights, effectively abrogated them.<sup>248</sup> The treaty rights were replaced with regulations and policies for non-commercial fisheries, which in the opinion of the Waitangi Tribunal were reviewable by the courts.<sup>249</sup> While it was consistent with treaty principles to regulate, it was found to be inconsistent to abrogate treaty rights by rendering them legally unenforceable.<sup>250</sup> The failure of the Crown to provide an administrative review mechanism was regarded as having failed to adequately protect Maori interests.<sup>251</sup> The retention of power by the Crown in regard to regulation of the non-commercial fisheries has created concern that tribal control will be subverted.<sup>252</sup>

In recognition of Maori interests, subsections 10(b)(i) and (ii) of the *Treaty of Waitangi (Fisheries Claim) Act 1992* provide that the Minister, 'acting in accordance with the principles of the Treaty of Waitangi' shall consult with the *tangata whenua* (people of a given place) about the Maori non-commercial fishing use and management practices and develop policies which help recognise those practices. The Minister is to recommend the making of regulations to recognise and provide for the customary food gathering. The Maori role is ultimately limited to consultation.<sup>253</sup>

The customary taking of fish or seafood is recognised and authorised by regulation 27 of the Fisheries (Amateur Fishing) Regulations.<sup>254</sup> The taking of seafood is subject to the Director-General's approval and any conditions the Director-General considers necessary. Regulation 27(2) provides for the delegation of the approval to specified Maori or marae committees or to *kaitiaki* (caretakers/guardians).

Additional potential powers are found in section 89(1) of the *Fisheries Act 1983*, inserted by section 34 of the *Treaty of Waitangi (Fisheries Claim) Settlement Act 1992*. The Minister may make regulations for *taiapure*-local fisheries<sup>255</sup> declare mataitai reserves after consultation with the *tangata whenua*<sup>256</sup> and empower the appropriate Maori representative to make by-laws restricting the taking of customary fish and seafood.<sup>257</sup> The regulations have not yet been promulgated and the limited ability of the Maori to influence the regulations has been criticised.<sup>258</sup>

The sport fishing of indigenous and acclimatised introduced fish is governed by the *Conservation Act 1987*. Section 4 provides that '[t]his Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi'. Section 26ZH provides that '[n]othing in this part shall affect any Maori fishing rights'. In the case of *Taranaki Fish and Game Council v McRitchie*, fishing in a traditional river fishery without a licence was initially upheld where one is fishing with traditional authority.<sup>259</sup> In *Ngai Tahu Maori Trust Board v Director-General of Conservation*, the Court of Appeal held that the treaty principles as stated in section 4 of the *Conservation Act 1987* governed the administration of the Marine Mammals Protection Regulations and required active protection of Maori interests, rejecting a narrow approach to consultation.<sup>260</sup>

Maori non-commercial customary fishing rights are expressly acknowledged in statutes, and the mechanisms for governing customary taking of fish and seafood, and managing *taiapure* and *maitaitai* reserves are in place. The form that the various regulations and by-laws take will determine the level of local control over the resource. Yet again, the Maori role is largely consultative.

*Negotiated settlements: The return of tribal lands and co-management initiatives*

The return of a portion of tribal lands claimed and a negotiated co-management approach to conservation areas has arisen in various negotiated settlements. The 1994 government claims policy was accepted by some claimants who entered into negotiations within the government's requisite framework.<sup>261</sup> The benefits of the settlements, concluded and under negotiation, included the restitution of a land base for the Tribe and compensation. The control and resource management of the tribal lands returned will be subject to the domestic laws of New Zealand unless expressly exempted in the enactment of the settlement deed.<sup>262</sup>

The Tainui land claim, settled in 1995, related to the confiscation of land under the *New Zealand Settlements Act 1862*.<sup>263</sup> The agreement, enacted as the *Waikato Raupata Claims Settlement Act 1995*, provided for the return of 15,790 hectares, an apology from the Queen and monetary compensation for a total value of NZ\$170 million.<sup>264</sup>

Since 1991 the Ngai Tahu and the Crown have attempted to reach a negotiated settlement of the claims over South Island land purchased by the Crown. The Waitangi Tribunal reported on the injustice of the alienation and the failure to reserve a sufficient land base and recommended a negotiated settlement with the Crown.<sup>265</sup> After protracted negotiations the Deed of Settlement, signed in October 1996, included the grant of title over certain properties of conservation interest that were agreed to be leased back to the Crown and also recognised Ngai Tahu rights to *pounanu* (jade).<sup>266</sup> The settlement acknowledged the Ngai Tahu management of areas of the coastline and reefs, granted title to and use of 32 customary fishing areas, granted title to Mutton Bird (Crown Titi) and Centre Islands, with the former to be managed by the Ngai Tahu as a nature reserve.<sup>267</sup>

A final settlement of the Ngai Tahu claims has not yet been concluded. Mason Durie observes that the settlement process is 'indicative of co-management of conservation by government and Maori'.<sup>268</sup> In 1998, as a show of good faith, the Crown enacted the *Ngai Tahu (Tutaepatu Lagoon Vesting) Act 1998*. That Act vests the Tutaepatu Lagoon in the Te Runanga o Ngai Tahu and provides for the co-management of the lagoon by Waimakariri District Council and the Ngai Tahu in accordance with the principles set out in Schedule 3 of the Act.<sup>269</sup>

The Whakatohea also entered into settlement negotiations and signed a Deed of Settlement which provides for an apology for confiscating 70,000 hectares of the Opotiki area and NZ\$40 million in compensation, less the value of any land transferred.<sup>270</sup> The Crown proposed involving *iwi* in management of Ohiwa Harbour, *iwi* representation on the East Coast Conservation Board, access to plants and whalebone and the right to identify sites of special significance within the Conservation Estate.<sup>271</sup> The settlement terms were not ratified by Whakatohea in the time frame set by the government and the Deed of Settlement has lapsed.<sup>272</sup>



### *Maori consultative powers under the Resource Management Act 1991*

The practical powers offered to the Maori in the *Resource Management Act* are limited to the opportunity to become involved in environmental impact assessment and resource management. However the lack of priority accorded to the principles of the Treaty of Waitangi in Part II of the *Resource Management Act* have proved frustrating to Maori in the consultative process and have been found by the Waitangi Tribunal to be inconsistent with treaty principles.<sup>273</sup>

The failure to accord Maori concerns proper priority arose in *Te Runanga o Taumarere v Northland Regional Council*.<sup>274</sup> The Planning Tribunal accepted the treaty principle of active protection of Maori interests, and granted an interim stay of the planned effluent discharge outlet. However, it was made clear that Maori interests were not absolute and community need would prevail if alternatives were untenable.<sup>275</sup>

In effect, the Maori involvement in the planning, environmental assessment and management process will depend on the commitment of the local authorities.<sup>276</sup> Section 33 of the *Resource Management Act*, which allows for councils to transfer powers to *iwi* (Tribes), has been criticised as a failure of the Act to allow *iwi* to manage natural resources. Where power is transferred to *iwi*, the local council is ultimately responsible.<sup>277</sup>

The power of the Maori to control development by means of the section 314 objection process and section 319 enforcement orders has recently been litigated. The test of what is offensive or objectionable has been determined to be the standard of the community at large.<sup>278</sup> The Court of Appeal overturned an earlier decision that 'the reasonable person, where cultural issues are the focus of the objection, should be a reasonable member of the Maori community not the community at large'.<sup>279</sup> *Watercare Services Ltd v Minhinnick* is indicative that the effectiveness of the protection of Maori interests, ostensibly a purpose of the Act, will depend on how conscientiously local authorities embrace the spirit of the Treaty of Waitangi. It appears that until land and other resource ownership issues have been resolved, the issue of management and control of natural resources will be problematic and dependent on the goodwill of the parties.

## **Conclusion**

The last twenty years have witnessed a radical and irreversible change in the New Zealand government's acknowledgment of Maori interests. The judiciary's interpretation of the role of the Treaty of Waitangi and its principles have invigorated the Crown/Maori relationship. As a consequence, land claims, rights to participate in the management of traditional fisheries and other resource management issues have progressed significantly in the last twenty years.

The judicial acknowledgment of the continuing viability of the common law doctrine of Aboriginal title (and the Treaty of Waitangi), first in relation to non-territorial fisheries in the *Te Weehi* case and second more generally in respect to traditional lands and waters in the *Te Runanganui* case, has been a major catalyst for change in the relationship of Maori and Pakeha in New Zealand.<sup>280</sup> The principle that pre-existing property rights, based upon prior occupation, continue until extinguished by a plain and clear intention of an act of the government is the law in New Zealand,<sup>281</sup> as it is in the US, Canada and Australia. The specific gains in relation to the ownership and management of lands, waters, fisheries and other resources made thus far in individual claims litigation have been supported by the general elevation of the principles of the Treaty of Waitangi as a fetter on parliamentary sovereignty. Moreover, the Court of Appeal has played a major role in recognising and refining the Treaty of Waitangi partnership, first enunciated in *New Zealand Maori Council v Attorney-General*.<sup>282</sup> The fiduciary-like relationship that arises under common law and which is acknowledged by the Treaty requires the Crown to actively protect Maori interests and has been applied in the State Owned Enterprises litigation and other cases.<sup>283</sup>

A related, and perhaps more important stimulus for legal change, is the creation of the Waitangi Tribunal which, since 1975, has inquired into treaty claims and interpreted the Treaty of Waitangi in relation to Maori grievances. In reporting on the various claims, the Tribunal has provided a useful analysis, claim by claim, of the concepts of *rangatiratanga* (full authority, chieftainship), *kawanatanga* (governance) and *taongo* (treasured things) as well as the Crown's guarantees to the Maori.<sup>284</sup> The Waitangi Tribunal reports have been referred to by the courts in the numerous Maori challenges to New Zealand legislation which have asserted breaches of treaty principles.

The development of the principles of the Treaty of Waitangi in the case law and the incorporation of express references to the Treaty in the new and revised statutes has offered the promise of substantive recognition of Maori interests.<sup>285</sup> However, the variety of references to 'giving effect to the principles of the Treaty of Waitangi',<sup>286</sup> not acting in a manner 'inconsistent with the principles of the Treaty of Waitangi',<sup>287</sup> and to 'the relationship of the Maori and their culture and their tradition with their ancestral lands, water, sites, *waahi tapu*, and other *taonga*',<sup>288</sup> is confusing as to the priority to be given to Maori interests.<sup>289</sup> Arguably, further judicial interpretation of these provisions is necessary to refine their intent in a manner compatible with the Treaty of Waitangi and cement their import in the law of New Zealand.

Negotiated claims settlements have returned some lands to the Maori, as well as providing economic compensation for the historical loss of those lands, while the Sealord Deal has provided the Maori with a large share of the New Zealand commercial fisheries. The

Maori have not, however, been significantly involved in the regulation of the fisheries resource. In non-commercial fisheries, law reform has offered various *iwi* an opportunity to consult on and object to fisheries decisions, manage *taiapure* and act as advisers to the Minister in promulgating regulations, generally under the watchful eye of the Minister.<sup>290</sup> The recognition of the emerging right to development of Indigenous rights by the Waitangi Tribunal in the context of fisheries has been particularly beneficial for expanding these rights.<sup>291</sup>

The courts have also had an impact on the articulation of mineral and timber rights. The Court of Appeal has recognised the Tainui interests in coal and *pounana* (jade). In the Coalcorp case it was said in dicta that the treaty partnership did not mean that ‘every asset or resource in which Maori have a justifiable claim to share would be divided equally’,<sup>292</sup> however, it is clear that the Maori have rights in the resources of the land. Additionally, while the final contours of the relationship are yet to be negotiated, it is also now clear that Maori interests in forest resources will be acknowledged.<sup>293</sup>

Apart from Maori freehold land, Maori reserves and land returned to or purchased by Maori in negotiated settlements, the Maori have a limited (albeit increasing) power to manage and conserve their environment. Statutory recognition of the special relationship of the Maori to their land has not empowered the Maori to make decisions relating to land use and management, but has allowed them to participate in the process and be a mandatory decision making consideration of the Crown.<sup>294</sup> Importantly, Crown policy on negotiated settlements now expressly includes offers of Maori management or co-management of specific natural resources and for Maori representation on advisory boards and tribunals.<sup>295</sup>

In summary, recent judicial recognition of the partnership obligations of the Treaty of Waitangi has identified both the source of Aboriginal rights for the Maori and the fiduciary-like duty to protect those and other Maori rights and interests. Moreover, these cases establish that the protection of those rights and interests is to be active not passive. Earlier precedent identifies the common law duty to protect the Maori apart from the treaty principles.<sup>296</sup> While to date the recognition of the native title rights and interests of the Maori, based on their prior occupation, has not been translated into a comprehensive recognition of their customary rights to manage and control all their lands and resources (apart from lands and resources restored through settlement or by the courts), the right to consult and participate in management and conservation is an important step forward. Finally, the continuing work of the Waitangi Tribunal—its reports and recommendations<sup>297</sup>—will have, as has been the case over the past 25 years, an increasingly important role in refining both the legal nature of Maori rights and the social relationship of Maori and Pakeha in New Zealand.

## Notes

- <sup>1</sup> Maori terms and their English equivalents will be used throughout this paper interchangeably with the other language equivalent in parentheses.
- <sup>2</sup> See generally, K Sinclair, *A history of New Zealand*, 4<sup>th</sup> revised edition Penguin, 1991; WH Oliver (ed), *Oxford history of New Zealand*, Oxford University Press, 1981; A Alston, M Slatter, R Thomas and E Toomey, *Guide to New Zealand land law*, Brookers, 1997, pp 196-224; and P Spiller, J Finn and R Boast (eds), *A New Zealand legal history*, Brookers, 1995.
- <sup>3</sup> Chapter 3, pp 3-8.
- <sup>4</sup> Chapter 5, pp 3-8.
- <sup>5</sup> JM Davidson, 'The Polynesian foundation' in WH Oliver (ed), above note 2, pp 3, 6.
- <sup>6</sup> Id, p 4.
- <sup>7</sup> Id, pp 4-5.
- <sup>8</sup> Id, p 5; and see also Sinclair, above note 2, pp 16-18.
- <sup>9</sup> Davidson, above note 5, p 5.
- <sup>10</sup> Id, p 6; and Sinclair, above note 2, p 18.
- <sup>11</sup> Davidson, above note 5, pp 6-7; and Sinclair, above note 2, pp 18-19, who notes that the only native mammal in New Zealand at the time of original settlement was the bat. The Maori brought with them the dog and the rat, as well as important food crops such as yams, sweet potatoes and the taro.
- <sup>12</sup> Davidson, above note 5, p 6.
- <sup>13</sup> Sinclair, above note 2, p 20.
- <sup>14</sup> RJ Walker, 'Maori sovereignty, colonial and post-colonial discourses' in P Haveman (ed), *Indigenous peoples rights in Australia, Canada and New Zealand*, Oxford University Press, 1999, pp 108, 109.
- <sup>15</sup> MH Durie, *Te Mana, Te Kawanatanga: The politics of Maori self-determination*, Oxford University Press, 1998, p 53. Durie explains that the Indigenous inhabitants of New Zealand did not refer to themselves as Maori, rather they identified with one of forty or more *iwi* (Tribes).
- <sup>16</sup> Ibid.
- <sup>17</sup> Id, pp 52-114 for a discussion of the role of the *iwi* in Maori culture, past and present. See also on the topic of Maori social organisation Walker, above note 14, pp 108-22.
- <sup>18</sup> P McHugh, *Maori Magna Carta: New Zealand law and the Treaty of Waitangi*, Oxford University Press, 1991, p 7. Durie, above note 15, pp 21-23 expands on *kaitaki* as part of the Maori world view that the environment is a 'network of related elements, each having a relationship to the others and to earlier common origins'. At pp 52-84 Durie discusses the changing demography of the Maori and the number of Maori no longer associated with the ancestral lands or an *iwi*.
- <sup>19</sup> As to whether *iwi* or *hapu* originally had power over land held communally see ET Durie, 'Will the settlers settle?' (1993) 8 *Otago Law Review* 449, pp 449-50.
- <sup>20</sup> Alston, above note 2, p 198.
- <sup>21</sup> Durie, above note 19, p 452.
- <sup>22</sup> McHugh, above note 18, p 74.
- <sup>23</sup> Durie, above note 19, p 452.
- <sup>24</sup> Durie, above note 15, p 116.
- <sup>25</sup> Id, p 76.
- <sup>26</sup> Sinclair, above note 2, pp 29-49.
- <sup>27</sup> JMR Owens, 'New Zealand before annexation' in WH Oliver (ed), above note 2, p 28.

- <sup>28</sup> McHugh, above note 18, p 78.
- <sup>29</sup> Ibid.
- <sup>30</sup> Alston, above note 2, p 198. Alston illustrates the magnitude of the loss of Maori land with statistics that reveal that today there are 13 million hectares of Maori land presently recognised, which equates to 4.5 percent of the total land area of New Zealand. This represents a surprisingly small remnant of Maori land holdings when one considers that Maori ownership of their lands was recognised early and guaranteed by the *Treaty of Waitangi* in 1840.
- <sup>31</sup> McHugh, above note 18, p 24.
- <sup>32</sup> Walker, above note 14, p 111 refers to an 1835 communication to Busby in which Charles Baron de Thierry proclaimed himself sovereign Chief of New Zealand.
- <sup>33</sup> Ibid.
- <sup>34</sup> Ibid. See generally P Adams, *Fatal necessity: British intervention in New Zealand 1830-1847*, Auckland University Press/Oxford University Press, 1977; J Rutherford, *The Treaty of Waitangi and the acquisition of British sovereignty in New Zealand*, Auckland University College, 1949.
- <sup>35</sup> Sinclair, above note 2, pp 51-52.
- <sup>36</sup> *Facsimiles of the Declaration of Independence and the Treaty of Waitangi 1877*, reprinted Government Printer, 1976.
- <sup>37</sup> Durie, above note 15, p 176. For a discussion on whether Maori consent was a prerequisite for the Crown to annex Maori territory see P McHugh, 'Constitutional theory and Maori claims' in IH Kawharu (ed), *Waitangi: Maori and Pakeha perspectives of the Treaty of Waitangi*, Oxford University, 1989, p 32.
- <sup>38</sup> McHugh, above note 18, pp 25-30.
- <sup>39</sup> Ibid.
- <sup>40</sup> Though briefly discussed below at notes 51-56 and accompanying text, an in depth discussion of the controversy over the interpretation of the Treaty of Waitangi is outside the scope of this Chapter. See generally, Kawharu, above note 37.
- <sup>41</sup> McHugh, above note 18, p 79.
- <sup>42</sup> Durie, above note 15, p 118.
- <sup>43</sup> The English Text of the Articles of the Treaty of Waitangi reads:

*Article the First*

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation, all of the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

*Article the Second*

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate – at such prices as may be agreed between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

*Article the Third*

In consideration thereof her Majesty the Queen of England extends to the natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

(Note: Texts in English and Maori are found in the *Treaty of Waitangi Act 1975*.)

<sup>44</sup> For a discussion on the signing of the Treaty of Waitangi see C Orange, *The Treaty of Waitangi*, Allen and Unwin/Port Nicholson Press, 1987, Chs 3, 4.

<sup>45</sup> I Browlie QC, *Treaties and Indigenous peoples: The Robb lectures 1991*, Clarendon Press, 1992, p 11.

<sup>46</sup> Id, p 31.

<sup>47</sup> Waitangi Tribunal, *Finding of the Waitangi Tribunal on the Manukau Claim (Wai 8)*, New Zealand Government Printer, 1985, p 90.

<sup>48</sup> Durie, above note 15, p 176.

<sup>49</sup> Ibid.

<sup>50</sup> Id, p 119. See id, p 121 for discussion of the role of the Native Land Court that was established by the *Native Land Act 1862*.

<sup>51</sup> See generally, Durie, above note 15; Waitangi Tribunal, *Muriwhenua Fishing Report (Wai 22)*, Waitangi Tribunal, 1988, pp 173-88; P Cleave, *The sovereignty game: Power, knowledge and reading the Treaty*, Victoria University Press, 1989; P Adams, above note 42; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

<sup>52</sup> FM Brookfield, 'The New Zealand Constitution the search for legitimacy' in Kawharu (ed), above note 37, pp 4-5. See also Durie, above note 15, p 177.

<sup>53</sup> Durie, above note 15, p 177.

<sup>54</sup> *New Zealand Maori Council v Attorney General* [1987] NZLR 641 per President Cooke at 664. He encapsulated the terms of the Treaty of Waitangi as follows: 'In brief the basic terms of the bargain were that the Queen was to govern and the Maori to be her subjects; in return their chieftainships and possessions were to be protected, but the sales of land to the Crown could be negotiated. These aims partly conflicted. The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas'. See also R Boast, 'The Treaty of Waitangi - A framework for resource management law' (1989) 19 *Victoria University of Wellington Law Review* 1, p 7.

<sup>55</sup> Brownlie, above note 45, pp 9-10.

<sup>56</sup> Confirmed by the Privy Council in *Te Heu Heu Tukino v Ateu District ML Board* [1941] NZLR 590; [1941] AC 308. The Treaty of Waitangi is not enforceable in New Zealand except where incorporated by statute. This precedent is known as the *Te Heu Heu Tukino* principle.

<sup>57</sup> [1840-1932] NZPCC 387 (SC). This case was a challenge to the legality of a Crown grant where the land had been a prior acquisition directly from the Maori during the period Governor Fitzroy waived the Crown's right of pre-emption. The Court of Appeal held that the right of the Crown to extinguish native title must be consistent with legal principles. Reference was made to the decisions of the Supreme Court of the US under Chief Justice Marshall demonstrating 'principles of the common law as applied and adopted from the earliest times by the colonial laws'. Justice Chapman stated at 390 that: 'Whatever may be the opinion of jurists as to the strength or weakness of native title...it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert in doctrine or in practice any thing new or unsettled'.

<sup>58</sup> Id, pp 388-90.

## 6. Environmental and Natural Resources Management by the Maori in New Zealand

- <sup>59</sup> Id, p 391.
- <sup>60</sup> Under the Native Land Ordinances 1846, land acquired from the Maori was considered Crown waste land and, unless needed for a public purpose, was distributed to settlers via Crown Grants. S Dorsett and L Godden, *A guide to overseas precedents of relevance to native title*, Native Title Research Unit/AIATSIS, 1998.
- <sup>61</sup> McHugh, above note 18, p 79.
- <sup>62</sup> Ibid.
- <sup>63</sup> Ibid.
- <sup>64</sup> Ibid.
- <sup>65</sup> M Litchfield, 'Confiscation of Maori land' [1985] *Victoria University Wellington Law Review* 335, p 340.
- <sup>66</sup> See generally, H Miller, *Race conflict in New Zealand 1814-1865*, Blackwood and Janet Paul, 1966, pp 19-125.
- <sup>67</sup> The confiscation of large areas of land in the North Island extinguished native title under the *New Zealand Settlers Act 1863* and are subject of claims before the Waitangi Tribunal.
- <sup>68</sup> P Haveman, 'Chronology 3: Indigenous rights in the political jurisprudence of Australia, Canada, and New Zealand' in P Haveman (ed), above note 14, pp 22, 28. The land was confiscated on the basis that its owners were in 'rebellion' against the Crown. Litchfield, above note 65, p 335.
- <sup>69</sup> McHugh, above note 18, p 80.
- <sup>70</sup> Ibid. See generally IH Kawharu, *Maori land tenure*, Oxford University Press, 1977; ETJ Durie, *Submission to the Royal Commission on Maori Land Court*, No 11, 1979; J McGuire, 'The status and functions of the Maori Land Court' (1993) 8 *Otago Law Review* 125.
- <sup>71</sup> Ibid.
- <sup>72</sup> Ibid.
- <sup>73</sup> Waitangi Tribunal, *The Report of the Orakeia Claim (Wai 9)*, Waitangi Tribunal, 1987, pp 44-45. The Tribunal discusses the role of Justice Fenton and s 23 of the *Native Title Act 1865*.
- <sup>74</sup> McHugh, above note 18, p 80.
- <sup>75</sup> Meyers and Landau, above note 3, pp 5-6.
- <sup>76</sup> See *Re Landon and Whitaker Claims* (1872) NZCA 41 at 49 in which Justice Chapman notes, '[t]he Crown is bound both by the common law of England and by its own solemn engagements [that is the Treaty of Waitangi], to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to accept it'.
- <sup>77</sup> (1878) 3 NZ Jur 72. The case concerned land the Ngati Toa had gifted to the Bishop in 1850 for the purposes of building a church or school. As the school was never built Wi Parata and others sought a declaration that the grant of the land was void.
- <sup>78</sup> Id at 77-78.
- <sup>79</sup> McHugh, above note 18, pp 114-15. McHugh criticises the decision with references to the fundamental misconception of the basis of land titles in the colony. He argues that the basis for the denial of the status of the Treaty of Waitangi and the denial of common law Aboriginal title were erroneous.
- <sup>80</sup> McHugh, above note 18, pp 119-21 discusses the Privy Council judgment holding that the Tribe's endowment of land to the Bishop of Wellington was not an act of state but a fully justiciable act. The response to the Privy Council judgment was a dramatic and unprecedented critical response by the judges and the legal community of New Zealand.
- <sup>81</sup> McHugh, above note 18, pp 120-30.

- <sup>82</sup> (1912) 32 NZLR 321 at 340.
- <sup>83</sup> Id at 341; McHugh, above note 18, pp 121-22 discusses the case and the application of the statutory recognition of Aboriginal rights as applied by New Zealand courts.
- <sup>84</sup> [1941] AC 308.
- <sup>85</sup> Id at 315.
- <sup>86</sup> Durie, above note 15, p 315; See generally E Haughney, 'Maori claims to lakes, river beds, and the foreshore' (1966) 2 *NZULRev* 29.
- <sup>87</sup> [1955] NZLR 419.
- <sup>88</sup> [1962] NZLR 600. The Court of Appeal applied the *ad medium filum* rule to deny the claim to the river bed.
- <sup>89</sup> [1960] NZLR 673. Justice Turner in the Supreme Court applied the *Hoani Te Heu Heu Tukino* principle finding that the Treaty of Waitangi did not give the Maori any cause of action, until the Treaty is recognised by statute it is not enforceable in the courts.
- <sup>90</sup> See generally R Boast, 'In Re Ninety Mile Beach revisited: The Native Land Court and the foreshore in New Zealand legal history' (1993) 23 *Victoria University Wellington Law Review* 145 who discusses the historical background of the case noting that the Native Land Court had previously issued Maori freehold titles to the foreshore, reviews the legislative appropriation of the foreshore and historical documentation from the Crown Solicitor's Office and comments on the weakness of the Crown's opposition to the issue of Maori freehold titles to the foreshore.
- <sup>91</sup> [1960] NZLR 673; [1963] NZLR 461 (CA). Justice North at 471-73 approached the question on the basis that as earlier adjudication of the land blocks adjoining the foreshore did not include the foreshore in the title, then Maori customary law title to the foreshore must be treated as extinguished. Justice Gresson at 474-80 upheld the decision of Justice Turner in the Supreme Court denying the Maori Land Court jurisdiction over the foreshore. Gresson J agreed with the reasons of the other judges.
- <sup>92</sup> Id at 474-80.
- <sup>93</sup> Durie, above note 20, p 120. Durie states at p 53 that by 1874 the Maori were reduced to 14% of the population of New Zealand. The source of this statistic is given as I Poole, *Te Turi Maori: A New Zealand population past, present and projected*, Auckland University Press, 1991, p 245.
- <sup>94</sup> Id, p 116.
- <sup>95</sup> Haveman, above note 68, pp 37, 46.
- <sup>96</sup> Dorsett and Godden, above note 60, p 44.
- <sup>97</sup> See generally ET Durie, 'A Judge's eye view of the Waitangi Tribunal', paper presented at a conference on Indigenous peoples: Rights, Lands Resources, Autonomy International Symposium and Trade Show, Vancouver Canada, 20-22 March 1996.
- <sup>98</sup> WH Oliver, *Claims to the Waitangi Tribunal*, Department of Justice, 1991, p 10.
- <sup>99</sup> Ibid.
- <sup>100</sup> Id, p 11. The claim boosted the Tribunal's reputation in the eyes of the increasingly environmentally conscious public. Oliver notes 'The Tribunal's findings on land ownership claims, by contrast, were never received by Pakeha with such applause'.
- <sup>101</sup> Ibid.
- <sup>102</sup> Ibid.
- <sup>103</sup> [1986] 1 NZLR 682. The case involved a defence to a charge of breach of the Fishing (Amateur Fishing) Regulations 1983, relying on s 88(2) which provided that the regulatory scheme did not effect Maori fishing rights. An earlier fishing prosecution case *Waipapakura v Hempton* (1914) NZLR 1065



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had held that the protected fishing rights were those conferred by statutes other than the *Fisheries Act 1908*. In *Te Weehi Williamson* J held that s 88(2) was intended to save the common law native title fishing rights. See FM Brookfield, 'Maori fishing rights and the Fisheries Act 1983: Te Weehi's case' [1987] *Recent Law* 65.

- <sup>104</sup> Dorsett and Godden, above note 60, p 98.
- <sup>105</sup> [1973] SCR 313 (SCC). This split decision of the Supreme Court of Canada held that at common law the Nisga'a First Nation held native title over their ancestral lands, although the Court divided on the question of extinguishment. The Nisga'a lands in question were not the subject of any treaty.
- <sup>106</sup> (1985) 13 DLR (4th) 321. This claim involved the Crown as trustee and its negotiation of leases of the land reserved to the Musqueam Nation. The Supreme Court held that the Crown owed a fiduciary duty to the Musqueam and had failed to protect their commercial interests.
- <sup>107</sup> McHugh, above note 18, p 131.
- <sup>108</sup> Ibid.
- <sup>109</sup> F Hackshaw, 'Nineteenth century notions of Aboriginal title and their influence on the interpretation of the Treaty of Waitangi' in Kawharu (ed), above note 37, pp 92-120.
- <sup>110</sup> [1994] 2 NZLR 20.
- <sup>111</sup> Id at 23-24.
- <sup>112</sup> [1987] NZLR 641. The case arose when the Maori Council objected to the State Owned Enterprises Bill 1986 which created the State Owned Enterprises and made provision for existing Crown assets to be transferred to these enterprises. The Maori Council believed the transfer of ownership of the Crown assets would jeopardise the possibility of the restoration or restitution of Crown assets that were subject of claims before the Waitangi Tribunal or for which claims were being prepared. The Waitangi Tribunal issued an Interim Report to the Minister of Maori Affairs which queried whether the Bill was consistent with the principles of the Treaty of Waitangi. In response, amendments were introduced aimed at alleviating Maori concerns. Sections 9 and 27 were inserted, with s.27 intended to protect land subject to existing claims before the Waitangi Tribunal even after the Crown land had been transferred to a State Owned Enterprise. The Maori Council sought a declaration that the amended State Owned Enterprises Bill was inconsistent with the principles of the Treaty of Waitangi. The decision to make the declaration was unanimous and each judge elected to give a decision, reflecting the historic nature of the decision.
- <sup>113</sup> [1987] 1 NZLR 641 per President Cooke at 667.
- <sup>114</sup> Id at 664.
- <sup>115</sup> Id per Justice Richard at 683 and per Justice Somers at 693.
- <sup>116</sup> Id at 665.
- <sup>117</sup> Durie, above note 15, p 184.
- <sup>118</sup> *Treaty of Waitangi Act 1975* s 8A inserted by the clawback provisions of the *Treaty of Waitangi (State Enterprises) Act 1988*.
- <sup>119</sup> The *Crown Forests Act 1989* arose out of negotiations following the decision in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 where it was held that the proposal to sell timber and milling rights to Forestcorp, rather than the land itself, was inconsistent with the spirit of the principles of the Treaty of Waitangi and hence inconsistent with s 9 of the *State Owned Enterprises Act 1988*.
- <sup>120</sup> Oliver, above note 98, pp 12-13.
- <sup>121</sup> J Munro, 'The Treaty of Waitangi and the Sealord deal' (1994) 24 *Victoria University Wellington Law Review* 389, p 396; and see McHugh, above note 18, pp 314-16 regarding the interpretative role of the Waitangi Tribunal and remedies.

- <sup>122</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.
- <sup>123</sup> Waitangi Tribunal, *Report findings and recommendations of the Waitangi Tribunal on the application by Aila Taylor for and on behalf of the Te Atiawa Tribe in relation to fishing grounds in Waitara District (Wai 6)*, Department of Justice, 1983.
- <sup>124</sup> Oliver, above note 98, p 19.
- <sup>125</sup> *Id.*, p 20.
- <sup>126</sup> *Id.*, p 21.
- <sup>127</sup> *Ibid.*
- <sup>128</sup> *Ibid.*
- <sup>129</sup> Waitangi Tribunal, above note 51.
- <sup>130</sup> *Id.* at 1.
- <sup>131</sup> *Ibid.*
- <sup>132</sup> *Id.* at 8-9. An urgent fifth hearing was heard on 30 September 1987 to consider the claimants' request that the Tribunal report on an urgent basis. The Tribunal prepared a *Memorandum of Tribunal's preliminary opinions as conveyed to the Hon Minister of Fisheries* which summarised findings of fact to date, expressed the Tribunal's collective opinion that to proceed further with the issue of the quota management system 'would be contrary to the Treaty insofar as the Muriwhena Tribes are concerned' and recommended that the Crown negotiate with the Muriwhena Tribes. The *Memorandum* is reproduced in Appendix 3.4.5 of the *Muriwhena Report*.
- <sup>133</sup> *New Zealand Maori Council and Runanga-o-Muriwhena Inc v Attorney-General (Ministry of Agriculture and Fisheries)* (unreported) High Court, Wellington, CP 553/87, Grieg J.
- <sup>134</sup> Waitangi Tribunal, above note 51 at 189-95.
- <sup>135</sup> *Id.* at xx.
- <sup>136</sup> *Id.* at 225.
- <sup>137</sup> *Ibid.*
- <sup>138</sup> *Id.* at 226.
- <sup>139</sup> *Id.* at 234-38 and 227. It was also noted that the failure of the Crown to honour its treaty obligations was not necessarily the sole cause of the decline of the Muriwhena Maori fishing activity.
- <sup>140</sup> I Magallanes, 'International human rights and their impact on domestic law on Indigenous peoples' rights in Australia, Canada, and New Zealand' in P Haveman (ed), above note 14, p 262.
- <sup>141</sup> Waitangi Tribunal, above note 51 at 228. The Tribunal was adamant in its support of negotiations of a new agreement or arrangement on fisheries. See at xxi, and 239-41.
- <sup>142</sup> *Id.* at 240.
- <sup>143</sup> See generally, Munro, above note 121; C Wickliffe, 'The Co-management of Hui, reserves and Maori customary fishing rights' in GD Meyers (ed), *The way forward: Collaboration and cooperation 'in country'*, Proceedings of the Indigenous Land Use Agreements Conference, 26-29 September 1995, 2<sup>nd</sup> edn National Native Title Tribunal/AGPS, 1996, pp 67-89.
- <sup>144</sup> Waitangi Tribunal, above note 73.
- <sup>145</sup> Oliver, above note 98, pp 41-42. The original claim was made in 1985 prior to the amendment of the *Treaty of Waitangi Act 1975*, the jurisdiction of the Tribunal was then expanded to hear the grievances which went back to 1840.
- <sup>146</sup> Waitangi Tribunal, above note 73 at 248-52. The Statement of Claim, in Appendix II of the Report, included a request for pardon of the convicted protestors and a cessation of enforcement of fines for trespass.

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- <sup>147</sup> [1987] 1 NZLR 641.
- <sup>148</sup> Waitangi Tribunal, above note 73 at 189, 212.
- <sup>149</sup> Id at 254-55.
- <sup>150</sup> Oliver, above note 98, p 149.
- <sup>151</sup> Waitangi Tribunal, above note 73 at 277-79.
- <sup>152</sup> Ibid.
- <sup>153</sup> Waitangi Tribunal, *The Ngai Tahu Report (Wai 27)*, Department of Justice, 1991. See also *The Ngai Tahu Fisheries Report (Wai 27)*, 1992 and the *Ngai Tahu Ancillary Claims Report (Wai 27)*, 1995. See generally for a discussion of the reports AL Mikaere, 'Maori issues' [1996] *New Zealand Law Review* 162.
- <sup>154</sup> *Re a Claim to the Waitangi Tribunal by Henare Rakihia Tau and the Ngai Tahu Trust Board* (unreported) Maori Appellate Court, 12 November 1990, South Island ACMB fol.673. The Maori Appellate Court was called to determine ownership as between Maori, and resolved the matter in favour of the Ngai Tahu. McHugh, above note 18, pp 77-78 refers to this decision for discussion of the customary law principles of take (right to land), occupation or use.
- <sup>155</sup> Waitangi Tribunal, above note 153 at 359.
- <sup>156</sup> Id at 332.
- <sup>157</sup> Id at 1061.
- <sup>158</sup> Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi (Wai 143)*, GP Publications, 1996.
- <sup>159</sup> McHugh, above note 18, pp 322-26. For a discussion of the *Taranaki Report* see S Milroy, 'Maori issues' [1997] *New Zealand Law Review* 247.
- <sup>160</sup> 'Tribes to vote on \$23m redress', *Sydney Morning Herald*, 27 September 1999, p 15.
- <sup>161</sup> Waitangi Tribunal, above note 158 at 5.
- <sup>162</sup> Id at 54.
- <sup>163</sup> Durie, above note 15, p 184. Durie records that as at 31 January 1995 the Tribunal had written 45 reports and 43 percent of recommendations had been implemented. For a critical analysis of the Waitangi Tribunal, see A Fleras, 'Politicising indigeneity: Ethno-politics in white settler dominions' in P Haveman (ed), above note 14, pp 208-11.
- <sup>164</sup> Milroy, above note 159, p 250.
- <sup>165</sup> Durie, above note 15, pp 184-85.
- <sup>166</sup> Durie, above note 97.
- <sup>167</sup> Durie, above note 15, p 185.
- <sup>168</sup> McHugh, above note 18, p 69.
- <sup>169</sup> Protection at common law for Maori customary fishing rights was also confirmed by Justice Greig in *Ngai Tahu Maori Trust Board v Attorney-General (Ministry of Agriculture and Fisheries)* (unreported) High Court, Wellington, CP 559/87, 610/87, 614/87. He followed the decision in the *Te Weehi* case, holding that the rights referred to in s.88(2) of the *Fisheries Act 1983* must be outside the Act, unaffected by it, and that s.88(2) itself implied recognition of the customary fishing rights.
- <sup>170</sup> [1986] 1 NZLR 680.
- <sup>171</sup> [1990] 2 NZLR 641.
- <sup>172</sup> Id at 656 quoting Justice Blair in *R v Agawa* (1988) 65 OR (2d) 505 at 524.
- <sup>173</sup> *R v Sparrow* (1990) 70 DLR (4<sup>th</sup>) 385 (SCC). The Supreme Court of Canada at 407-08, 413 adopted a test that to extinguish an Aboriginal right, in this case fishing rights, there must be a clear and plain

intention to do so. Further, the Crown when regulating Aboriginal rights afforded the protection of s.35(1) of the *Constitution Act 1982* (Cdn) must ensure the legislation is fair, that a trust-like relationship has been adopted and that a generous and liberal interpretation of Aboriginal rights has been applied.

- <sup>174</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641. In this case the Maori Council challenged the proposed transfer process. The Court of Appeal interpreted the meaning of the phrase ‘Principles of the Treaty of Waitangi’ for the purpose of construing sections 9, 23 and 27 of the *State Owned Enterprises Act 1986*. Although fiduciary duties were found to arise from the treaty partnership, it was the presence of s 9 that gave the Maori influence over the transfer of natural resources. Section 9 provides: ‘Nothing in this Act shall be inconsistent with the principles of the Treaty of Waitangi’ and was held to override the rest of the *State Owned Enterprises Act 1986*. Cooke P at 651 recognised that the case was ‘as important for the future of our country as any as has come before in New Zealand’.
- <sup>175</sup> Id at 664. Boast, above note 54, pp 6, 62 prefers the Waitangi Tribunal approach to interpreting the Treaty on a case-by-case exploration of *kawantanga* (governance), *rangatiratanga* (greatest authority) and *taonga* (treasured things). In any event, the Court of Appeal and High Court in the late 1980s and early 1990s referred regularly to the findings and principles of the Treaty of Waitangi.
- <sup>176</sup> McHugh, above note 18, p 252. Sections 27A-27D of the *Treaty of Waitangi (State Enterprises) Act 1988* provide for memorials on the titles of crown land sold, which state that the land is subject to being clawed back to satisfy Waitangi Tribunal claims. Other proposed Crown asset transfers under the *State Owned Enterprises Act 1986* also met with challenges from the Maori, who argued that Maori interests were not sufficiently taken into account. See the Radio Broadcasting cases which challenged the transfer of state broadcasting assets under the *State Owned Enterprises Act 1986* and in which it was found that no treaty principles had been breached. See *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129; *New Zealand Maori Council v Attorney-General* [1922] 2 NZLR 576; See also Waitangi Tribunal, *Report of the Waitangi Tribunal on claims concerning the allocation of radio frequencies (Wai 26 and Wai 150)*, Brooker and Friend, 1990.
- <sup>177</sup> *Tanui Maori Trust Board v Attorney General* [1989] 2 NZLR 513. Durie, above note 15, pp 38, 195-98, notes that after the legal victory the Waitangi Tribunal hearings never progressed to the reporting stage. The Tainui withdrew their mineral claims during negotiations leading up to a Deed of Settlement signed in May 1995 and passed into legislation in the *Waikato Raupatu Claims Settlement Act 1995*.
- <sup>178</sup> McHugh, above note 18, p 254.
- <sup>179</sup> [1989] 2 NZLR 513.
- <sup>180</sup> *Tanui Maori Trust Board v Attorney General* [1989] 2 NZLR 513. The Court also found that as Coalcorp was able to negotiate the sale of Crown land, this brought Coalcorp within s.23(1)(b) of the *State Owned Enterprises Act 1986*. Coalcorp was itself subject to s.9 and required not to act in a manner inconsistent with treaty principles.
- <sup>181</sup> Durie, above note 15, p 38.
- <sup>182</sup> Ibid.
- <sup>183</sup> [1987] 1 NZLR 641.
- <sup>184</sup> McHugh, above note 18, p 252.
- <sup>185</sup> [1987] 1 NZLR 641 at 719, leave reserved. The events are noted in McHugh, above note 18, p 253 with reference to the source document W Renwick, *The Treaty now*, GP Publications, 1990.
- <sup>186</sup> *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142.
- <sup>187</sup> T Castree, *The Crown Forestry Rental Trust/Nga Kaitiaki Reti Ngahere Karauna: Its purpose and functions*, Crown Forestry Rental Trust, 1996, p 6.
- <sup>188</sup> Ibid.

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- <sup>189</sup> Id, p 9. See Durie, above note 15, pp 42-46 for a critique of the effectiveness of the Crown Forests Rental Trust and outstanding issues regarding Maori concerns about forest conservation and resource utilisation.
- <sup>190</sup> Boast, above note 54, p 28 states that the variations in the phraseology in the various statutes is not indicative of any deliberate approach by the parliamentary draftsman. It is the phrase 'principles of the Treaty of Waitangi' which will give scope for the precedent or the concept of partnership to be developed.
- <sup>191</sup> See generally Munro, above note 121; and Boast, above note 54.
- <sup>192</sup> The express acknowledgments are found in the *Town and Country Planning Act 1977* s.3(1)(g); *Conservation Act 1984* s.4; *Environment Act 1986* long title; *Maori Fisheries Act 1989* s.74; *Fisheries Act* s.88(2) now repealed by the *Treaty of Waitangi (Fisheries Claim) Settlement Act 1992*; *Resource Management Act 1991* ss.6(e), 7(a), 8, 61(2)(a)(ii), 66(2)(c)(ii) and 74(2)(b)(iii); *Historic Places Act 1993* s.4(2)(c); *Tē Ture Whenua Maori Act 1993* preamble and s.2; *Law Commission Act 1985* s.5.
- <sup>193</sup> For a concise assessment of the fiduciary doctrine and statutory interpretation using the principles of the Treaty of Waitangi in resource related statutes see McHugh, above note 18, pp 251-64 and 267-79.
- <sup>194</sup> Waitangi Tribunal, above note 51; Waitangi Tribunal, *Ngahi Tahu Fishing Report (Wai 27)*, GP Publications, 1992; Waitangi Tribunal, *The Fisheries Settlement Report (Wai 307)*, Brooker and Friend, 1992.
- <sup>195</sup> Waitangi Tribunal, above note 51 at 80.
- <sup>196</sup> Id at 81.
- <sup>197</sup> See Boast, above note 90 for background to this decision confirming Crown ownership of the foreshore in 1963 and an argument outlining the erroneous legal reasoning; and JS Davidson, 'New Zealand: Ownership of the foreshore' (1998) 13(4) *International Journal of Marine and Coastal Law* 617, pp 617-22.
- <sup>198</sup> Waitangi Tribunal, above note 51 at 81-82.
- <sup>199</sup> Id at 81-88.
- <sup>200</sup> Ibid. The first law to recognise Maori fishing rights was the *Fish Protection Act 1877*, s.8 of which specified that the Act did not affect the Treaty of Waitangi or take away any Maori rights secured by the Treaty. Section 88(2) has been repealed by the *Treaty of Waitangi (Fisheries Claim) Settlement Act 1992*.
- <sup>201</sup> [1986] 1 NZLR 682. Tom Te Weehi successfully argued s.88(2) of the *Fisheries Act 1983* as a defence to a charge of taking abalone in breach of the Fishing (Amateur Fishing) Regulations 1983. Justice Williamson held *inter alia* that the non-territorial customary right to fish exercised by Te Weehi was within the exemption provision of s.88(2).
- <sup>202</sup> Wickliffe, above note 143, p 72.
- <sup>203</sup> Id, pp 74-75; See below notes 243-46 and accompanying text for a more detailed discussion of the Taiapure management model.
- <sup>204</sup> Ibid. See also Munro, above note 121 for a discussion of the draft Maori Fisheries Bill clauses and the events leading to the final Bill passed by parliament.
- <sup>205</sup> Munro, above note 121.
- <sup>206</sup> See generally *ibid*; M Robinson, 'The Sealord Fishing settlement: An international perspective' (1994) 7(3) *Auckland University Law Review* 557; P McHugh, 'Sealord and sharks: The Maori fisheries agreement' (1992) *New Zealand Law Journal* 354; Waitangi Tribunal, above note 194.
- <sup>207</sup> *New Zealand Maori Council v Attorney-General (Minister of Agriculture and Fisheries)* (unreported) 30 September 1987, Greig J; *Ngai Tahu Maori Trust Board v Attorney-General (Minister of Agriculture and Fisheries)* (unreported) 2 November 1987, Greig J.

- <sup>208</sup> Waitangi Tribunal, above note 132.
- <sup>209</sup> Above note 207.
- <sup>210</sup> Wickliffe, above note 143, pp 73-74.
- <sup>211</sup> Ibid.
- <sup>212</sup> Ibid.
- <sup>213</sup> *Te Runanga o Muriwhena Inc v Attorney-General* [1990] 2 NZLR 641.
- <sup>214</sup> Waitangi Tribunal, above note 194.
- <sup>215</sup> Boast, above note 54, p 1, who catalogues the legislation which was the subject of the resource management law review and the government policy papers released in the 1980s.
- <sup>216</sup> Ibid.
- <sup>217</sup> McHugh, above note 18, p 267.
- <sup>218</sup> See Durie, above note 15, pp 24-27 for a discussion of the Motunui, Kaituna, Manuka and Manganui claims and reports.
- <sup>219</sup> Id at 28. See also Ministry for the Environment, *Resource Consultation with Tangata Whenua*, Ministry for the Environment, 1994.
- <sup>220</sup> *Resource Management Act 1991* s.3 Maori terms.
- <sup>221</sup> Durie, above note 15, pp 31-32.
- <sup>222</sup> Section 8, *Resource Management Act 1991* is a lesser limitation than s.9 of the *State Owned Enterprises Act 1986*. Durie, above note 15, p 28 notes the original draft of s 8 had wording similar to s.9, *State Owned Enterprises Act 1986*. However the new government, seeing the litigation which had arisen from s 9 *State Owned Enterprises Act 1986*, adopted wording that was less strict.
- <sup>223</sup> The *Resource Management Amendment Act 1997* s.2(4) adds a definition for 'kiatiakitanga' as the concept of guardianship expressed by the *tangata whenua* and expressly states that it applies to the Maori only. Section 7 was also amended to add the 'ethic of stewardship' to emphasise the difference between *kaitiakitanga* expressed by the *tangata whenua* and the ethic of stewardship.
- <sup>224</sup> *Resource Management Act 1991* Sch 1 s.6: Right to make submissions in regard to proposed policy statements; Sch 1 s.10: Right to be given reasons for accepting or rejecting submissions; Sch.1 s.11: Right to be notified of a decision; Sch.1 s.14: If one has made submissions one has standing to appeal the decision to the Planning Tribunal.
- <sup>225</sup> *Resource Management Act 1991* ss.31(1), 316(1).
- <sup>226</sup> In *Seatow Ltd v Auckland Regional Council* (unreported) Planning Tribunal, A129/93, 14 December 1994, the Ngatiwati challenged recommendations to the Minister to consent to sand extraction from the seabed. It was held that the ownership of the seabed was outside the Planning Tribunal's jurisdiction and the role of the Ngatiwati in the decision making process was limited. However the parties all accepted the right of the *tangata whenua* to be consulted. In contrast, *Hanton v Auckland City Council and BP Oil NZ Ltd* (unreported) Planning Tribunal, March 1994, the Ngati Whatua o Orakei Trust Board, who had not been consulted, appealed the Council's consent for a petrol station on land purchased from the local authority on the basis that surplus land should be returned to the Maori. The Tribunal rejected the argument that consultation was required by s.8 of the *Resource Management Act 1991*. It was held s.8 did not impose upon local authorities the same obligation to take the principles of the Treaty of Waitangi into account as it did on the Crown.
- <sup>227</sup> (Unreported) Environment Court, W129/96, 20 September 1996, Treadwell, Catchpole and Rowan JJ. This case involved a consent and grant by the Council to Petrocorp to discharge treated stormwater which the hapu challenged as having had inadequate consultation. In setting out the consultation requirements the court referred to the earlier decision of *Greensill v Waikato Regional Council and*

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- Witchell* (unreported) Planning Tribunal, W17/95, 6 March 1995, Treadwell J. See AL Mikaere, 'Maori Issues' [1995] *New Zealand Law Review* 137 for discussion of the case.
- <sup>228</sup> *Greensill v Waikato Regional Council* at 4-5.
- <sup>229</sup> *Resource Management Act 1991* ss 61(2)(a)(ii), 66(2)(c)(ii) and 74(2)(b)(ii).
- <sup>230</sup> A English, 'Legislative and policy frameworks for Indigenous involvement in cultural heritage management in New Zealand and New South Wales' (1996) 13(2) *Environment and Planning Law Journal* 103, pp 111-12.
- <sup>231</sup> Milroy, above note 159, p 249.
- <sup>232</sup> 'Crown proposals for the settlement of Treaty of Waitangi claims: a summary' [1996] *Indigenous Law Reporter* 718. This policy, which promoted a 1 billion dollar 'fiscal envelope' for the settlement of all Maori claims in a ten year period, was abandoned by the coalition government in 1997. It does indicate the policy that settlements may include offers of greater Maori participation in managing natural resources including representation on advisory boards and tribunals.
- <sup>233</sup> Waitangi Tribunal, above note 194; Munro, above note 121, pp 410-11; McHugh, above note 206, p 255.
- <sup>234</sup> Waitangi Tribunal, above note 194 at 1.
- <sup>235</sup> Wickliffe, above note 143, p 78.
- <sup>236</sup> Id, pp 78-79; *Fishing Industry Board Act 1953* ss.3 and 9.
- <sup>237</sup> McHugh, above note 206, p 356; *Treaty of Waitangi (Fisheries Claim) Settlement Act 1992* ss.42 and 43.
- <sup>238</sup> Munro, above note 121, p 412 [see fn 152].
- <sup>239</sup> Id, p 423. Munro however is critical of the failure to accord Maori special status and the fact that the Crown retains ultimate control of the fishery resource. Maori have a larger role than ever, but it is still limited to being an industry interest group.
- <sup>240</sup> Waitangi Tribunal, above note 194; Munro, above note 121, pp 415-29; McHugh, above note 206, pp 355-56; Durie, above note 15, pp 169-70; Mikaere, above note 153, pp 171-73 outlines the Waitangi Tribunal's *Memorandum Following the Second Hearing of Fisheries Allocation Claims* (1995) and the numerous actions relating to the limitation of the Waitangi Tribunal's jurisdiction and the allocation of assets to iwi or iwi representative bodies.
- <sup>241</sup> Durie, above note 15, p 168.
- <sup>242</sup> Munro, above note 121, p 429. See Durie, above note 15, pp 165-71 on the allocation of assets by the Fisheries Commission following the decision of the Court of Appeal in *Te Runanga o Muriwhena v Treaty of Waitangi Fisheries Commission* [1996] 3 NZLR 10, that the distribution of assets by the Fisheries Commission was to include the urban Maori. On appeal to the Privy Council, the Court of Appeal decision was quashed and the matter was referred back to the High Court to decide if the allocation was to be only to *iwi*, and if so to what *iwi*. Durie reproduces Te Ohu Kaimoana statistics showing the increase in *iwi* involvement in fishing in the period 1989-96 with impressive gains.
- <sup>243</sup> A *taiapure* is defined in s 54A of the *Fisheries Act 1983* as a coastal fishing area, limited to littoral or estuarine waters, which is of special significance to the local *iwi* (Tribe) either for fishing or for cultural or spiritual reasons. The *taiapure* scheme was incorporated into the *Treaty of Waitangi (Fisheries Claim) Settlement Act 1992*.
- <sup>244</sup> Section 54J of the *Fisheries Act 1983* and the *Treaty of Waitangi (Fisheries Claim) Settlement Act 1992* s.34.
- <sup>245</sup> The *taiapure* scheme has not been actively undertaken by the Maori as the process is open for public objection to the establishment of the *taiapure* and the regulations are subject to review by the Parliamentary Review Select Committee: Wickliffe, above note 143, p 83.
- <sup>246</sup> Durie, above note 15, p 162.

- <sup>247</sup> [1993] 2 NZLR 301 at 306.
- <sup>248</sup> Waitangi Tribunal, above note 194, p 8.
- <sup>249</sup> Ibid. The Waitangi Tribunal noted that not all counsel agreed with this interpretation of clause 3.5.1.4 of the Deed of Settlement. See also Wickliffe, above note 143, p 81.
- <sup>250</sup> Ibid.
- <sup>251</sup> Ibid.
- <sup>252</sup> Ibid.
- <sup>253</sup> Wickliffe, above note 143, p 81.
- <sup>254</sup> Section 89 of the *Fisheries Act 1983*.
- <sup>255</sup> Id s 89(1C)(a).
- <sup>256</sup> Id s 89(1C)(b).
- <sup>257</sup> Id s 89(1C)(d).
- <sup>258</sup> Wickliffe, above note 143, pp 81-85. Wickliffe is a member of Paepae/Taumata 2, a Maori working party that has been preparing the draft Kaimoama (Maori Traditional and Customary Fishing) Regulations which are discussed in her paper. The Kaimoana Regulations propose nominated *tangata kaitaitaitiaki* (caretakers/stewards) who will regulate within defined areas and reflect a co-management approach to non-commercial fisheries.
- <sup>259</sup> (Unreported) District Court, Wanganui, 27 February 1997, ORN: 5083006813-14, Becroft J. McRitchie was prosecuted for fishing for trout in the Mangawhero River without a licence. It was held that he was exercising his customary Maori fishing right and the matter was dismissed. On appeal the High Court overturned the decision in 1998. See Magallanes, above note 140, pp 235, 262 for a discussion of the international right of development of Indigenous rights adopted by Justice Becroft with reference to the *Muriwhena Report*.
- <sup>260</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553. The Ngai Tahu challenged the issue of a whale watching permit without any consultation. The High Court held the treaty principles did not support a Maori veto or priority for Ngai Tahu enterprises. On appeal to the Court of Appeal the failure to consult and the narrow view of consultation was held to be contrary to treaty principles. The matter was referred back to the Director-General for reconsideration taking into account treaty principles.
- <sup>261</sup> See *Crown Proposals*, above note 232.
- <sup>262</sup> For example see the revocations in *The Ngai Tahu (Tutaepatu Lagoon Vesting) Act 1998* ss.3 and 4.
- <sup>263</sup> Durie, above note 15, pp 195-98.
- <sup>264</sup> Ibid. The land returned, a fraction of the 486,502 hectares confiscated, is to be vested in the name of Potatau Te Wherowhero, the first Maori King. The land is unalienable and will be used for cultural and customary uses, and for economic advancement of the Tribe.
- <sup>265</sup> Durie, above note 15, p 200.
- <sup>266</sup> Id, p 202.
- <sup>267</sup> Ibid.
- <sup>268</sup> Ibid.
- <sup>269</sup> *Ngai Tahu (Tutaepatu Lagoon Vesting) Act 1998* s.7.
- <sup>270</sup> Durie, above note 15, p 195.
- <sup>271</sup> Ibid.
- <sup>272</sup> A Mikaere and S Milroy, 'Maori issues' [1998] *New Zealand Law Review* 467, p 475. See for a discussion of the treaty claims policy and the Whakatohea claim RJ Walker, 'Policy generation praxis and



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transformation' a paper presented at The Delgamuukw Workshop, Australian National University, 4 October 1998.

- <sup>273</sup> Above note 230 at 112; Waitangi Tribunal, *Te Arawa Representative Geothermal Claims (Wai 32)*, Waitangi Tribunal, 1993 at 34. See also Waitangi Tribunal, *Ngawha Geothermal Resource Report (Wai 304)*, Waitangi Tribunal, 1993 at 145 which described s.8 of the *Resource Management Act* as 'fatally flawed' in that decision makers are not obliged to act in conformity with treaty principles but only to take them into account.
- <sup>274</sup> [1996] NZRMA 77. The planned effluent discharge outlet was challenged on spiritual and cultural grounds arising from the significance of Te Uruti Bay to the *tangata whenua* (people of a given place).
- <sup>275</sup> Ibid.
- <sup>276</sup> Above note 230 at 112; Durie, above note 15, p 34 notes there have been several productive relationships between Maori and local councils.
- <sup>277</sup> Waitangi Tribunal, above note 273 at 23. The Tribunal noted where power is transferred to *iwi* at the discretion of the council, the local council is ultimately responsible.
- <sup>278</sup> *Minhinnick v Watercare Services Ltd* [1997] NZRMA 289 Mrs Minhinnick challenged a proposed sewage pipeline through an area considered *wahi tapu* (sacred place). She failed at first instance. The appeal before Salmon J succeeded *Minhinnick v Watercare Services Ltd* [1998] 1 NZLR 63. Watercare succeeded in their appeal before the Court of Appeal; see *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294.
- <sup>279</sup> *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294.
- <sup>280</sup> See above notes 103-11 and accompanying text.
- <sup>281</sup> *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 682.
- <sup>282</sup> [1987] 1 NZLR 641.
- <sup>283</sup> *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142; *Tanui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (the Coalcorp case); *New Zealand Maori Council v Attorney-General* [1991] 2 NZLR 129.
- <sup>284</sup> Boast, above note 54, pp 58-59.
- <sup>285</sup> See generally, Boast, above note 54.
- <sup>286</sup> *Conservation Act 1987* s 4.
- <sup>287</sup> *State Owned Enterprises Act 1988* s 9.
- <sup>288</sup> *Resource Management Act 1991* s 6(e).
- <sup>289</sup> Boast, above 54, p 65 advocates one central statute recognising Maori customary interests.
- <sup>290</sup> Wickliffe, above note 143.
- <sup>291</sup> Magallanes, above note 140, p 262.
- <sup>292</sup> *Tanui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513.
- <sup>293</sup> See above notes 183-89 and accompanying text.
- <sup>294</sup> *Resource Management Act 1991* ss 6(e), 7(a), 8, 314 and 316.
- <sup>295</sup> Above note 232.
- <sup>296</sup> *R v Symonds* [1840-1932] NZPCC 387 (SCC) at 391.
- <sup>297</sup> The work and reports of the Waitangi Tribunal can be accessed via the internet: < <http://www.knowledge-basket.co.nz/waitiangi/welcome/html> >.



## Chapter 7 ■

# The North American and New Zealand Experience with Indigenous Land Rights and Its Application to Australia

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### Introduction

In *Mabo v Queensland<sup>1</sup>* (*Mabo (No 2)*) the Australian High Court decision acknowledging the reception into Australian law of the common law doctrine of native title, Justice Brennan, author of the principal majority decision, writes:

Native title has its origins in and is given its content by the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.<sup>2</sup>

Earlier in his opinion, commenting on the reception of English common law in newly acquired territories, Justice Brennan notes that the general rule is that in conquered territory and lands acquired by cession, the laws of the newly acquired country remained in effect until affirmatively changed by the new sovereign.<sup>3</sup> While unoccupied territory (land terra nullius) that is peacefully settled is treated differently (because there are no occupants and, therefore, no existing law), Brennan notes that, under the common law, in respect to the discovery and peaceful annexation of inhabited territory, '[t]he preferable rule...is that a mere change in sovereignty does not extinguish native title to land...and equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land...'<sup>4</sup>

This summary Chapter considers the applicability of the common law jurisprudence on Indigenous land rights of the highest courts in North America and New Zealand to the developing interpretation of native title in Australia. It attempts to answer two questions by reference to the leading judgments on Indigenous rights in the United States (US), Canada, and New Zealand. First, what are the general parameters of the content of native title—must each and every right be proved by reference to a particular customary use of the land or does possessory native title confer a generally unencumbered right to use the land as native title holders see fit to support their economic and cultural development, as well as diminished sovereign rights to manage the land. (As part of this question it is important to consider the distinction between possessory native title and the exercise of individual native title rights, as well as what management powers may adhere to the exercise of these individual rights.) Second, it is necessary to consider what is meant by the rule that the pre-existing laws are recognized by the new sovereign until affirmatively changed.

Whether the rights developed in the context of US-Indian, Canadian-Aboriginal, and New Zealand-Maori relations are applicable to or can inform the future understanding

of native title law in Australia is a question that can only be addressed summarily in this Chapter. In the author's view, the answer depends on identifying and understanding the source of those rights. Arguably, that source is the same in the US, Canada, New Zealand and all other common law jurisdictions, including Australia—the common law's historical acknowledgment of the pre-existing rights of Indigenous peoples which arise from their prior occupation of the land in organized societies.<sup>5</sup>

## Indian title in the US

The three seminal Aboriginal title cases of the US Supreme Court, *Johnson v M'Intosh*, *Cherokee Nation v Georgia* and *Worcester v Georgia*, have consistently informed the jurisprudence of other common law countries, including Canada, New Zealand and Australia.<sup>6</sup> In *Johnson v M'Intosh*, Chief Justice Marshall notes that in the establishment of relations between US Indian Tribes and the British Crown:

...the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; *but their rights to complete sovereignty as independent nations, were necessarily diminished* and their power to dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle, that discovery [of new territory] gave exclusive title to those who made it.

While the different nations of Europe respected the rights of the natives as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of their ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indians' right of occupancy. The history of America [citing the practices of Spain, Portugal, France, Holland, and England], from its discovery to the present day, proves, we think, the universal recognition of these principles.<sup>7</sup>

Marshall goes on to hold that:

[t]he United States, then, have unequivocally acceded to that great and broad rule [of discovery] by which its civilized inhabitants now hold this country. They hold and assert in themselves, the title by which it was acquired. They maintain as all others [nations] have maintained, that discovery gives an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; *and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.*<sup>8</sup>

In the two following cases, both involving the state of Georgia and the Cherokee, the US Supreme Court further refined the doctrine of native (Indian) title, setting out the limits of tribal sovereignty. In the first of these, *Cherokee Nation v Georgia*, Chief Justice Marshall confirmed the Tribes' special constitutional status<sup>9</sup> and laid the foundation for

the Indian Trust Doctrine, requiring the federal government to protect Indian tribal interests.<sup>10</sup> Marshall writes that:

[t]hough the Indians are acknowledged to have an unquestionable and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.<sup>11</sup>

In the final case in the trilogy, *Worcester v Georgia*, Marshall first revisits the principle that: '[t]he Indian nations had always been considered as distinct, independent communities, retaining their original natural rights, as the undisputed possessors of the soil...[with the single exception that the Doctrine of Discovery provided a preeminent title to the discovering nation enabling it to extinguish aboriginal title]'.<sup>12</sup> He goes on to reiterate that the US Constitution confirms the Tribes' status as 'powers who are capable of making treaties'.<sup>13</sup> Moreover, Marshall notes that the Tribes' status as domestic dependent nations does not deprive those peoples of all their sovereign powers. He writes, '[a] weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state'.<sup>14</sup> Marshall concludes therefore that the state law challenged in this case has no effect in Cherokee territory.<sup>15</sup>

Taken together, the Marshall trilogy establishes that native title rights to land and resources, as well as the rights of Indigenous peoples to govern their affairs and manage their lands, arise out of their prior occupancy of European-settled lands and the English common law's historical recognition of these rights. As Deloria and Lytle note, *Cherokee Nation* and *Worcester* in particular define the two basic thrusts of the relationship between the US and the Tribes (and arguably, of native title law in general): first, under the rule of discovery (and the common law), the Tribes no longer enjoy ultimate sovereignty but retain certain aspects of sovereignty not extinguished by the ultimate sovereign; and second, by assuming a paramount sovereignty over lesser powers (domestic dependent nations), the new sovereign accepts the responsibility to protect the Tribes in their rights to occupy their lands, manage their natural resources, and exercise lesser rights of self-government.<sup>16</sup>

As indicated in Chapter 4 of this volume, Alaska Natives exercise their rights to manage their lands and resources under a different regime than the one which has evolved in the 'lower 48 states'. The *Alaska Native Claims Settlement Act* (ANCSA) has structured a legal regime for governing Alaskan Native lands more akin to the regional agreements process

in Canada than to the tribal reservation model which historically developed in the rest of the US.<sup>17</sup> While native title to land has been extinguished under ANCSA, Alaskan Natives retain some of their traditional lands, and most importantly, their powers of self-government. As Getches, Wilkinson and Williams note:

[l]and title may be in corporate ownership, but the native governments that preceded ANCSA continue in existence.<sup>18</sup>

Moreover, while the jurisprudential contours of US Indian policy may be broadly applicable to Native Alaskans (making it possible to speak generally of Indian law in the US), the unique regime created by ANCSA, the *Alaskan National Interest Lands Conservation Act 1980*, state law and their interaction with federal law means that:

several of the crucial elements of this unique legal system remain unidentified...<sup>19</sup>

While the fortunes and 'independence' of US Indian Tribes have waxed and waned over the years in response to US government policy,<sup>20</sup> the Tribes have continued to exercise a measure of self-determination, even in the face of the Supreme Court's 130 year retreat<sup>21</sup> from the doctrine of inherent sovereignty established in the Marshall trilogy. Though the inherent sovereignty doctrine was revitalised by the US Supreme Court in 1978, it is clear that the diminished sovereignty of US Indian Tribes is subject to extinguishment by the federal government.<sup>22</sup> Those sovereign powers retained by the Tribes are, however, still viable. As the Court notes in *US v Wheeler*, 'those aspects of sovereignty not withdrawn by treaty or statute or by implication as a necessary result of their [the Tribes'] dependent status...[are retained by the Tribes]'.<sup>23</sup>

In sum, US Indian Tribes exercise a wide variety of governmental powers. These powers and rights extend well beyond the mere right to occupy reservation lands or enjoy subsistence hunting and fishing rights. As Getches, Wilkinson and Williams note:

[the] result of the legal relationship of tribes with the United States is that they continue to be ruled by their own laws. Today tribal governments exercise legislative, judicial, and regulatory powers and it is clear that their authority is derived from their aboriginal sovereignty, not delegated from the federal government. Indian governments are rapidly expanding their operations to implement their police power through tribal courts, zoning ordinances, taxation bureaus, environmental controls, business and health regulation, and fisheries and water management codes.<sup>24</sup>

The Marshall trilogy and the development of Indian law in the US has played a significant role in informing the Aboriginal rights jurisprudence in Canada and New Zealand. While the Canadian jurisprudence is more recent and Canadian Aboriginal policy is undergoing rapid change, thus making the final outlines of both law and policy less clear than in the US, the similarities are far more prominent than any differences in the treatment of Indigenous peoples.

## Aboriginal title in Canada

Native title in Canada was first recognized by the Canadian Supreme Court in 1889 in *St Catherine's Milling and Lumber Co v The Queen* as a personal usufructuary right, dependent on the good will of the Crown, arising from the Royal Proclamation of 1763 which reserved to the Indians of North America all lands in their possession not ceded to or purchased by the Crown.<sup>25</sup> That limited view of native title prevailed for over 100 years until challenged in *Calder v Attorney General of British Columbia*,<sup>26</sup> where the Canadian Supreme Court was forced to find an alternate source of native title, since the plaintiff Tribe was not on lands protected by the Proclamation of 1763. The *Calder* decision confirms that Aboriginal (native) title in Canada is not a collection of rights given to Aboriginal peoples by the new sovereign, parliamentary action, any other affirmative act or the common law; the simple fact of Indian occupancy before the settlers' arrival provides the source of Aboriginal title. In support for a legal basis upholding Aboriginal title to land, the most quoted passage in the judgments links native title/land rights to the existence of established sovereign societies in North America prior to European settlement: '...when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. That is what Indian title means...'.<sup>27</sup>

As in the US, where a century and a half earlier the *Johnson v M'Intosh* case acknowledging the Tribes' native title was followed by the *Cherokee Nation* case establishing a continuing fiduciary duty prescribing the government's obligation to protect native title rights, the *Calder* decision was followed by the Canadian Court's similar decision in *Guerin v The Queen*.<sup>28</sup> In *Guerin*, the Court reinstated a trial court decision awarding the plaintiff Tribe \$10 million from the government for leasing tribal lands at less favorable terms than agreed to by the Tribe, holding that the government's supervision of Indian lands and peoples created a trust or trust-like relationship requiring it to protect the Tribe's rights and interests in lands and other Aboriginal rights.<sup>29</sup>

In Canada, the government's fiduciary obligation to Aboriginal peoples is given added weight via the Court's interpretation of a 1982 constitutional amendment. Section 35(1) of the *Constitution Act 1982* 'affirms and recognises existing Aboriginal and treaty rights'. The practical effect of the constitutional acknowledgement of Aboriginal and treaty rights is twofold. First, it insulates those rights from provincial regulation.<sup>30</sup> Second, as the Court notes in *Sparrow v The Queen* which considered the impact of fisheries regulations which restricted Aboriginal fishing rights, section 35(1) limits the capacity to extinguish or impair Aboriginal rights to those instances where such regulation is for a compelling purpose (for example, resource conservation), where regulation is non-discriminatory and where such regulation minimises the impact on the exercise of Aboriginal rights.<sup>31</sup>

Judicially, the decade of the 1990s was a particularly important period in Canadian-Aboriginal relations. Following the *Sparrow* decision at the outset of the decade, the Court decided a number of important cases which acknowledged a panoply of native title rights similar to those acknowledged in the US, including the capacity for native title to encompass commercial exploitation rights in natural resources<sup>32</sup> and hunting, fishing and other rights which may arise independently of any possessory native title in land.<sup>33</sup> By far the most important case decided by the Canadian Supreme Court, and one most likely to influence the Australian jurisprudence, is *Delgamuukw v British Columbia*.<sup>34</sup>

In *Delgamuukw* the Canadian Supreme Court holds that native title encompasses a spectrum of rights arising from prior occupancy of the land and the relationship between the common law and pre-existing systems of Aboriginal law. Chief Justice Lamer writes that:

[t]he picture that emerges...[from the Canadian jurisprudence] is that Aboriginal rights which are recognized...fall along a spectrum with respect to their degree of connection to the land. At one end, there are those Aboriginal rights which are practices, customs and traditions that are integral to the distinctive Aboriginal culture of the group claiming the right. However, the 'occupation and use of the land' where the activity is taking place is not 'sufficient to support a claim of title to the land'. ...In the middle, there are activities which, out of necessity, take place on the land and, indeed might be intimately related to a particular piece of land. Although an Aboriginal group might not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. ...At the other end of the spectrum, there is Aboriginal title itself..., [which] confers more than the right to engage in site-specific activities. ...What Aboriginal title confers is the right to the land itself.<sup>35</sup>

While the *Delgamuukw* Court declines to rule definitively on the issue of self-government,<sup>36</sup> given the analogous position of lands subject to Aboriginal title with Indian reserves, recent developments in the negotiated settlements process which increasingly provide substantial measures of self-government to First Nations and other Indigenous peoples and the willingness of the Court to consider afresh self-government claims,<sup>37</sup> such claims are surely within the ambit of rights associated with Aboriginal title.

The *Delgamuukw* Court's ruling that Aboriginal title carries with it the full beneficial use of the land, subject to the limitation that the land not be used in ways contrary to a people's traditional connection to the land and the limitation that Aboriginal title/rights may be diminished by a compelling government purpose that does not violate the fiduciary duty owed an Aboriginal group,<sup>38</sup> strongly suggests that Aboriginal title encompasses self-government rights. The acceptance in the *Van der Peet* trilogy of commercial Aboriginal rights in resources, whether associated with reserves or Aboriginal title lands or exercised as independent Aboriginal rights acknowledged in *Adams* and *Cote*, as well as the *Delgamuukw* Court's ruling that government must consult with Aboriginal groups prior to actions which affect Aboriginal title/rights,<sup>39</sup> further supports the proposition that recognition of Aboriginal title/rights includes a measure of self-management of those areas and resource interests.



As in the US, First Nations and other Indigenous peoples in Canada retain considerable authority to manage their own affairs on Indian Reserves, lands made available to Aboriginal peoples via negotiated settlements and, following *Delgamuukw*, on lands held pursuant to Aboriginal title. Similarly, Aboriginal peoples in Canada also possess Aboriginal rights (analogous to off-reservation rights in the US), which allow them to pursue their traditions and customs, such as hunting and fishing rights, on lands (and waters) not associated with reserves or held pursuant to Aboriginal title, as well as rights to be consulted about activities which affect their rights or to protect lands and other resources from environmental degradation. Finally, both Supreme Courts have acknowledged that acceptance of common law Aboriginal title includes acceptance of a fiduciary responsibility to preserve and protect the rights associated with Aboriginal title.

### Maori title in New Zealand

Native title law in New Zealand has developed in a broadly similar fashion to that of Canada. After the initial acceptance of native title, followed by a long period of rejection and neglect, increased political activism and judicial attention in the last quarter of the twentieth century has reinvigorated Maori land and resource rights. This jurisprudence underlies the continuity of the common law theory of the content and source of native title rights.

The mechanism by which the British asserted sovereignty over New Zealand was the Treaty of Waitangi, signed in 1840 by a number of Maori Chiefs and representatives of the British Crown.<sup>40</sup> Without descending into the controversy that engulfs the interpretation of the English and Maori versions of the Treaty,<sup>41</sup> by Article One the Maori signatories ceded *kawanatanga* (governance in the Maori version or sovereignty in the English version). In return, Article Two reserved to the Maori signatories *te tino rangatiratanga* (full chieftainship in the Maori version or exclusive possession in the English version) of their lands, estates, forests, fisheries and other properties.<sup>42</sup>

The Treaty of Waitangi occupies a similar position in its historical significance in New Zealand to the Royal Proclamation of 1763 in Canada. The Royal Proclamation has been characterised as an Indian Bill of Rights,<sup>43</sup> while the Treaty of Waitangi has been called a Maori Magna Carta.<sup>44</sup> As one commentator notes, the Treaty of Waitangi presupposed the legal and political capacity of the Chiefs of New Zealand to enter into a binding agreement that was valid by contemporary international law.<sup>45</sup> While fundamental to Maori-New Zealand relations, it is critical to note, however, that, like the Royal Proclamation or treaties entered into by US Indian Tribes, the Treaty of Waitangi is not the source of Maori rights; rather, as observed above, the Treaty of Waitangi reserves pre-existing rights to the Maori. It is not a grant of rights to New Zealand's Indigenous peoples.<sup>46</sup>

The first case to consider the native title rights of the Maori was the 1847 decision in *R v Symonds*.<sup>47</sup> The New Zealand Court held (relying on the Marshall Trilogy) that, native title is a recognized right of customary use and possession of lands, subject only to the exclusive right of the Crown to extinguish those rights.<sup>48</sup> The view expressed in *Symonds* prevailed for over 40 years until the decision in the case of *Wi Parata v Bishop of Wellington* which held that the Treaty of Waitangi is a nullity without legislative action and therefore that Maori title and other property rights require affirmative recognition.<sup>49</sup> This meant that Maori rights in land, except for rights conferred under New Zealand legislation, were unenforceable in the New Zealand courts.<sup>50</sup>

As in Canada,<sup>51</sup> increased political activism on the part of the Maori and judicial reconsideration of Maori rights brought about significant changes in both the legal view of Maori title and the relationship between Maori and non-Indigenous New Zealand. In many respects, passage of the *Treaty of Waitangi Act 1975* and the creation of the Waitangi Tribunal to consider Maori land/natural resources claims and claims that government action is inconsistent with the Treaty is both a result of this 'activism' and a precursor to greater recognition of Maori rights.<sup>52</sup>

Following years of neglect, the New Zealand Court in *Te Weehi v Regional Fisheries Officer* rejected the prevailing, narrow view of Maori land rights as dependent on affirmative recognition, a principle derived from the *Wi Parata* case and a view consistently rejected by the Privy Council in the early to mid-1900s, but ignored by New Zealand courts.<sup>53</sup> The Court applies the principle of continuity of private property rights upon assertion of new sovereignty to specifically determine that native title rights to hunt and fish in traditional areas arise independently from any statutory recognition of those rights.<sup>54</sup> The *Te Weehi* decision revolved around an interpretation of fisheries regulations and was confined to non-territorial, non-exclusive access rights to traditional resources. The decision in *Te Weehi's* case did not, however, affect the assumed statutory bar against the enforcement of native title to land, fishing rights not being within the ambit of Part XIV of the *Maori Affairs Act 1955* which prohibited customary claims to land,<sup>55</sup> nor did it consider whether the Crown was bound by a fiduciary duty to protect the rights of the Maori.

The question of the Crown's relationship to the Maori was answered first in *New Zealand Maori Council v Attorney-General*.<sup>56</sup> That case interpreted section 9 of the *State Owned Enterprises Act 1986* which provided that nothing in the Act permitted the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi. The Maori mounted a challenge to the proposed transfer of 10 million hectares (37 percent of the land surface of New Zealand) to State Owned Enterprises (corporations). After examining the *State Owned Enterprises Act*, the Court of Appeal found that there was no provision for considering whether the proposed Crown asset transfer would be inconsistent with the principles of the Treaty, hence any such transfers would be unlawful. The Court

held that the Treaty relationship gives rise to responsibilities analogous to fiduciary duties which include active protection by the Crown of the Maori in the use of their land and water 'to the fullest extent reasonably practicable'.<sup>57</sup>

The application of the *Te Weehi* principle to land and reinvigoration of the common law doctrine of native title in New Zealand occurred seven years later. In 1994 in *Te Runanganui o Te Ika Whenua Inc Society v Attorney General*<sup>58</sup> the Court concludes that Aboriginal title is part of New Zealand law. Citing both the 1847 *Symonds* case and the Australian High Court in *Mabo*, President Cooke on behalf of the Court holds that: Aboriginal title (or interchangeably, Maori customary title) includes rights in lands and waters held by the Indigenous Tribes of an area up to the time of colonial annexation, upon annexation/colonisation the Crown acquires the radical title to the land burdened by or subject to Indigenous rights and the scope and nature of those (generally collective) rights depends upon the uses of those lands in a particular case.<sup>59</sup>

With the *Te Weehi*, *New Zealand Maori Council*, *Te Runanganui* and other decisions, the Maori in New Zealand now enjoy native title rights similar to those exercised by Indigenous Tribes in North America. The Maori enjoy both subsistence and commercial rights in their fisheries; they have interests in timber, some minerals, and other natural resources; they control reserves, Maori freehold land, and land returned in negotiated settlements; they are involved in natural resources co-management regimes; and, as in the US, statutory provisions provide additional authority enabling Maori participation in environmental decision making.<sup>60</sup>

### **The application of common law native title to Australia**

In sum, the judicial treatment of Indigenous rights in North America and New Zealand illuminates three fundamental principles of common law native title. First, the source of Indigenous land rights in newly acquired territory is the pre-existing, communal occupancy of the land by Indigenous people at the time of assertion of sovereignty to that territory by the colonizing state. Treaties and treaty substitutes (including negotiated agreements/co-management regimes), statutes or proclamations do not provide the source of those rights. Instead, they typically extinguish existing rights except where the Tribes were able to reserve those rights (for example, to a diminished land base or to hunt and fish in traditional hunting and fishing grounds). Equally clear, while exclusive authority to administer Indian/Aboriginal affairs is granted to the federal governments in the US and Canada by each country's constitution, that grant does not provide a source of title. Moreover, the Canadian Court is clear that the 1982 constitutional amendments preserved existing rights; section 35 does not create new rights. Second, prior occupation also gives rise to the powers to control resources on reserved/retained lands (including lands subject to Aboriginal title in Canada), as well as diminished self-government rights for Indigenous peoples. Like other Indigenous rights, those too continue to exist until

specifically (intentionally) extinguished. Third, the acknowledgment of Indigenous prior occupancy by the new sovereign and the assumption of ultimate sovereignty gives rise to a fiduciary duty to protect the remaining rights of the Indigenous occupants of the land, including their lesser sovereign rights. Again, statutes, treaties, executive agreements and similar legal instruments may inform the specific reach or content of the fiduciary duty in particular circumstances, but that ‘information’ ought not to be confused with the ‘source’ of the duty to protect Indigenous peoples’ rights to hold and manage their lands and other economic interests, or their interests in safeguarding their cultural, social and political integrity.

In this author’s view, these fundamental principles of native title law, which arise from the US, Canadian and New Zealand jurisprudence and experience, find support in the Australian jurisprudence. Arguably, they form part of the common law of Australia with respect to the recognition and treatment of Indigenous rights in Australia.

First and foremost, the Australian High Court has rejected the proposition that recognition of native title requires any affirmative action of the Crown. Citing the *Calder* case, Justice Brennan in *Mabo (No 2)* notes that the weight of the common law authority accepts the view that an affirmative act of recognition of native title rights is not required, rather, ‘the preferable rule...is that a mere change in sovereignty does not extinguish native title in land’.<sup>61</sup> Instead, as in North America and New Zealand, native title arises from an Indigenous community’s pre-existing occupation of land;<sup>62</sup> or as characterised by Justices Deane and Gaudron, from an Indigenous group’s established entitlement to occupy the land;<sup>63</sup> or as described by Justice Toohey, from meaningful presence on the land ‘amounting to occupancy’.<sup>64</sup>

Second, the Australian High Court has adopted the common jurisprudence that the extinguishment of native title requires a clear, unambiguous intention on the part of the parliament or executive to extinguish native title rights in land. That intention to extinguish may arise expressly from legislation that manifests in clear, unambiguous language an intent to extinguish native title rights or by necessary implication from government dealings in land that are clearly inconsistent with the continuing exercise of native title rights.<sup>65</sup> To date, the Court has interpreted the requirement for a clear intention to extinguish native title strictly, such that neither general assertions of sovereignty over the land at the time of colonisation,<sup>66</sup> state grants of interests in land only partially inconsistent with continuing native title rights (for example, pastoral leases granted pursuant to state legislation)<sup>67</sup> nor assertions of a state’s interest in managing and conserving its wildlife resources<sup>68</sup> have been found to extinguish native title. While it is clear that grants of interests in land which transfer the full beneficial interest in land to others, such as freehold title, will extinguish all native title rights,<sup>69</sup> it is equally clear that other grants may only partially extinguish native title, that is, grants of rights in land may extinguish a

native title right of exclusive possession without necessarily extinguishing particular native title rights, such as hunting and fishing rights.<sup>70</sup>

Two questions were raised at the outset of this Chapter: first, what is the ‘content’ of native title and must each right asserted be independently proved as a customary practice or does possessory native title confer an unencumbered right to occupy and use the land and its resources; and second, what is the extent of the recognition of the pre-existing laws of a people in an inhabited territory ceded by those inhabitants or settled or occupied by a new sovereign. The Australian answer to those questions is drawn into sharp focus by the contrasting federal appeals and trial court decisions in the recent native title litigation in the *Miriuwung-Gajerrong* case.

Following the acceptance of an application for determination of native title with the National Native Title Tribunal (NNTT)<sup>71</sup> and the failure to resolve the claim through mediation, the claim (consolidated with other related claims) was referred to the Federal Court for a determination of native title pursuant to section 74 of the *Native Title Act 1993* (Cth) (NTA). The Aboriginal claimants asserted a right to possess, occupy, use and enjoy the land and waters comprising an area of approximately 7900 square kilometres in the East Kimberley region of the north of Western Australia (WA) and adjacent land in the Northern Territory. The area claimed covered vacant Crown land, reserved Crown lands including national parks and Aboriginal reserves, lands granted as pastoral leaseholds, township areas, as well as lands subject to valid mining leases and an area set aside by the state of WA for a vast irrigation project (Ord River Irrigation Scheme).

The determination of which areas were and were not subject to native title by each court is less relevant in the present context than the different approaches taken to the content of native title by the Federal trial and appellate courts. In the event, the majority in the Full Federal Court ruling reduced the area covered by the claim, determining that mining leases<sup>72</sup> and state and territorial mining legislation extinguished native title, that the Ord Scheme extinguished native title and that pastoral leases partially extinguished native title,<sup>73</sup> but with one major and one minor exception, the appellate court left largely intact the definition of native title adopted by Justice Lee in his trial court opinion.<sup>74</sup>

At trial, Justice Lee held that the native title rights held by the Miriuwung-Gajerrong Peoples in the determination area included:

- a right to possess, occupy, use and enjoy the area;
- a right to make decisions about the use of the area;
- a right of access to the area;
- a right to control access by others;
- a right to use and enjoy the resources of the area;
- a right to control the use of resources by others;
- a right to trade in those resources;

- a right to receive a portion of resources taken by others;
- a right to maintain and protect important cultural sites; and
- a right to maintain, protect, and prevent the misuse of cultural knowledge.<sup>75</sup>

Justice Lee also held that these rights were subject to validly granted rights in others and that the native title rights could be regulated, controlled, suspended or restricted by the exercise of concurrent rights granted to others or held by the Crown.<sup>76</sup>

The two judge majority on appeal was less specific and less expansive about the content of native title, but essentially agreed with Justice Lee that native title encompasses the rights to possess, occupy, enjoy and access the land as well as the right to protect important places.<sup>77</sup> The appeals court also agreed that certain rights held by the Aboriginal plaintiffs were concurrent rights and that rights held by the Crown or exercised under Crown authority might curtail, impair or otherwise regulate or supersede the exercise of the plaintiffs' native title rights.<sup>78</sup> However, the court rejects the proposition that control of traditional, cultural knowledge could be a native title right.<sup>79</sup> Finally, where native title rights are exercised on lands to which possessory native title is extinguished, the court limits the right to use the resources of the land to a right to use 'the traditional resources of the land'.<sup>80</sup> That limitation, along with the express determination that existing mining legislation has extinguished any native title rights in minerals,<sup>81</sup> provides the major exception to the scope of native title rights articulated by Justice Lee; that limitation goes further, because it apparently eliminates the ability of native title holders to trade in those resources, be consulted regarding their use, exercise any control over the access of others to those resources and share in royalties from the use of those resources.<sup>82</sup>

As indicated above, the fundamental conflict between the two Federal Court judgments is over the definition of native title. Relying on the Canadian Supreme Court's *Delgamuukw* judgment, Justice Lee opines that,

[native title] is not a mere 'bundle of rights'. The right of occupation that is native title is an interest in land. There is no concept of 'partial extinguishment' of native title by the several 'extinguishment' of one or more components of a bundle of rights. It follows that there cannot be a determination under the [Native Title] Act that native title exists but that some, or all 'native title rights' have been extinguished.<sup>83</sup>

Justice Lee concedes that the regulation, suspension, or curtailment of particular native title rights arising from the legislative or executive grant of rights to third parties to use Crown lands may impair native title, but notes that, 'strict regulation of the exercise of such rights of itself, will not mean that native title has been extinguished'.<sup>84</sup>

In contrast to the trial court judgment, the appeals court majority holds that, 'the trial judge erred in holding that there is no concept at common law of partial extinguishment of native title'.<sup>85</sup> Their fundamental disagreement with Justice Lee goes further. The majority holds that:

[i]n our opinion the rights and interests of indigenous people which together make up native title are aptly described as a 'bundle of rights'. It is possible for some...of those rights to be extinguished by the creation of inconsistent rights by laws or executive acts. Where this happens 'partial extinguishment of native title' occurs.<sup>86</sup>

Arguably, both judgments are both correct and incorrect. The failure to concur on the definition and the content of native title arises from a failure to communicate what each judgment means by the term 'native title'. Justice Lee refers to and cites the Court's determination in *Delgamuukw* that native (Aboriginal) title is a right to the land which is more than a right to use the land for particular activities which do not in themselves constitute native title but which instead are parasitic on Aboriginal title, and which is limited only by the prescript that such use of lands held subject to Aboriginal title may not contradict the underlying attachment to the land which provides the basis for an assertion of Aboriginal title.<sup>87</sup> This clearly indicates that Justice Lee is speaking of what might be characterised as 'possessory native title'. He writes, as observed above, that '[t]he right of occupation that is native title is an interest in land'.<sup>88</sup> Although he notes the Canadian Court's distinction between Aboriginal title (that is, possessory native title) and Aboriginal rights (that is, native title rights such as hunting and fishing rights) that may be exercised in the absence of a connection to, or occupation of, land sufficient to provide for a finding of exclusive possession of the land,<sup>89</sup> Justice Lee does not make it expressly clear that he is referring only to possessory native title rather than lesser rights when he observes that there can be no partial extinguishment of native title. Considered in this light, Justice Lee is substantially correct when he asserts that there can be no partial extinguishment of (possessory) native title, for any act or interest in land which extinguishes the right to exclusively occupy the land would effectively defeat such a claim.

On the other hand, if native title is defined to include both the concept of possessory title (Aboriginal title in the Canadian context) and the exercise of particular (Aboriginal) rights and interests in land such as the right to hunt on or gather food from the land, fish in its waters, cross the land or protect sacred sites (which seems to be the view of the majority of the appeals court<sup>90</sup>) then the majority is correct to assert that there can be a partial extinguishment of native title. In other words, the extinguishment of a claim to exclusive possession does not necessarily deprive the claimants of all their interests in the land which arise from their traditional occupancy and use of the land. As the Full Federal Court majority observes, '[i]n a particular case a bundle of rights that was so extensive as to be in the nature of a proprietary [exclusive possession] interest [in the land], by partial extinguishment may be so reduced that the rights which remain no longer have that character [that is, are unable to demonstrate a continuing right to exclusively occupy the land]'.<sup>91</sup> That, however, does not mean that those continuing (lesser) rights do not persist.

In fact, the Full Federal Court majority opinion actually supports the proposition that there can be no partial extinguishment of possessory native title. Moreover, their reasoning, like that of the Canadian Supreme Court in *Delgamuukw*, supports Justice Lee's determination that once a claim to exclusive possession (Aboriginal title) is proven, that title includes the exercise of all rights parasitic on that title, that is, the right to all beneficial uses of the land (as well as sovereign rights to manage, allocate interests in and control the uses of the land pursuant to the laws and customs of the native title holders).

In response to WA's contention that section 225 of the NTA requires the court to specifically identify precisely which rights are held and which people may exercise those rights in which particular areas of a claim area determined to be held in exclusive possession by native title holders, the Court notes that the *Mabo (No 2)* Court made no such order.<sup>92</sup> Instead, the *Mabo (No 2)* Court held that the Meriam People were entitled 'as against the whole world', to occupy, possess, use and enjoy the Murray Islands, notwithstanding that Meriam Islander customary law provided for the cultivation of particular lands by individuals within the community.<sup>93</sup>

The Federal Court majority notes that a claim to exclusive possession under the NTA is similar to the claim acknowledged in *Mabo (No 2)*.<sup>94</sup> The majority goes on to hold:

[t]he activities which members of the community [with possessory native title] may undertake in accordance with their laws and customs are not frozen in time but may include activities of any kind undertaken from time to time by other members of the Australian community who use and enjoy freehold title.<sup>95</sup>

Arguably, this holding allows native title holders to control, commercially develop and profit from the use of the resources of the land held in their exclusive possession in the same manner as those holding freehold title.

In language reminiscent of the Canadian Supreme Court's distinction between Aboriginal title and Aboriginal rights articulated in *Delgamuukw*,<sup>96</sup> the Federal Court majority notes that when particular rights such as hunting and fishing rights or rights of access to the land are enjoyed by native title holders in the absence of possessory title, 'it will be necessary to specifically identify them'.<sup>97</sup> However, in response to the appellants' argument that Justice Lee's list of rights held by native title holders in relation to land held in their exclusive possession was unsupported by the evidence at trial, the majority notes that the list is not intended 'to reflect findings of the actual exercise of rights disclosed by the evidence'.<sup>98</sup> The majority observes that:

[r]ather, the list is intended to reflect activities permitted by the native title rights and interests which arise by reason of the common law holders having an exclusive right to possess, occupy, use and enjoy the determination. ...The list [of rights]...is not intended to be exhaustive. Other rights flowing from the right to [exclusive possession of]...the land may include rights to carry on other activities which are not listed.



...It would be an impossible task in a case where the native title rights comprise...[possessory native title], to specify every kind of use or enjoyment [of the land] that might flow from the existence of native title. [Given the novel nature of native title rights], section 225 [of the NTA] cannot have been intended to impose such an impossible task on the Court.<sup>99</sup>

Apparently, despite semantic differences over whether there can be a partial extinguishment of native title, which arguably arise from the failure to articulate a clear, coherent and comprehensive definition of native title which encompasses both possessory native title and native title rights (as well as articulate the legal distinctions that attach to such a paradigm), the Trial Court and Full Federal Court are largely in agreement regarding the nature of a native title right which amounts to a right to exclusively possess the land. That agreement mirrors the legal treatment of possessory native title in North America where Aboriginal title in Canada or Indian Title in the US carries with it the full beneficial use of the land and its resources (or in the Canadian Court's words, those rights parasitic on Aboriginal title). Moreover, given the nature of the right to full beneficial ownership of the land, a determination of possessory native title in Australia, like its counterparts in North America, must necessarily include the rights to manage the land and make decisions about the uses of the land subject to possessory native title.<sup>100</sup>

## Conclusion

The High Court decision in *Mabo (No 2)* establishes that native title in Australia, as in North America and New Zealand, arises from the pre-existing occupation of, and continuing association with the land by a defined group of Indigenous people.<sup>101</sup> Stripped of the semantic conflict over whether native title is or is not a bundle of rights, the Federal Trial Court and Full Federal Court *Miriuwung-Gajerrong* judgments are in agreement that continuing occupation of the land by Indigenous Australians which confers exclusive possession of the land on native title holders also confers the full beneficial use of the land equivalent to that held under freehold title.<sup>102</sup> Thus, it appears that the answer to the first question raised in the introduction to this Chapter is that native title holders asserting exclusive possession to the land need not specifically prove each and every beneficial use associated with the land. Rather, the prescript announced in *Mabo (No 2)* that native title is given its meaning by the traditions and customs observed by the claimants, means that *in a case of exclusive possession, those customary and traditional uses of the land define the area under claim, not the extent of the rights associated with exclusive occupancy of the land*. This interpretation is consistent with the North American jurisprudence as well as the *Mabo (No 2)* judgment<sup>103</sup> and is clearly more consistent with Indigenous perspectives of their relationship to land because it does not require native title claimants to compartmentalise those relationships or fragment their native title claims.<sup>104</sup> In a case where such a claim is extinguished, particular rights to use the area may remain viable.

Their viability and their nature and scope depend upon proof of a substantial continuity of traditional customs and practices, and appear to be limited to traditional uses of the land.<sup>105</sup>

The answer to the second question is less precise. The NTA provides that native title is to be held/administered by prescribed bodies corporate.<sup>106</sup> The means and methods of that exercise of authority are less well defined. Both *Miriuwung-Gajerrong* judgments confirm that possessory native title confers the right to manage and determine the uses of the land, *according to a particular Indigenous group's laws and customs*. That determination, at a minimum, means that those traditional resource management laws and customs persist, unless affirmatively extinguished. Moreover, North American and New Zealand jurisprudence also suggests that co-existing (non-possessory) rights may confer co-management rights, or at a minimum confer a right to be consulted in respect of activities that adversely affect the viability of those resource rights.<sup>107</sup> Finally, it is already clear that native title rights in Australia may include the exercise of rights not associated with any particular rights in land, such as the right to determine 'tribal' membership, which is akin to 'citizenship'.<sup>108</sup> The exact extent and contours of all these rights, however, is yet to be determined. What can be said is that all these rights are evidence of continuing rights to some form of self-government for Indigenous native title holders.

In the final analysis, the answers to both questions in Australia are generally consistent with the historical, and more importantly, contemporary answers given by the highest courts in North America and New Zealand. As for *the Miriuwung-Gajerrong* case, it might have been preferable for both the Trial and Appellate Courts to avoid the 'bundle of rights' terminology and simply adopt the *Delgamuukw* and *Mabo* prescript that native title rights occur along a spectrum of rights and interests in land, ranging from exclusive possession to rights exercised on land to rights exercisable as a result of the recognition of native title holders. Again, analysis of both decisions also indicates that is the practical effect of both Courts' reasoning and both judgments are generally consistent with the North American and New Zealand jurisprudence. Hopefully, the High Court will resolve these questions of interpretation, as well as the broader questions regarding the content and meaning of native title in Australia when the case reaches it on appeal.

The common law recognises Indigenous peoples' rights under their own laws in respect of territory, and some continuing rights of self-government. It follows that, in designing structures for interface between the systems, national law should accord due respect to Indigenous authority structures and processes.

## Notes

- <sup>1</sup> 175 CLR 1 (1992). Specifically, the Court held that, with the exception of certain areas in the Murray Islands where native title may have been extinguished, the plaintiffs were entitled as against the whole world to the possession, use and occupation of the contested territory: per Brennan J at 76, and per Toohey J at 217.
- <sup>2</sup> Id per Brennan J at 58.
- <sup>3</sup> Id at 35. In conquered territory the Crown held the full prerogative to change existing laws while in ceded territory the acts of cession might limit that power.
- <sup>4</sup> Id at 57.
- <sup>5</sup> Id per Toohey J at 178.
- <sup>6</sup> See *Calder v Attorney General of British Columbia* (1973) 34 DLR 3d 145 at 150-51; *Guerin v The Queen* (1984) 2 SCR 335 at 337-38; *The Queen v Symonds* [1847] NZPCC 387, 188-90; and *Mabo (No 2)*.
- <sup>7</sup> *Johnson v M'Intosh* 21 US (8 Wheat) 543, 574 (1823) (emphasis added).
- <sup>8</sup> Id at 587 (emphasis added).
- <sup>9</sup> This constitutional status is *jurisdictional* not substantive. Article 1 s.8 cl.3 of the US Constitution (the Commerce Clause) provides Congress with the exclusive power '[t]o regulate Commerce with foreign nations and among the several States and with the Indian Tribes'. Thus, the federal government possesses the exclusive power to regulate Indian affairs, however, this provision of the US Constitution confers no substantive rights on Indian Tribes.
- <sup>10</sup> *Cherokee Nation v Georgia* 30 US (5 Pet) 1, 17-20 (1821).
- <sup>11</sup> Id at 17.
- <sup>12</sup> *Worcester v Georgia* 31 US (6 Pet) 515, 559 (1832).
- <sup>13</sup> Ibid.
- <sup>14</sup> Id at 561.
- <sup>15</sup> Ibid.
- <sup>16</sup> V Deloria Jr and CM Lytle, *American Indians, American justice*, University of Texas Press, 1983, p 33.
- <sup>17</sup> The ANCSA is discussed further in Chapter 4.
- <sup>18</sup> DH Getches, CF Wilkinson, and RA Williams Jr, *Federal Indian law: Cases and materials*, 3<sup>rd</sup> edn West Publishing Co, 1993, p 917.
- <sup>19</sup> Ibid.
- <sup>20</sup> See GD Meyers and B Landau, *Environmental and natural resources management by Indigenous peoples in North America: Inherent rights to self government Part I - The US experience*, University of New South Wales Press, 1998, pp 3-8.
- <sup>21</sup> See *US v Rogers* 45 US (How) 567, 572 (1846); and see also S Dorsett and L Gooden, *A guide to overseas precedents of relevance to native title*, Native Title Research Unit, AIATSIS, 1998, pp 8-13.
- <sup>22</sup> *US v Wheeler* 435 US 313, 322-23 (1978).
- <sup>23</sup> Id at 323.
- <sup>24</sup> Getches, Wilkinson and Williams, above note 18, p 3.
- <sup>25</sup> *St Catherine's Milling and Lumber Co v The Queen* [1889] 13 SCR 577.
- <sup>26</sup> *Calder v Attorney General of British Columbia* (1973) 34 DLR (3d) 145.
- <sup>27</sup> Id at 160.
- <sup>28</sup> *Guerin v The Queen* [1984] 2 SCR 335.

- <sup>29</sup> Id at 364-91.
- <sup>30</sup> GD Meyers, 'Different sides of the same coin: A comparative view of Indian hunting and fishing rights in the United States and Canada' (1991-92) 10 *UCLA J Env L and Pol'y* 67, pp 109-10.
- <sup>31</sup> *Sparrow v The Queen* (1990) DLR (4<sup>th</sup>) 385 at 411-17; and see also, GD Meyers, *Environmental and natural resources management by Indigenous peoples in North America: Inherent rights of self government Part II - Defining the content of Aboriginal rights in Canada*, University of New South Wales Press, 1999, pp 14-15.
- <sup>32</sup> In 1996 the Supreme Court of Canada elaborated on the *Sparrow* test in a trilogy of cases that all dealt with whether native title rights in resources may encompass rights to exploit the resource commercially. The principal case in the trilogy, *R v Van der Peet*, answered the question of how Aboriginal rights should be defined in light of s.35(1) of the *Constitution Act*. Specifically, to be an Aboriginal right, 'an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right': *R v Van der Peet* (1996) 137 DLR (4<sup>th</sup>) 289 at 310. A commercial right to resources was rejected by the Court in *Van der Peet* and in the second case in the trilogy, *R v NTC Smokehouse Ltd* (1996) 137 DLR (4<sup>th</sup>) 528, but accepted in the final case, *R v Gladstone* (1996) 137 DLR (4<sup>th</sup>) 648 at 661-62. For a discussion of these cases, see: GD Meyers, 'Defining the content of native title: The North American experience with "Indian Sovereignty"' (June/July, 1999) No 2/1999 *AEIN* 20, pp 41-43.
- <sup>33</sup> These rights are analogous to off-reservation rights in the US: see *Adams v The Queen* (1996) 138 DLR (4<sup>th</sup>) 657 at 667; and *Cote v The Queen* (1996) 138 DLR (4<sup>th</sup>) 385 at 431.
- <sup>34</sup> *Delgamuukw v British Columbia* (1998) 1 CNLR 1.
- <sup>35</sup> Id at 67.
- <sup>36</sup> Id at 80-81.
- <sup>37</sup> Id at 80.
- <sup>38</sup> Id at 78-79.
- <sup>39</sup> Id at 79-80. As Chief Justice Lamer notes, in rare instances when the effects of government or government authorized actions on Aboriginal rights are minimal, all that is required is good faith consultation by government to address Aboriginal concerns, but in most cases a significantly deeper consultation is required, while in some cases consultation will rise to the level of 'the full consent of an Aboriginal nation, particularly where provinces enact hunting and fishing regulations in relation to Aboriginal lands'.
- <sup>40</sup> Unlike North American treaties, the Treaty of Waitangi neither transferred or reserved any particular lands to the Maori. MC Blumm, 'Native fishing rights and environmental protection in North America and New Zealand: A comparative analysis of profits a pendre and habitat servitudes' (1989) 8 *Wisc Intl LJ* 1, p 30.
- <sup>41</sup> See GD Meyers and CM Cowan, *Environmental and natural resources management by the Maori in New Zealand*, University of New South Wales Press, 1999, pp 8-11.
- <sup>42</sup> Blumm, above note 40, p 30.
- <sup>43</sup> See *St Catherines Milling and Lumber Co* at 577.
- <sup>44</sup> P McHugh, *Maori Magna Carta: New Zealand law and the Treaty of Waitangi*, Oxford University Press, 1997.
- <sup>45</sup> I Browlie QC, *Treaties and Indigenous peoples: The Robb Lectures 1991*, Clarendon Press, 1992, p 11.
- <sup>46</sup> See above note 40 and accompanying text.
- <sup>47</sup> [1840-1932] NZPCC 387 (SC).

## 7. The North American and New Zealand Experience with Indigenous Land Rights ...

- <sup>48</sup> Id at 388-91.
- <sup>49</sup> [1878] 3 NZ Jur 72.
- <sup>50</sup> Meyers and Cowan, above note 41, p 12.
- <sup>51</sup> Meyers, above note 31, p 8.
- <sup>52</sup> Blumm, above note 40, pp 36-37.
- <sup>53</sup> See Meyers and Cowan, above note 41, pp 12-16.
- <sup>54</sup> [1986] 1 NZLR 682.
- <sup>55</sup> F Hackshaw, 'Nineteenth century notions of Aboriginal title and their influence on the interpretation of the Treaty of Waitangi' in IH Kawharu (ed), *Waitangi: Maori and Pakeha perspectives*, Oxford University Press, 1989, pp 92-120.
- <sup>56</sup> [1987] NZLR 641.
- <sup>57</sup> Id at 664.
- <sup>58</sup> [1994] 2 NZLR 20.
- <sup>59</sup> Id at 23-24.
- <sup>60</sup> See generally, Meyers and Cowan, above note 41.
- <sup>61</sup> *Mabo (No 2)* at 52.
- <sup>62</sup> Id at 51-52.
- <sup>63</sup> Id per Deane and Gaudron JJ at 86.
- <sup>64</sup> Id per Toohey J at 184-88.
- <sup>65</sup> Id per Brennan J at 64-65 and per Deane and Gaudron JJ at 111.
- <sup>66</sup> *State of Western Australia v Commonwealth* (1995) 183 CLR 373 at 422-34. This case, also known as the *Native Title Act* case, rejected a challenge by Western Australia to the constitutionality of the *Native Title Act 1993* (Cth) and declared invalid Western Australia's initial legislative land rights scheme.
- <sup>67</sup> *The Wik People v State of Queensland* (1996) 187 CLR 1.
- <sup>68</sup> *Yanner v Eaton* (1999) 168 ALR 1 (High Court of Australia).
- <sup>69</sup> *Fejo v Northern Territory of Australia* (1998) 195 CLR 96.
- <sup>70</sup> *Wik* per Toohey J at 30-31, per Gaudron J at 166-67, per Gummow J at 204, and per Kirby J at 242-43 and 250.
- <sup>71</sup> See *Northern Territory v Lane* (1996) 138 ALR 544.
- <sup>72</sup> The proposition that mining leases, which do not confer anything approaching exclusive possession on the holders of those leases, extinguish native title is clearly at odds with the High Court's *Wik* decision, as well as with the NTA which provides that validly granted mining leases merely suspend native title for the duration of the lease.
- <sup>73</sup> See 'Judges reverse decision on title', *The West Australian*, 4 March, 2000, p 4 for a brief summary review of the Full Federal Court's reasons for judgment on the main issues raised on appeal, see R Bartlett, 'WA v Ben Ward (The Miriuwung Gajerrong Case)' [2000] *AMPLJ* 82.
- <sup>74</sup> *Ward v State of Western Australia* (1998) 159 ALR 483.
- <sup>75</sup> Id at 639-40.
- <sup>76</sup> Id at 640.
- <sup>77</sup> *Western Australia v Ward* (2000) 170 ALR 159 at 324. In his dissenting judgment in the Appeals Court, Justice North substantially agreed with the decision of Justice Lee.
- <sup>78</sup> *Ibid.*

- <sup>79</sup> Id at 321. Despite the court's conclusion that protection of cultural knowledge is not a native title right, arguably such rights may be among those 'sui generis' rights encompassed within the ambit of native title. One prominent commentator notes that communal intellectual property rights arising from the use or knowledge of the location or uses of traditional medicines derived from flora and fauna are one of the type of rights protected by the *Native Title Act* (and international human rights and environmental conventions): see M Davis, 'Indigenous rights in traditional knowledge and biodiversity approaches to protection' (1999) 4(4) *AILR* 1.
- <sup>80</sup> *WA v Ward* at 324.
- <sup>81</sup> Ibid. The court fails, however, to sufficiently analyse the Western Australian legislation. Arguably, rather than extinguishing native title in minerals, that legislation actually preserves native title rights in minerals by excepting from Crown ownership, minerals (other than gold and silver) in lands granted in fee simple prior to 1899. (See the *Mining Act 1904* (WA), as amended, *Mining Act 1978* (WA)). Thus, the legislation evidences an intention to preserve rather than extinguish pre-existing mineral rights. Space does not allow for a full exploration of this issue. See generally GD Meyers, CM Piper and HE Rumley, 'Asking the minerals question: Rights in minerals as an incident of native title' (1997) 2 *AILR* 203.
- <sup>82</sup> These rights, listed in Justice Lee's decision (*Ward v WA* at 643) are omitted in the Full Federal Court's list of native title rights (*WA v Ward* at 324).
- <sup>83</sup> *Ward v WA* at 508.
- <sup>84</sup> Ibid.
- <sup>85</sup> *WA v Ward* at 190.
- <sup>86</sup> Id at 189.
- <sup>87</sup> *Delgamuukw* at 57.
- <sup>88</sup> *Ward v WA* at 508.
- <sup>89</sup> Id at 507.
- <sup>90</sup> *WA v Ward* at 211-13.
- <sup>91</sup> Id at 213.
- <sup>92</sup> Id at 211-12.
- <sup>93</sup> Ibid.
- <sup>94</sup> Id at 212.
- <sup>95</sup> Ibid.
- <sup>96</sup> *Delgamuukw* at 67.
- <sup>97</sup> *WA v Ward* at 213.
- <sup>98</sup> Id at 212.
- <sup>99</sup> Id at 212-13.
- <sup>100</sup> Id; and see *Ward v WA* at 645.
- <sup>101</sup> See above notes 61-65 and accompanying text.
- <sup>102</sup> Whether that beneficial use may include rights in minerals awaits a determination of the question on appeal to the High Court.
- <sup>103</sup> See Meyers, Piper and Rumley, above note 81, pp 232-35; H Wootten, 'The rights and recognition of Indigenous people – Consequential land management impacts on the environment, and on the recognition of native title' in GD Meyers (ed), *Implementing the Native Title Act: First steps: Small steps*, National Native Title Tribunal, 1996, pp 60, 71; and R Bartlett, 'How native title at common law upsets the dominance of resource titles: Resource security and *Mabo*' in A Gardiner (ed), *The challenge of resource security: Law and policy*, Federation Press, 1993, pp 118, 119.

- <sup>104</sup> See Wootten, above note 103, p 71; and N Pearson, 'The concept of native title' in *Land rights: Past, present and future*, Northern and Central Land Councils, 1996, pp 118-23.
- <sup>105</sup> See *Washington v Washington State Commercial Passenger Fishing Vessel Ass'n* 443 US 658 (1979); *Delgamuukw v British Columbia* (1998) 1 CNLR 1; *R v Van der Peet* (1996) 137 DLR (4<sup>th</sup>) 289; and *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 682.
- <sup>106</sup> *Native Title Act 1993* (Cth), as amended by the *Native Title Amendment Act 1998* (Cth) Pt 2, Div 6 ss 55-60AA; and see *WA v Ward* at 209-10.
- <sup>107</sup> *Delgamuukw* at 79-80. This ruling is analogous to the position in the US where Indian Tribes control game laws on their reservations and are immune from state regulation: see Meyers and Landau, above note 20, pp 23-25.
- <sup>108</sup> See *Mabo (No 2)* at 61; and *WA v Ward* at 213.





## Chapter 8 ■

### The Significance of the Nordic Experience for Indigenous Governance in Australia

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It is instructive to look at the experience of Indigenous governance structures in various Nordic countries as another reference point in the ongoing development of appropriate structures in Australia and to determine their relevance with regard to the experience of Australian Indigenous peoples. The following two Chapters of this publication describe the Indigenous land-holding and governance structure experiences of the Inuit in Greenland (Chapter 9) and in those Scandinavian countries with a Sámi population—Norway, Sweden and Finland (Chapter 10). From a detailed review of those particular systems, a number of observations may be made.

In many ways, the experience of Greenlandic Inuit and the Scandinavian Sámi may seem far removed from Australian Indigenous peoples and their aspirations for self-governance. In no way do we seek to extract ‘models’ from these experiences to be uncritically applied in Australia. The respective experiences of the Inuit and the Sámi are very specifically influenced by their history, culture and the various political contexts that they have had to deal with over time. However, both populations strongly identify as Indigenous peoples and they are increasingly involved in international Indigenous forums and movements.

As colonial powers Denmark and Norway have a contemporary reputation as being liberal democratic nations that are generally supportive of Indigenous rights. Consequently, it might be surprising to many outsiders that the Sámi continue to experience fundamental difficulties. Various forms of governance structures have been implemented on an *ad hoc* basis, and this has been coupled with prevarication in having their Indigenous rights recognised and implemented at the national level. To this extent, there are some significant parallels with the experience of Australian Indigenous peoples. The Nordic experience illustrates that apparently benign colonialism can be enduring, divisive of Indigenous political action and extremely difficult to dislocate in order to develop contemporary Indigenous self-governance.

Notwithstanding various problems, however, it seems that Greenland has seen an astonishing commitment, first material and then moral, from a Danish government trying to pick itself up from wartime occupation and the destruction of its infrastructure and industry. Furthermore the Danes have shown a courage and steadiness in helping to make Greenland an Inuit-run success story—a claim that cannot be made to the same level in the five Anglophone democracies, with the possible exception of New Zealand and parts of northern Canada.<sup>1</sup>

Equally, the claims made by Denmark from 1950 to 1979 (the date of Home Rule), which in part reflect the post war policies of Scandinavian governments, that they have significantly improved the living standards and services provided to Indigenous peoples have some very real basis. In reality such efforts have accorded Indigenous peoples their basic human and citizenship rights, to which they were always entitled on an equitable basis with non-Indigenous citizens. In a sense these social and economic developments are directed to past 'wrongs' and are more consistent with assimilationist policies, particularly in circumstances where no further recognition is given to Indigenous rights. Yet there does appear to be an acknowledgment in Scandinavia that these are fundamental entitlements of all citizens and that Indigenous rights extend beyond non-discrimination in these areas. As Minde says with respect to Norway:

The basis of a positive development between the Sami and the Nordic governments is the welfare-state (which gives social and economic safety), and the Sami Parliament model, which has the possibility within it of a functioning self-government in opposition to the more problematic self-determination. Those are the two conditions that inspire other Indigenous peoples to establish new political goals.<sup>2</sup>

The claims of Indigenous peoples under human rights and Indigenous rights standards in international law are that their Indigenous rights are specific to them and should be recognised as being *in addition to* basic citizenship rights. Citizenship rights should not be 'traded off' or be a replacement for Indigenous rights particularly in relation to basic needs and services. Where this is done, it would represent an abuse of non-Indigenous governance.

The Greenlandic Inuit and Scandinavian Sámi have followed different strategies in seeking recognition of their specific Indigenous rights such as self-governance and usufructory rights (for example, access and use of reindeer grazing land).

The Greenland experience demonstrates an evolving form of self-governance, having some parallels with the United States' legal concept of sovereign dependent nations. The Greenland government recognised the need for a transition period from colonialism. It appears that their aspirations have always been towards constantly increasing levels of self-governance.

To a significant extent they have been successful in achieving this through:

- demonstrating responsible Greenlandic democratic governance and service delivery;
- promoting Indigenous rights and knowledge of governance;
- emphasizing the centrality of responsible and culturally appropriate environmental and natural resource use and management. Clarifying ownership (of land and resources) and management rights is usually an evolving but fundamental aspect of this. Greenlanders have highlighted environmental and natural resource use and management as being inextricably part of their Indigenous rights. Arguably, they have been more successful in this aspect of governance than the former colonial administration of Denmark.

- using environmental and natural resource management and Indigenous rights to extend self-governance through Indigenous internationalism in global forums (such as the IWC and the United Nations) and regional forums (such as the ICC). Gradually, there has been an extension of the Greenland government's role and powers in international affairs relating to these areas and a forging of special economic and diplomatic relationships with new Indigenous governments such as Nunavut.
- maintaining a relatively unified position with Greenlandic and other Inuit peoples in the evolution of Greenland self-government and regional Indigenous rights and policies. This is particularly evident through their role in the ICC, the Inuit contribution to the AEPS and their role in the Arctic Council.

The Inuit have emphasised the central role of environment and natural resource management and use (as part of their integrated rights as Indigenous peoples). Through their internationalisation of these areas of concern, they have contributed to an expansion of Greenland government power both domestically and internationally.

To some extent, the apparently unified, co-operative and internationalist approach of Greenlanders (in the Arctic and globally) has assisted the evolution of Greenland self-governance. It may be interesting to reflect upon whether proposals for regional and/or co-operative agreements with Australian Indigenous peoples would have the potential for evolving and increasing self-governance (as in Greenland) or merely give the appearance of Indigenous rights recognition, without providing a clear national approach to settling Indigenous rights to land, waters, seas and resources (including their use and management).

The Scandinavian Sámi have increasingly identified and co-operated with other Indigenous peoples (regionally and internationally). Many Sámi have tenaciously asserted their Indigenous rights in a context of and against powerful assimilationist policies. The Sámi experience indicates some confusion by non-Indigenous governments about the relationships between citizenship rights and service delivery and the inherent rights of Indigenous peoples. In addition, their dispersion across three national boundaries has proven to be a difficult political reality for them to deal with. The improvement of basic citizenship rights has raised many of the issues related to Indigenous rights referred to above.

The Sámi parliaments appear to be an important formal recognition of the Indigenous rights of Sámi to participate in governance. However, the reality appears to be far short of this. The parliaments currently represent little more than a consultative process. It is hoped that Sámi political struggle can increase their governance power through this and other means.

A fundamental problem for the Scandinavian Sámi appears to be that this political edifice was built before domestic legal recognition was given to their Indigenous rights to land, resources and their use and management. These rights are usually a pre-condition to the exercise of contemporary Indigenous governance.

### Notes

- <sup>1</sup> See Chapters 5 and 6 for a detailed description of the Indigenous governance structures in Canada and New Zealand respectively.
- <sup>2</sup> H Minde, 'Sami land rights in Norway: A test case for Indigenous peoples' accessed through the University of Tromso Webpage.

## Chapter 9 ■

### Indigenous Governance by the Inuit of Greenland

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#### Introduction

Chapter 8 raised a number of points of comparison between both the Inuit and the Sámi experience and their possible significance in relation to the experience of Australian Indigenous people. This Chapter is an overview of Indigenous land-holding and governance structures in Greenland. It discusses the Inuit of Greenland and focuses on the evolution of the present system of Greenland government, which has been in place since the establishment of Home Rule in 1979. The terminology 'Home Rule' has tended to be dropped, in recent times, which may symbolise that the Greenland government represents a very significant and evolving example of modern Indigenous governance.

The developments in Greenland can be compared with the governance structures in place for the Sámi populations in Norway, Sweden and Finland. Each of these countries has established a Sámi parliament, the details of which are discussed in Chapter 10.

#### The Inuit of Greenland

The first part of this Section looks briefly at the demographics and geography of Greenland. An overview of the administration in provincial Greenland is followed by a discussion of the Greenland government.

The establishment of the Home Rule government, hereafter referred to as the Greenland government, was not simply benevolently granted by the Danish state, but rather arose as a result of struggle by Greenlanders for increased rights.<sup>1</sup> It has enabled Greenland to achieve a relatively high degree of political autonomy, which is reflected in the breadth of activities now falling within the jurisdiction and responsibility of the Greenland government.

The Greenland government's jurisdiction is defined territorially, not ethnically, although it has highlighted the need for discussion on matters such as self-determination and Indigenous rights.<sup>2</sup> It must, however, be noted that Greenland still remains partially dependent on Denmark, particularly for economic support. This is an important factor to consider in any discussion regarding the possible future political autonomy of Greenland. For many formal and informal purposes, fluency in Greenland's Inuit language is viewed as the marker of Greenlandic identity.

## The land and people

The first Inuit came to Greenland about four to five thousand years ago.<sup>3</sup> The most recent significant influx occurred with the Vikings and the eastward-moving Thule Inuit migration, which took place between the tenth and nineteenth centuries. The Inuit refer to the island as *Kalaallit Nunaat*, meaning 'the land of the Greenlanders'. Inuit peoples also live in three other Arctic areas: Canada, Alaska and Russia.<sup>4</sup> Greenlandic (*Kalaallisut*) is part of the East-Eskimo family of languages. Three main dialects are spoken: West Greenlandic (the official language), East Greenlandic and Polar-Eskimo. While English remains a direct threat to Inuit dialects in the Canadian North and Alaska, the fear that the Greenlandic languages may eventually disappear a particular concern during the 1950s, no longer appears to be the case.<sup>5</sup>

Greenland has an extremely harsh physical environment. Approximately 85 percent of the country is covered by an ice cap and the climate is arctic. It lies north of the tree line and with rare exceptions it is not possible to cultivate crops there. The Arctic Circle crosses Greenland south of Sisimut. As a result a large section of the island is subjected to twenty-four hour darkness during the winter and midnight sun in summer.<sup>6</sup>

Figures issued by Statistics Greenland, the central authority for statistics in Greenland, show that, as at 1 January 1999, only 11.2 per cent of a total population of 56,083 were born outside Greenland, mainly in Denmark and the Faroe Islands.<sup>7</sup> More than eighty per cent of the population are Inuit.

Approximately eighty per cent of the population live in the eighteen larger towns, with the remainder in fifty-nine small settlements and stations spread along the approximately 410,449 square kilometres of ice-free coastal land.<sup>8</sup> The capital, Nuuk, has a population of around 13,000.<sup>9</sup>

Approximately two-thirds of the workforce are employed in the public sector. Fishing and fish processing, which represent the most significant elements of the economy, employ approximately 5,500 people. The public sector includes enterprises that might be private elsewhere, notably key aspects of the fishing industry. Furthermore, the public sector is required to become involved in many things in areas such as the Arctic where private enterprise is not feasible or viable.

## Colonial Greenland

Prior to the 1720s the waters of Greenland had been regularly visited by whaling vessels from England, Spain and Portugal, and by Danish-sponsored German missionaries who had regular contact with the Inuit living in small settlements along the coastline. A small colony and Lutheran mission was established near the site of present-day Nuuk by Denmark in 1721 as a result of the activities of the Danish King, the Church and Danish-Norwegian trading companies.

As well as allowing missionaries to convert many of the Inuit to Christianity, this was intended to exclude foreigners from the waters of Greenland. The island was incorporated as a Danish province by constitutional amendment in 1953. This gave the residents of Greenland equal rights and ended the over two-hundred years of colonisation.

In 1776 the Danish government formed the Royal Greenland Trade Company (KGH) and established a trade monopoly which was to last until the end of the Second World War. The KGH established a number of trading posts (*udsteder*) on the island, some of which were to develop into larger villages over time.<sup>10</sup> The KGH is now known as KNI, and it remains a limited liability company owned by the Greenland government. Through the ownership of KNI, the Greenland government maintains control over production and export in the fishing industry.<sup>11</sup> KNI is represented in all inhabited places and charges the same prices everywhere.

During the period of colonial rule Danish authorities administered the thirteen districts here. Villages were smaller settlements consisting of a trade station, school, midwife and representative of the district council.<sup>12</sup> The Danish administration was headed by two regional governors, each of whom chaired a provincial council. The councils, elected among Greenlanders and Danes living in Greenland, had a mainly advisory role.<sup>13</sup> Independent municipal administration was initiated in 1905.<sup>14</sup>

Municipalities then took on responsibility for wildlife management and social welfare. In the mid 1960s they took control of construction, pollution control and road maintenance. By the time Home Rule was achieved in 1979, the municipalities also had responsibility for town planning.

Under the colonial regime there was a dual system of law. Danish law applied to the minority of the population who were employed in various state agencies.<sup>15</sup> The rest of the people, who lived by the traditional means of hunting and fishing, were governed by Greenlandic customary law.<sup>16</sup> This law was made up of some written rules and by-laws passed by the local councils and a set of unwritten customs.<sup>17</sup> Where those involved were all Greenlanders, civil and criminal disputes were generally resolved by municipal councils. This was considered as a quick and flexible administration of justice and successfully helped to maintain civil order because it was based upon the mutual acceptance of the decisions.<sup>18</sup>

Matters where only one party was under Greenlandic law were heard by district courts which were dominated by Danish personnel. The Danish civil administrator (who was often also the district governor) functioned as investigator, prosecutor and chairperson of the court. He or she was assisted by between two and four other members acting as law assessors. One or two of these assessors may have been Greenlanders.<sup>19</sup>

## Provincial Greenland

As mentioned above, Greenland became a province of Denmark in 1953, thus giving the Greenland Inuit equal status with the Danes. This reform was prompted by concerns which began to be more widely expressed after the Second World War about the low standard of living of most Greenlanders. After 1945, people in Greenland began to question the concept of continued colonization of Greenland and overall Danish economic policy. In 1948 in response to increasing pressure from Greenlanders and the Danish media,<sup>20</sup> the Danish government set up a Royal Commission for Greenland. The Commission recommended reforms of economic and trade structures designed to increase productivity and end state monopoly.<sup>21</sup> It also made recommendations about housing, education and the administration of justice.<sup>22</sup>

In 1948-49 a Danish juridical expedition to Greenland studied the prevailing customary law with the aim of determining 'how far it was possible to introduce unity of law between Denmark and Greenland or at least between Danes and Greenlanders in Greenland'.<sup>23</sup> The expedition determined that looking at council decisions and interviewing decision makers in isolation would not provide a sufficient picture of customary law, which was regarded as

... not a closed system such as a modern dogmatically defined system of law. Customary law is a 'living law', not written law. Data gathering must be concerned with the whole cultural context.<sup>24</sup>

In 1951 a Law Reform Committee was established to draft legislation intended to apply to all people living in Greenland. Bills were circulated to the Greenlandic authorities for comment before being presented to the Danish parliament. What developed through the meshing of customary and Danish law is referred to as local law.<sup>25</sup>

Following the end of colonization, Greenland saw rapid development and industrialisation. Large scale construction projects and modern infrastructure were all planned, built and run by Danes for the benefit of Greenland.<sup>26</sup> This led to much frustration and alienation among the Inuit population who feel that the changes associated with these developments led to various societal problems such as alcoholism and family breakdowns. The developments of the 1950s and 1960s transformed the economic basis of Greenland and, by the 1970s Greenlandic society had been transformed from one based on small-scale subsistence hunting and fishing to a modern, export-oriented economy.<sup>27</sup>

These developments helped to facilitate the emergence of an educated Greenlandic elite, comprising teachers, journalists and social workers, who with the support of the wider Greenlandic population sought greater independence for Greenland.<sup>28</sup> There also emerged a much stronger element of Inuit political awareness.<sup>29</sup>



## Home Rule: The Greenland government

### *Structure*

The North Slope Borough of Alaska—a region the same size as the Australian state of Victoria but with a population of 5000 people—was actually the first population of Inuit to achieve a form of self-government. The Inuit of Greenland became the second or third population of Inuit to achieve a degree of self-government over a large region of the high Arctic<sup>30</sup> when Home Rule from Denmark was established in May 1979. Under the structure that established the system of Greenland Home Rule, an emphasis was placed on the definition of Indigenous peoples, as collective entities, being the first inhabitants of part or all of Greenland.<sup>31</sup>

A movement to establish local autonomy in Greenland had arisen during the mid 1970s, after Denmark began granting concessions for oil exploration off the Western coast to foreign groups, even though this had been approved by an advisory body of Greenlandic politicians at the time. The granting of these concessions created expectations of the need to change the relationship between Denmark and Greenland.<sup>32</sup> In 1975 recommendations were made to create a form of Home Rule for Greenland based on the system that had been established for the Faroe Islands in 1948.<sup>33</sup>

The terms of Home Rule were proposed by the joint Danish-Greenlandic Greenland Home Rule Commission, a group of seven elected Indigenous representatives and seven Danish national members of parliament, with a constitutional law professor as a neutral Chairman.<sup>34</sup> These were adopted without amendment by the Danish parliament.<sup>35</sup>

After approval by a referendum in Greenland (12,754 votes for and 4,705 against),<sup>36</sup> responsibility for political decisions in a number of key areas was transferred from the Danish government to the Greenland government under the *Greenland Home Rule Act 1978*,<sup>37</sup> which came into force on 1 May 1979. However, there remain a number of unsolved problems linked with the development of Greenland's society toward greater economic independence.<sup>38</sup>

The *Greenland Home Rule Act 1978* describes Greenland as a 'distinct community within the Kingdom of Denmark'.<sup>39</sup> The Schedule to the Act lists those areas over which the Greenland government has assumed responsibility and jurisdiction. These include local government, taxation, religion, fishing, hunting and reindeer breeding, social welfare, employment, education, trade and environmental protection. In the course of exercising this jurisdiction, the Greenland government has instigated various policies designed to develop Greenland within the context of its own social and economic conditions and available natural resources.<sup>40</sup>

Certain major responsibilities continue to remain within the jurisdiction of the Danish state. These include the administration of justice and civil rights, citizenship, passports,

visas, national emblems, foreign policy, defence, the National Bank, currency, weights and measures, foreign exchange and legislation on the rights of the individual, family law, criminal law and prisons.<sup>41</sup> All health care and schooling in Greenland is provided by the state<sup>42</sup> irrespective of citizenship and is the responsibility of the Greenland government.

The Greenland government comprises a popularly elected assembly (*Landsting*) and an administration headed by an executive (*Landsstyre*).<sup>43</sup> The size of the *Landsting* has changed over time and currently has thirty-one members chosen on the basis of proportional representation. General elections for the *Landsting* are held every four years<sup>44</sup> although other elections may be necessary if the government loses the confidence of the *Landsting*. All Greenlanders or resident Danes over 18 years of age are eligible to vote.<sup>45</sup> Both Inuit and Danes living in Greenland are eligible for election to the *Landsting*.

Proposed legislation is prepared by the administration and debated three times in the *Landsting* prior to adoption. These laws are binding on all permanent residents of Greenland. It is still the subject of debate as to whether these law making powers have been *delegated* to the *Landsting*—and thus could be withdrawn or amended unilaterally by Denmark at any time—or alternately *irrevocably transferred*, in which case Denmark cannot interfere with Greenland government legislation.<sup>46</sup>

The Premier and other members of the *Landsstyre* are elected by the *Landsting*.<sup>47</sup> The Danish government is represented by a Commissioner (*Rigsombudsmand*) in Greenland. The *Landsstyre* implements decisions and legislation made by the *Landsting*. Individual members of the *Landsstyre* have day-to-day responsibility for particular areas of authority, though important decisions are made at joint meeting sessions of the *Landsstyre*. Integral to the *Landsstyre* is the Premier, who is responsible for the administration of the Greenland government, supported by a Cabinet.

Any jurisdictional disputes between the Greenland government and the Danish government are resolved by a board comprising two representatives of each government. If this group cannot determine the issue it is referred to three judges of the Supreme Court of Denmark nominated by its President.<sup>48</sup> A liaison committee has been established to coordinate relations between the Danish parliament (*Folketing*) and the *Landsting*.

At the most recent elections held in Greenland on 16 February 1999, the distribution of the thirty-one representatives were as follows:<sup>49</sup>

Atassut	8
Siumut	12
Inuit Ataqaṭigiit	7
Kattusseqaṭigiit	4

The current government is a coalition between the social democratic party, Siumut (Forward), and the Inuit Ataqatigiit (Inuit Brotherhood) parties. Each coalition party has a representative in the Folketing.

Other political parties include Akullit Partiaat (Centre Party) and the more right-wing Atassut (Unity) party. While Inuit Ataqatigiit (Inuit Brotherhood) has been a socialist opposition party, it held the balance of power from 1983 up until the mid 1990s.<sup>50</sup> Inuit Ataqatigiit has flagged independence as one of its major goals although there has been little real progress on this front.<sup>51</sup> Economic independence would be highly problematic for Greenland given that core funding comes by way of a block grant from Denmark to help meet the costs of those public services previously administered by Denmark. Some observers believe that this dependency on the economic support from Denmark through the block transfer payments is actually increasing,<sup>52</sup> highlighting both the differences between the two economies and the difficulties associated with any call by Greenlanders for full national independence.

Indeed, the GNP of Greenland has been declining during the 1990s, partly as a result of the collapse of cod fishing and the closure of two producing mines in the late 1980s. Future economic initiatives are likely to be in the area of resource development, particularly oil and gas, and inter-regional business development.<sup>53</sup> This is evidenced by the recently concluded agreement between Greenland and the new Canadian self-governing territory of Nunavut.

There are limited natural resources from which the Inuit could generate an income. Some traditional practices, such as whaling and fur trading, are contentious internationally,<sup>54</sup> but are strenuously maintained by Greenlanders as being culturally, environmentally and economically appropriate. The Greenland government levies taxes and duties, including goods tax and company tax but, although this is an important source of revenue, it is not particularly substantial given the small size of the tax base. The municipalities impose some forms of income tax and receive subsidies from the Greenland government. The level of tax rate differs in each of the municipalities. Tax paid by businesses is shared between the Greenland government and the relevant municipality. The system of municipal government allows for a less centralised form of administration and gives the municipalities responsibility for social services, education and housing.

Greenland is currently divided into eighteen districts or municipalities made up of a main town and various smaller villages. Each town has a member board of governors of between three and seventeen people. Elected village councils perform tasks delegated by the boards. The councils can recommend policies.

There are five Greenland government enterprises: Greenland Telecom; Greenland Building and Construction; Greenland Energy Supply (responsible for water supply as well as electricity); Greenland Shipyards; and Greenland Field Investigation. The

Greenland government has interests in a number of trading and shipping companies and has been considering the privatisation of some of those enterprises in which it is the sole shareholder.<sup>55</sup>

The magistrates' courts which administer local law are staffed by Greenlandic lay judges. This is regarded as significant because

...it has been of major importance for the hearings proper that the courts have been managed by people with a thorough knowledge of the local community and the language, culture and ways of living of the local population, the clients of the court. This has contributed to the confidence in the judge and the administration of justice, especially in the Greenlandic population.<sup>56</sup>

District Courts and the Greenland High Court also exercise legal jurisdiction. With the permission of the Danish Ministry of Justice, decisions of the Greenland High Court can be appealed to the Danish Supreme Court.<sup>57</sup>

### *Effect of Home Rule*

The political transfer of power and authority to the Greenland government has been successfully managed by all sides. This form of political autonomy allows Greenland to set out its own policies and adopt its own laws, while remaining within the Danish kingdom (for some purposes) and receiving financial support, for administrative functions from Denmark.

The Greenland government now acts on many issues as if it were an independent nation. Although in principle it has no power to conclude treaties or maintain links directly with foreign governments,<sup>58</sup> it has, independently of Denmark, entered into a number of bilateral agreements with Norway, Russia and Iceland on fishing and with Canada on narwhals and white whales.<sup>59</sup>

Greenland, along with Iceland, Norway and the Faroe Islands, was a founding member of the North Atlantic Marine Mammal Commission (NAMMCO), which was established pursuant to an agreement signed in Nuuk in April 1992. NAMMCO is involved in the research and management of marine mammals, and arguably may be considered<sup>60</sup> as a competing body to the International Whaling Commission (IWC) of which Denmark is a member.<sup>61</sup>

Internally, the success of the Greenland government in developing a regular parliament with a structure similar to that of other governments<sup>62</sup> has been to unify the population of Greenland—both Inuit and Danish born. Whereas prior to the establishment of Home Rule, Inuit politicians and leaders spoke on behalf of ethnic Greenlanders, they now speak for *all* people living in Greenland. The transfer of responsibility for economic matters to the Greenland government has strengthened Greenlandic politicians' ability to influence societal development.

The large majority of Danes living in Greenland now regard the Greenland politicians as their representatives in internal and external affairs, a situation markedly different from the mid-1970s.<sup>63</sup> There has therefore been a gradual incorporation of ethnic Danes and Greenlandic Inuit into 'a common political frame of reference'.<sup>64</sup> While the Danes living in Greenland are a minority group, they remain an important part of Greenlandic society, and own a number of businesses often working together with Inuit.<sup>65</sup>

Under the Greenland government, the development of Greenland has been more rapid than in the prior period, although it experiences fluctuations associated with a narrow economic base and the impact of the global economy. The system has brought with it a sense of empowerment for the Inuit of Greenland.<sup>66</sup> The process appears to have been well managed, although there have been occasional crises due to poor financial management.<sup>67</sup> In a radio interview, the then Premier Lars Emil Johansen was quoted as saying:

...Greenlandic authorities have been better in managing the development [of Greenland] than the Danish authorities back in their governing time.<sup>68</sup>

#### *Relationship to land and uses of land and resources*

Traditionally, land in Greenland was not 'owned' as there was no concept of private property. Hunting and fishing were unrestricted. The Inuit regarded the land as 'an integrated part of their cultural identity'.<sup>69</sup> Individuals or groups could obtain exclusive use of an area for special purposes with the permission of the local council, for example, to build a house. If that purpose was abandoned, the site reverted to common property.<sup>70</sup>

Under the current system, local authorities allocate land for building purposes and other private enterprises free of charge but the site cannot be sold. If the land stops being used it reverts to the municipality.<sup>71</sup>

Subsistence hunting and fishing continues to underpin the social economies of a number of local communities in Greenland, particularly in the north-west and on the east coast. Subsistence hunting also has significant cultural and symbolic significance, with the procurement, sharing and consumption of *kalaalimernit* (Greenland food acquired through hunting and fishing) facilitating the continuity of Inuit culture and identity.<sup>72</sup> In traditional Inuit society, there is a code of unwritten rules and regulations that specify how hunters are to act in relation to animals and the environment. Traditionally, the catch of bigger mammals such as whales, seals and bears was divided among a settlement according to strict customary rules.

In small Inuit settlements, meat from seals and other marine mammals is not regarded as a commodity, but rather as something containing an 'element of the giver' when shared or given away.<sup>73</sup> When meat is shared it expresses the relationships people share and cements feelings of kinship and close social association.<sup>74</sup>

The subsistence and small scale commercial hunting activities of Inuit have, from time to time, been the subject of protest by international environmental groups. Anti-sealing protests and European Community bans on the import of sealskins and seal skin products have had a significant effect on smaller Greenlandic communities which traditionally relied upon the sale of sealskins as their primary source of income.<sup>75</sup> NAMMCO supports the subsistence whaling activities of its members (which include Greenland), though international opposition to whaling has been strident. Greenland's subsistence whaling activities still remains subject to quotas and regulation specified by the IWC, by virtue of Denmark's continued membership of that organisation.

International agencies are increasingly focusing on the design of what they consider to be appropriate resource management structures and environment protection strategies for the Arctic region generally.<sup>76</sup> This undoubtedly affects the traditional Inuit hunting and fishing activities.

Fishing and hunting, along with sheep farming, are the main industries of Greenland and provide a significant means of employment. Manufacturing depends on the fishing industry, fish and prawn processing plants in major towns accounting for a high proportion of employment.<sup>77</sup> The trade in cod has declined as the shrimp market has increased.

Customary activities such as hunting and fishing have been increasingly disturbed by non-Indigenous activities such as building construction and mineral exploration. The presence of hydrogen bombs at Thule in 1953-54 is an infamous example of such disruption.<sup>78</sup> In August 1999, a Danish court found that Inuit of the far north-west of Greenland had been forced to move from their traditional village to make way for a United States air base. The base was secretly used to store hydrogen bombs<sup>79</sup> resulting in a disaster in 1968 when a plane loaded with four bombs crashed into Wolstenholme Fiord.<sup>80</sup>

The events at Thule exposed the weaknesses of the Danish government, which was not told about the accident and the resultant plutonium contamination until nineteen hours after the crash.<sup>81</sup> Parts of the four bombs located in the crashed plane have never been retrieved and there are continuing concerns about the level of contamination in the area.<sup>82</sup>

In June 1995, the Danish government made public the fact that it had become aware that nuclear weapons had been stored at the base. As a result of the court decision, damages were awarded to a group of fifty-three Inuit, who had brought a legal action against Denmark on behalf of 611 people, for the loss of their homes and hunting grounds. Shortly afterwards, Prime Minister Poul Nyrup Rasmussen of Denmark met with locals and Inuit leaders and apologised—in Danish and Inuktitut (the Greenlandic Inuit language) — ‘...to the Inuit, the population of Thule, and to the whole population of Greenland...’<sup>83</sup>

As well as issues relating to the forced abandonment of settlements or impeded access to traditional hunting grounds, Inuit have also raised concerns over disturbance to breeding areas and migration routes.<sup>84</sup>

### *Mining*

Private mining activities have been undertaken in Greenland since the 1860s. Historically, however, there have been limited economic resources available to explore much of the vast area of Greenland, hence relatively little is known about its natural resources.<sup>85</sup> Over recent years, greater efforts have been undertaken to find mineral resources.

Traditionally, land and non-living resources in Greenland were regarded as being publicly owned. Denmark took the position that jurisdiction over mineral resources could not be transferred to another part of the country, since these were to be regarded as common assets of Denmark. On the other hand, Greenland had maintained that such resources in the territory of Greenland should be regarded as the property of Greenland's population.<sup>86</sup>

Eventually, a compromise was negotiated. Section 8 of the *Greenland Home Rule Act 1978* provides that the permanent resident population of Greenland has fundamental rights to the natural resources of Greenland. This included rights to the underground.

Over time, the Greenland government has determined that a greater emphasis should be placed on the exploitation of non-renewable resources to provide increased revenues. In 1991 the Greenland parliament passed a *Mining Act* which encouraged mineral exploration and exploitation. The *Mining Act* provided for favourable taxation treatment and concession arrangements for foreign companies seeking to mine resources on the island.<sup>87</sup>

In 1992 the Danish government changed its previously held position by allowing for the Home Rule government of the Faroe Islands to assume all responsibility for natural resources in its territory. Subsequently, in January 1998, amendments were made to the *Greenland Mineral Resources Act* transferring responsibility for oil and mineral resources management in Greenland to the Greenland government.<sup>88</sup>

In the early 1980s the *Landsting* had granted a concession for prospecting for oil over 10,000 square kilometres of land which includes an Inuit hunting ground for those living in the small town of Scoresby Sound on the east coast of Greenland. The grant was made subject to certain conditions including 'an assurance of compensation for expropriation of hunting areas and compensation for decrease in the catch provided the same effort of work'.<sup>89</sup>

The most profitable mineral for Greenland has been cryolite although supplies have been largely exhausted, having yielded approximately thirty-five million tons. At one stage

these were the richest deposits in the world of this mineral, and were exploited from 1860 to the early 1980s.<sup>90</sup> Zinc and lead have also been mined but these deposits also now seem to be depleted. Iron, chromium, molybdenum, tungsten and anorthosite deposits have been located but have largely not yet been exploited, primarily for commercial reasons. Coal was mined at Qutligssat on the island of Disko from 1924 to 1972, and large deposits still remain there. Uranium deposits have been found but not yet exploited, on both economic and political grounds. There is interest in potential oil and gas deposits in Jameson Land.<sup>91</sup>

There have been progressive agreements reached between the Danish Prime Minister and Greenland political leaders, with the result that proceeds from the exploitation of natural resources in Greenland were once divided on an equal basis, subject to various limits, but have more recently reached the point where the benefit to Greenland is substantially stronger.

### *Environmental, resource and wildlife management*

Environmental, resource and wildlife management are seen as integral and centrally important to Indigenous culture, identity, rights and self-governance in Greenland.<sup>92</sup> Indigenous Greenlanders have an impressive contemporary record in recognizing traditional practices and of adapting to new environmental problems and knowledge. In traditional Inuit society, unwritten rules underpinned the way hunters were to act in relation both to the animals and to the environment. Historically, there is no record of Greenlanders ever making a species extinct.<sup>93</sup> More recently, the emphasis has been on recognizing traditional practice, knowledge and, more particularly, traditional use, from which much Indigenous knowledge derives. This does not necessarily ignore modern environmental issues and knowledge but places them in an Indigenous value context.

Traditional activities such as subsistence hunting have increasingly come under the management of the Greenland government which has been placing a greater emphasis on more formal environmental strategies. Rights to continue with traditional subsistence hunting practices are subject to quotas. The legal right to hunt is dependent on the individual holding of a hunting licence allocated by the municipal authorities. There are two types of licence—one for people who make their living from hunting or fishing and the other for recreational or part-time hunting or fishing. Hunting and shrimp fishing licences are now allocated in accordance with the specific requirements and circumstances. Quotas for each licensee are allocated by the Greenland government after the total allowable catch of each species has been determined.

In addition, the Greenland government is responsible for the distribution of quotas for subsistence fin and minke whaling in collaboration with the IWC and provides annual reports on all whaling activities in Greenland. These reports form the basis upon which the following year's quotas are calculated. The Greenland government and Greenland



Association of Fishermen and Hunters (KNAPK – *Kalaallit Nunaat Aalisartut Piniartullu Kattufiat*)<sup>94</sup> argue the case for a continuation of subsistence whaling at IWC meetings, challenging IWC scientific research and policy on the basis of their own research. They stress the importance of more ‘use-based’ research and cultural knowledge.

They also contend that subsistence hunting, both historically and in contemporary Indigenous culture, often involves elements of the cash economy in the various stages of procurement, sharing and consumption of *kalaalimernit*. Indeed, access to this food by Greenlanders who cannot carry out subsistence hunting has important cultural significance for Greenlanders.<sup>95</sup>

Complete jurisdiction over environmental matters is among the responsibilities transferred to the Greenland government. It has developed various environmental strategies to safeguard the future of Inuit resources.<sup>96</sup> The *Landsting* passed the *Environmental Protection Act 1988* which became effective on 1 January 1989, and other legislation designed to protect wildlife most commonly harvested by local communities.

The experience of the Greenland government in environment and resource management areas, including the concept of sustainable development, is extensive and adaptive. It regards environmental issues as the concern of Indigenous Inuit and values and protects Indigenous culture, believing it to be essential that local knowledge is utilised in the ongoing research of natural resources and environmental management.<sup>97</sup> It also addresses new political developments and environmental issues such as ozone depletion.<sup>98</sup>

The Inuit themselves claim the right to international recognition as resource conservationists and have begun to use Indigenous knowledge to further their political actions.<sup>99</sup> They also argue that their Indigenous culture is not frozen in time and that they need a contemporary economic base that strengthens and renews this culture.

### *International relations*

Section 11(1) of the *Greenland Home Rule Act 1978* specifically requires that foreign relations remain a matter for the Danish parliament. In practice, however, Greenland participates in relevant international negotiations. For example, it plays an integral role in the Nordic Council,<sup>100</sup> of which it has been a member since 1984. Two members of the Danish delegation to the Council are appointed by the *Landsting*.<sup>101</sup> Danish bills including provisions of exclusive concern to Greenland must be referred to the Greenland government for comment.<sup>102</sup>

Greenland was brought into the European Community upon Denmark’s admission in 1973, despite the fact that less than twenty-nine percent of people in Greenland voted in favour of membership.<sup>103</sup> Following a referendum in 1982, Greenland chose to withdraw with effect from 1 February 1985 and remains outside the membership of the European

Community.<sup>104</sup> It now has the status of an associated Overseas Country and Territory (OCT) under Part 4 of the 1957 Treaty Establishing the European Economic Community (the Treaty of Rome).<sup>105</sup>

The Greenland government can negotiate and enter into treaties and international agreements concerning matters of specific interest to Greenland, such as fish and marine mammal management. Greenland maintains a Brussels Representative Office, which functions as Greenland's permanent representative to the European Union, and continues to negotiate fisheries agreements with the European Union, allowing Member States access to Greenland waters for certain fishing activities in return for annual payments.<sup>106</sup> European Union countries purchase approximately eighty percent of Greenland's exports.<sup>107</sup>

Greenland is also a member of a number of multinational organisations, either in its own right (for example NAMMCO) or through the Danish membership of the particular organisation concerned. Greenland is often represented in two capacities: as the Greenland government and as the Inuit delegation through the Inuit Circumpolar Conference. Through the Danish delegation, the Greenland government has attended global conferences such as the 1992 United Nations Conference on Environment and Development (the Earth Summit). ILO Convention No 169 was adopted by the Danish parliament at the request of the Greenland government. This is the most important (operative) global convention dealing with Indigenous rights at the present time. The *Landsting* has two permanent seats on the Danish parliamentary delegation to the United Nations General Assembly.

The approach of the Greenland government and Indigenous Greenlanders to environmental management has been exerted both nationally and internationally through the United Nations, the Inuit Circumpolar Conference, the Arctic Environmental Protection Strategy, the IWC and NAMMCO. The Greenland government is increasingly able to hold itself out as an example of the centrality of these concerns to Indigenous rights and their successful implementation in a modern system of Indigenous governance.

Greenland has opened a representation with the Danish Embassy in Ottawa to facilitate the exchange of information with Canada.<sup>108</sup> On 22 June 1999, the Premier of Greenland signed a Memorandum of Intent to develop a co-operation agreement with the recently elected government of Nunavut, an Inuit self-governing territory in Canada, by the year 2000.<sup>109</sup>

Greenland has also established a Trade Council to coordinate and facilitate development of international trade.<sup>110</sup>

*Inuit Circumpolar Conference and other regional initiatives*

Greenland Inuit are members of the Inuit Circumpolar Conference (ICC), an NGO which has since 1983 had consultative status under the United Nations Economic and Social Council (ECOSOC). Its purpose is to increase the level of international awareness and co-operation among Inuit peoples, especially in relation to matters concerning the environment. It was established in Alaska in 1977 in response to increased oil and gas-based development in the Arctic, with initial participation of the Inuit of Greenland, Canada and Alaska. The Inuit of Russia have participated as members from 1989.<sup>111</sup>

In 1985 the ICC established its own Environmental Commission (ICCEC) which has been involved in the Inuit Regional Conservation Strategy. This included the development of a resource management programme designed to take account of the cultural and subsistence needs of Inuit communities.<sup>112</sup> Subsequently, in 1992 an extensive document entitled *Principles and Elements for a Comprehensive Arctic Policy* was published.<sup>113</sup>

The discussions leading to the final formulation of this policy highlighted the value to Indigenous peoples and to governments of co-operation between them and among different Indigenous peoples.<sup>114</sup> The policy was a significant factor in the formation of the Declaration on the Arctic Environmental Protection Strategy (AEPS)<sup>115</sup> and the founding of the recently inaugurated (September 1996) Arctic Council, where the ICC had observer status.<sup>116</sup> AEPS was signed in 1991 by the eight countries that make up the circumpolar region. It set out the fundamental principles for co-operation among these countries and the role of Indigenous peoples.<sup>117</sup> It focuses on the monitoring of pollution and the establishment of procedures in the event of an environmental disaster, as well as the prevention of further degradation of the Arctic environment and conservation of Arctic flora and fauna. At the same time, it recognizes the need to accommodate the concerns of Indigenous people and to encourage their participation.<sup>118</sup>

Greenland participates in the Arctic Council, which has taken over the AEPS and is developing programs to reflect its broadened mandate. The Arctic Council pursues environmental protection (through this AEPS mandate) and economic, social and cultural aims by promoting sustainable and equitable development. The Council comprises the eight Arctic countries, as well as international Indigenous peoples' organisations.<sup>119</sup>

By providing for this formal role of Indigenous people in the international agreement establishing the Arctic Council, the status of these groups is stronger than in most other conventions (or under current international law and practice) which provide for meaningful participation or full consultation. Moreover, the Council can readily use the knowledge and expertise of the Indigenous people of the Arctic region and can be sensitive to their cultural and social priorities. This allows for a contribution to other international initiatives such as sustainable development and human rights.<sup>120</sup>

The Arctic Council has developed terms of reference and a work plan for a Sustainable Development Program. Arctic Indigenous Peoples, including Greenland, are involved in the Council through this Program as well as the Indigenous Peoples Secretariat.

The ICC is also involved in the Arctic Monitoring and Assessment Program (AMAP), for which it has prepared a report on the risk of contaminants for Arctic Indigenous peoples. It also co-operates with the Sámi Council and the Association of Indigenous Minorities of the Russian North and East Asia (RAIPON).<sup>121</sup>

Greenland is the most populated homeland for Inuit—it has a substantial proportion of the Inuit population of the Arctic region. The ICC and, subsequently, the AEPS and Arctic Council are examples of how Greenlanders have worked on a successful regional approach to environmental protection and sustainable development with other Indigenous people and governments (Indigenous and non-Indigenous).

## Conclusion

The Arctic Indigenous people are developing a unique status and role under international law through these areas and issues. Greenlanders have exercised significant leadership and co-operation in regional and international forums and have often resorted to international standards, such as human rights conventions, when conflicts have arisen or as authority for their claims. In addition, Greenlanders have played a leadership role in laying the foundations for first world Indigenous internationalism; firstly at the Arctic Peoples Conference in Copenhagen in 1973, followed by the founding in 1975 of the World Council of Indigenous Peoples and the Barrow founding in 1997 of the Inuit Circumpolar Conference.<sup>122</sup> It might also be observed that the development of the form of Greenland self governance described here has arguably involved a remarkable commitment, first material and then moral, from a Danish government trying to pick itself up from the wartime occupation and destruction of infrastructure and industry.

## Notes

<sup>1</sup> LE Johansen, 'International experiences: Greenland' in A Harris (ed), *A good idea waiting to happen: Regional agreements in Australia*, proceedings from the Cairns workshop July 1994, Cape York Land Council.

<sup>2</sup> Ibid.

<sup>3</sup> Greenland Home Rule government, Ministry of Foreign Affairs, Danida, *Greenland on its way – Home Rule since 1979*, September 1997, p 6.

<sup>4</sup> For an overview of the position in Alaska and Canada see Chapters 4 and 5. For additional material on Alaska and on Russia see IWGIA, *The Indigenous world 1997-98*, IWGIA, 1998, pp 21-25, 37-40.

<sup>5</sup> M Nuttall, 'Greenland: Emergence of an Inuit homeland' in Minority Rights Group (Ed), *Polar peoples – Self-determination and development*, Minority Right Publications, 1994, pp 1, 16.

- <sup>6</sup> Greenland Home Rule government, above note 3, p 5.
- <sup>7</sup> *Greenland Home Rule Page* accessed from the world wide web at [www.gh.gl/](http://www.gh.gl/) on 5 July 1999.
- <sup>8</sup> Accessed from the world wide web at [www.statgreen.gl/English/IndexUK.htm](http://www.statgreen.gl/English/IndexUK.htm) on 10 August 1999. The uninhabitable inland ice cap covers 1.8 million km<sup>2</sup> and is 3 km thick at its centre: Greenland Home Rule Authorities, *Kalaallit Nunaat: Greenland — A modern arctic society*, 1993, p 3.
- <sup>9</sup> Greenland Home Rule government, above note 3, p 7.
- <sup>10</sup> Nuttall, above note 5, p 6.
- <sup>11</sup> Id, p 12.
- <sup>12</sup> AW Bentzon, 'Law and legislation in Greenland during the transition from colonial status to Home Rule status (1945-1980)' (1986) 1 *Law and Anthropology* 199, p 200. There were sixty-five municipalities, p 201.
- <sup>13</sup> Id, p 201.
- <sup>14</sup> Municipal councils were introduced in 1857. Councils investigated crime and punished offenders, settled civil litigation and divided inheritances: id, p 217.
- <sup>15</sup> Those covered by Danish law were under the jurisdiction of regional governors who tried all civil matters and criminal matters punishable by a fine. More serious criminal matters were heard in Denmark: id, p 201.
- <sup>16</sup> *Greenland Government Act 1925*; Administration of Justice Decree, 26 July 1925.
- <sup>17</sup> Bentzon, above note 12, p 201.
- <sup>18</sup> Ibid.
- <sup>19</sup> Ibid.
- <sup>20</sup> Greenland Home Rule government, above note 3, p 8.
- <sup>21</sup> The Royal Greenlandic Trading Company (KGH) had a virtual monopoly on trade in Greenland. It fixed prices and determined which products would be traded: Bentzon, above note 12, p 200.
- <sup>22</sup> Id, p 202.
- <sup>23</sup> Ibid. Ms Bentzon was a member of the expedition.
- <sup>24</sup> Id, p 203.
- <sup>25</sup> Id, p 199.
- <sup>26</sup> Greenland Home Rule government, above note 3, p 9.
- <sup>27</sup> Nuttall, above note 5, p 7.
- <sup>28</sup> Greenland Home Rule government, above note 3, p 9.
- <sup>29</sup> Nuttall, above note 5, p 8.
- <sup>30</sup> Id, p 1.
- <sup>31</sup> H Rasmussen, 'Greenland - Current concerns of the Inuit people' IWGIA, *Indigenous Affairs*, No 3 July-Sept 1995, p 48.
- <sup>32</sup> TOK Berthelsen, 'Greenland Home Rule' IWGIA, *Indigenous Affairs*, No 1 Jan-March 1995, p 16.
- <sup>33</sup> F Harhoff, 'The status of Indigenous peoples under international law: Greenland and the right to self-determination' [1994] *The Canadian Yearbook of International Law* 243, p 249.
- <sup>34</sup> P Jull, *Forums and processes for constitutional reform: Options for Indigenous Australians*, 9 July 1999 (copy with authors).
- <sup>35</sup> Berthelsen, above note 32, p 15.
- <sup>36</sup> Greenland Home Rule government, above note 3, p 11.

- <sup>37</sup> Reproduced in (1996) 1 AILR 61.
- <sup>38</sup> IWGIA, above note 4, p 22.
- <sup>39</sup> *Greenland Home Rule Act* s 1(1).
- <sup>40</sup> D Craig, *Aboriginal and Torres Strait Islander involvement in bioregional planning: Requirements and opportunities under international and national law and policy*, background paper prepared for conference entitled 'Approaches to bioregional planning', Melbourne 30 October - 1 November 1995, p 121.
- <sup>41</sup> Greenland Home Rule government, above note 3, p 10.
- <sup>42</sup> Greenland Home Rule Authorities, *This is Greenland*, Spring 1993, pp 19-20.
- <sup>43</sup> *Greenland Home Rule Act* s 1(2).
- <sup>44</sup> *Greenland Home Rule Act* s 2(1).
- <sup>45</sup> Berthelsen, above note 32, p 16.
- <sup>46</sup> Harhoff, above note 33, p 250.
- <sup>47</sup> *Greenland Home Rule Act* s 3.
- <sup>48</sup> *Greenland Home Rule Act* ss 18(1), (2).
- <sup>49</sup> *Greenland Home Rule Page* accessed from the world wide web at [www.gh.gl/uk/parlia/context.htm](http://www.gh.gl/uk/parlia/context.htm) on 6 December 1999.
- <sup>50</sup> Nuttall, above note 5, p 9.
- <sup>51</sup> IWGIA, above note 4, pp 35-36.
- <sup>52</sup> Nuttall, above note 5, p 11.
- <sup>53</sup> Johansen, above note 1.
- <sup>54</sup> See M Freeman et al, *Inuit, whaling and sustainability*, Alta Mira Press, 1998.
- <sup>55</sup> Rasmussen, above note 31, p 49.
- <sup>56</sup> Bentzon, above note 12, pp 230-31.
- <sup>57</sup> Greenland Home Rule government, above note 3, p 13.
- <sup>58</sup> Section 19 (1) of the Danish Constitution, dealing with 'Foreign Affairs', provides as follows:  
(1) The King shall act on behalf of the Realm in international affairs. Provided that without the consent of the Parliament the King shall not undertake any act whereby the territory of the Realm will be increased or decrease, nor shall he enter into any obligation which for fulfillment requires the concurrence of the Parliament, or which otherwise is of major importance; nor shall the King, except with the consent of the Parliament, terminate any international treaty entered into with the consent of the Parliament.
- <sup>59</sup> Greenland Home Rule government, above note 3, p 15.
- <sup>60</sup> When it announced its withdrawal from the IWC in December 1991, the Icelandic government stated that it 'must respond to the grim reality that the International Whaling Commission is no longer a viable forum for international cooperation on the conservation and management of the whale populations in our region'. Press release dated 27 December 1991, issued by the Ministry of Fisheries, Iceland, accessed from the world wide web at [www.highnorth.no/go-og-ic.htm](http://www.highnorth.no/go-og-ic.htm) on 10 March 1999.
- <sup>61</sup> Berthelsen, above note 32, p 19.
- <sup>62</sup> J Dahl, 'From ethnic to political identity' [1988] 57 *Nordic Journal of International Law* 312, p 313.
- <sup>63</sup> *Id.*, p 314.
- <sup>64</sup> *Id.*, p 313.

- <sup>65</sup> Nuttall, above note 5, p 9.
- <sup>66</sup> Rasmussen, above note 31, p 48.
- <sup>67</sup> Berthelsen, above note 32, p 19.
- <sup>68</sup> Quoted in Berthelsen, above note 32, p 20.
- <sup>69</sup> Dahl, above note 52, p 312.
- <sup>70</sup> Bentzon, above note 12, pp 208-09.
- <sup>71</sup> Id, p 210.
- <sup>72</sup> Nuttall, above note 5, p 21.
- <sup>73</sup> Id, p 23.
- <sup>74</sup> Ibid.
- <sup>75</sup> Id, p 22. As discussed below, the determination of what is traditional or customary use and what is commercial use is not easy in the case of Greenland.
- <sup>76</sup> Id, p 2.
- <sup>77</sup> Ibid.
- <sup>78</sup> Rasmussen, above note 31, p 49.
- <sup>79</sup> P Jull, 'Bridging the Indigenous gulf' *Arena Magazine*, No 43 Oct-Nov 1999, p 33.
- <sup>80</sup> Rasmussen, above note 31, p 49.
- <sup>81</sup> C Oreskov 'Ultima Thule?' IWGIA, *Indigenous affairs*, No 3 July-Sept 1995, p 52.
- <sup>82</sup> Ibid.
- <sup>83</sup> *Time Magazine*, 13 September 1999, page 16, column 1.
- <sup>84</sup> Bentzon, above note 12, p 211.
- <sup>85</sup> L Lyck, 'Natural resources in Greenland – Economic possibilities and restraints' [1988] 57 *Nordic Journal of International Law* 345, p 345.
- <sup>86</sup> Harhoff, above note 33, p 253.
- <sup>87</sup> Nuttall, above note 5, p 13.
- <sup>88</sup> Accessed from the world wide web at [www.gh.gl/uk/NEWS/GOVERN/resourc.html](http://www.gh.gl/uk/NEWS/GOVERN/resourc.html) on 10 May 1999.
- <sup>89</sup> Bentzon, above note 12, p 213.
- <sup>90</sup> Lyck, above note 85, p 345.
- <sup>91</sup> Id, p 346.
- <sup>92</sup> See generally F Lynge, *Arctic wars: Animal rights, endangered peoples*, Dartmouth College and University Press of New England, 1992.
- <sup>93</sup> Per comments by Finn Lynge, Senior Advisor to the Greenland government, to the authors in 1998.
- <sup>94</sup> Nuttall, note 5, p 25.
- <sup>95</sup> Id, p 21.
- <sup>96</sup> Ibid.
- <sup>97</sup> Id, p 25.
- <sup>98</sup> Craig, above note 40, p 123.
- <sup>99</sup> Nuttall, above note 5, p 24.
- <sup>100</sup> IWGIA, *The Indigenous world 1996-97*, IWGIA, 1997, p 28.
- <sup>101</sup> Berthelsen, above note 32, p 18.

- <sup>102</sup> *Greenland Home Rule Act* s 12(1).
- <sup>103</sup> Harhoff, above note 33, p 248.
- <sup>104</sup> A majority of people living in Greenland voted against accession in the Common Market Referendum of 1972: Bentzon, above note 12, p 226. However, due to a positive result in Denmark, Greenland was obliged to be involved.  
On 1 February 1985, Greenland succeeded in withdrawing from the EEC entirely through a referendum. Greenland Home Rule government, above note 3, p 14.
- <sup>105</sup> Harhoff, above note 32, p 252.
- <sup>106</sup> Berthelsen, above note 32, p 18.
- <sup>107</sup> Greenland Home Rule government, above note 3, p 14.
- <sup>108</sup> *Greenland Home Rule Act* s 16(1) provides that the Home Rule Authorities may demand that Danish diplomatic missions employ officers to attend to their interests in countries where Greenland has special commercial interests.
- <sup>109</sup> Accessed from the world wide web at [www.gh.gl/UK/NEWS/GOVERN/agreem.htm](http://www.gh.gl/UK/NEWS/GOVERN/agreem.htm) on 5 July 1999.
- <sup>110</sup> IWGIA, above note 4, p 33.
- <sup>111</sup> IWGIA, *Indigenous affairs*, No 3 July-September 1995, p 44.
- <sup>112</sup> Nuttall, above note 5, p 27.
- <sup>113</sup> Inuit Circumpolar Conference, Ottawa and Centre for Northern Studies and Research, McGill University, Montreal, Canada 1992.
- <sup>114</sup> P Jull, 'Indigenous internationalism: What should we do next?' IWGIA, *Indigenous Affairs*, No 1 Jan-March 1999 12, p 16.
- <sup>115</sup> IWGIA, *Indigenous affairs*, No 3 July-September 1995, p 46.
- <sup>116</sup> Greenland Home Rule government, above note 3, p 14.
- <sup>117</sup> M Simon, Presentation to the IUCN Commission on Environmental Law Workshop, *Comprehensive approaches for ensuring the rights of Indigenous peoples: New standard-setting approaches for international environmental law*, Montreal, 12 October 1996.
- <sup>118</sup> Ibid.
- <sup>119</sup> Ibid.
- <sup>120</sup> Ibid.
- <sup>121</sup> Greenland Home Rule government, above note 3, p 14.
- <sup>122</sup> P Jull, "First world" Indigenous internationalism after twenty five years' (1998) 4 *Indigenous Law Bulletin* 13, pp 13-16.



## Chapter 10 ■

### Indigenous Governance by the Sámi of Scandinavia

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#### Introduction

This Chapter is an overview of the governance structures in place for the Sámi<sup>1</sup> populations in Norway, Sweden and Finland. Each of these countries has established a Sámi parliament, the details of which are discussed in this Chapter. The experience of the Sámi represents an interesting comparison with that of the Inuit of Greenland, which is discussed in Chapter 9.

#### The Sámi of Scandinavia

The Sámi, or Lapps,<sup>2</sup> are the native people of the area in northernmost Europe formerly known as Lapland. There are currently estimated to be somewhere between 75,000-100,000<sup>3</sup> Sámi people living in their ancient homeland. They have inhabited these areas for thousands of years.<sup>4</sup> These traditional lands now lie within the borders of four present day countries: Russia, Norway, Sweden and Finland. As a result, the Sámi have now found themselves under the jurisdiction of four different governments and four separate systems of State authorities.

Moreover, there are other layers atop the four nation-states, such as defence arrangements (NATO and neutral Russia) and the European Union and the non-European Union, both of which have had significant (and even more so during the Cold War) impacts on Sámi policies and politics.

Their relationship with the governments and populations of these countries 'became one of minority and majority'.<sup>5</sup> Yet, in spite of the fundamental differences between the Sámi minority and other population groups within these four countries, they have managed to maintain access to much of their traditional land, despite ongoing debates regarding the true legal ownership.<sup>6</sup> Nevertheless, they have also at times been treated as immigrants and have been stigmatised by the various assimilationist policies of the respective countries.

Despite the fact that their traditional areas have been divided by State borders for centuries, the Sámi have maintained a strong will to ensure the survival and growth of their culture, language and lifestyle in the traditional ancestral lands, whilst also adapting to the modern way of life. It is with respect to one principal aspect of their traditional livelihood, reindeer-herding, that the Sámi have been most able to ensure their cultural survival. The Sámi have historically regarded the reindeer as one of the basic guardians of their culture and it provides a common identity that stretches across the various State

borders. While their efforts to maintain their reindeer herding rights have represented an important focus for the ongoing existence of Sámi culture, there has also been a related issue about the sole identification of reindeer herding with ‘Sáminess’.

It has been through the reindeer herding efforts in particular that they have managed to maintain a common identity across State borders. In 1956 a Nordic Sámi Council was established to promote Sámi economic, social and cultural interests. The Kola (Russian) Sámi having subsequently joined, it is now referred to as the Sámi Council<sup>7</sup> and has NGO status within the United Nations. A Nordic Sámi Institute was established in Norway in 1973 and the Sámi of Norway, Sweden and Finland have become members of the World Council of Indigenous Peoples (WCIP). At its 1996 meeting, the Sámi Council unanimously adopted a motion drawn up by its legal committee for the establishment of a Sámi Convention,<sup>8</sup> giving national and international legal recognition to their rights as an Indigenous people.

The Sámi language is divided into a number of major dialects with quite marked variations. It contains many borrowed words from Finnish, indicating a long history of Sámi-Finnish relations, and also from Old Norse, going back at least 1,300 years.<sup>9</sup>

### Historical background

The Sámi have been recorded as being reindeer herders, hunters and fishermen in the areas now forming part of the four countries mentioned above since AD 98.<sup>10</sup> Historically, large areas of the northern regions of the four countries mentioned above were called Finnmark, or alternatively Lappland, or in the Sámi language, Sapmi. Parts of the area north and east of the city of Tromsø, which were solely inhabited by Sámi, were regarded as *terra nullius* by other Norwegian settlers.<sup>11</sup>

Even before they were brought under the full sovereignty of the States of Sweden, Denmark-Norway and Russia, the Sámi had felt the effects of competition between these regional kingdoms as they engaged in territorial rivalry. In the early fourteenth century, state and church expansion into Finnmark intensified and the Danish-Norwegian kingdom declared its sovereignty over the coastal regions of Finnmark, declaring the Arctic Ocean *mare nostrum*—‘our sea’ or ‘the King’s sea’.<sup>12</sup>

This was followed by further colonization activities in the region. A number of wars were fought over ‘the Finnmark question’ between Russia and Sweden and then between Denmark-Norway and Sweden (the Kalmar War 1611-1613).<sup>13</sup> Following Denmark-Norway’s victory in the Kalmar War, Finnmark was officially designated as a county.

During the eighteenth century, particularly after the Great Nordic War (1701-1720), it became obvious that formal borders between Norway and Sweden were necessary. Border Treaties were concluded between Denmark-Norway and Sweden-Finland in 1751 (the Stromstad Treaty) and between Norway and Russia 1826. A codicil to the Stromstad

Treaty, known as the Lapp Codicil but now commonly referred to as the ‘Sámi Magna Carta’, recognised that Sámi had migrated across what became the border between Norway and Sweden for centuries without hindrance and provided a guarantee that this right to freely cross the border as part of their seasonal migration of reindeer herding could continue.

The Lapp Codicil provided in part as follows:

The Sami need the land of both states. Therefore, they shall, in accordance with tradition, be permitted both in autumn and spring to move their reindeer herds across the border into the other state. And hereafter, as before, they shall, like the state’s own subjects, be allowed to use land and share for themselves and their animals, except in the places stated below, and they shall be met with friendliness, protected and aided...<sup>14</sup>

In the view of Carsten Smith, the Lapp Codicil had as its main objective the conservation of the Lapp nation.<sup>15</sup> Politically, it has also been said that despite the recognition of the traditional rights, the Lapp Codicil has, in effect, cut across ‘immemorial territories’<sup>16</sup> and forced pastoral Sámi to choose citizenship in either Denmark-Norway or Sweden. However, the border was actually devised taking existing Sámi land use into account so as to create as little hardship as possible. Indeed, it has been observed of the codicil to the border treaty between Sweden and Denmark-Norway in 1751 that ‘the situation of the Sámi was regulated in a remarkably generous way’<sup>17</sup> since they were permitted to cross the national border freely with their reindeer herds and included ‘an agreement for the avoidance of double taxation’.<sup>18</sup> The Lapp Codicil has never been cancelled, though its implementation is regulated by bilateral commissions and agreements.

The Treaty of Teusina in 1595 created the border between Sweden-Finland and Russia, effectively cutting off Russia’s Kola Peninsula Sámi from those in Scandinavia. Russia ceased to play a significant role in greater Sámi affairs until it gained control of Finland in 1808.<sup>19</sup>

From this time onwards, the Sámi have lived as an ethnic minority in each of the four countries exercising sovereignty over the land of the Sámi (the Sapmi). By the late nineteenth century, the Sámi were often considered by the majority of the population as:

...beings of lower order, who should not be given the same legal status as the Nordic peoples, nor stand in the way of higher civilization.<sup>20</sup>

In the early years of the twentieth century, a number of Sámi organisations began to emerge,<sup>21</sup> partially in response to this perception of the Sámi. Because, these earlier organisations had difficulty showing positive results and did not create a financial base for future activity,<sup>22</sup> the notion of organised Sámi opposition largely disappeared.

It was not until the end of the Second World War that significant renewed attempts began to establish various forms of Sámi organization—described as ‘Sami self-organising initiatives’.<sup>23</sup> Over time these have led to a ‘new Sami self-understanding’<sup>24</sup> and the

emergence of the Sámi as a political force in the Scandinavian region. A Nordic Sámi Conference met for the first time in 1953, leading to the establishment in 1956 of a Nordic Sámi Council to co-ordinate the various Sámi organisations in each of the Scandinavian countries. The Sámi appear to have in mind a special delegation like Greenland, the Faroe Islands and the Asland Islands within the Nordic Council, although there has been some governmental opposition to this on the basis that it may represent some form of quasi-nation precedent. There is also an interesting and gradual development of Sámi ethno-political trans-national regionalism.<sup>25</sup>

Sámi organisation and the recognition of various forms of Sámi rights have followed to varying degrees in the four countries which they inhabit. This Chapter will briefly overview the current position of the Sámi in the three Scandinavian countries: Norway, Sweden and Finland. Overall, the position of the Sámi has improved in recent years mostly in Norway, where the authorities have made a relatively coherent effort to make progress. In Sweden and Finland, the progress that has been achieved has largely been on a sporadic basis.<sup>26</sup> However, in each of the three countries there has been a revival of the Sámi language and culture.<sup>27</sup>

There is not, however, any serious consideration about the establishment of an independent Sámi state. They are more concerned with the protection of the traditional lands against exploitation and the clear recognition of their traditional hunting, fishing and reindeer herding rights. The establishment of Sámi parliaments in each of the three Scandinavian countries potentially provides for their interests to be taken more into account and is a further avenue for Sámi to present a more unified front. This will require the 'healing' of those internal divisions that have arisen among Sámi<sup>28</sup> and the role and powers of the Sámi parliaments to increase.

### *Conclusion*

It has been said that 'for some two thousand years, the Sámi people have been regarded as a remote and exotic curiosity on the periphery of Europe'.<sup>29</sup> They have been referred to as 'the most remote primitive nomads on Europe's northern fringe, who roam with their herds of reindeer in forests and on fells'.<sup>30</sup> Yet 'few remember that the Romans failed to conquer the Sámi, just as they failed to vanquish the Basques'.<sup>31</sup> There is now considerable evidence from historical research work undertaken in Sweden that the Sámi were not in fact landless, rather nomad Sámi could be landholders in Sweden and further were bound as administrative subjects of the Crown by the laws of the Crown.<sup>32</sup> Whether they are legally recognised landholders and the nature and extent of their landholdings and land use remain as the primary unresolved questions in each of the Scandinavian nations under consideration.

## Norway

There are estimated to be approximately 40,000-60,000 Sámi in Norway,<sup>33</sup> representing the most significant ethnic minority in the country,<sup>34</sup> as well as the largest Sámi group in any one country. They are usually categorised into three groups: the Sea Sámi (*mearraolbmot*) who live in the coastal regions, the *dalon* who are small landholders engaged in subsistence agriculture and the reindeer Sámi (*boazosápmelaðeat*) who engage in nomadic herding activities.<sup>35</sup>

Unlike the situation in Finland, the Sámi have no clearly defined homeland in Norway and are found throughout the country. There was, however, an administrative area for Sámi language, which takes in a number of municipalities.<sup>36</sup> In 1953 the County Prefect (*Fylkesmannen*) in Finnmark established a Sámi Council to look at regional Sámi issues. In the 1960s, a more organised 'Sámi Movement' began to develop as Sámi developed a growing awareness of the need to maintain their identity and culture. A national Norwegian Sámi Council, a state institution, was established by Royal Resolution in 1964<sup>37</sup> to act as an advisory body in relation to issues of significance to Sámi, replacing the Sámi Council.

### *The Alta conflict*

Historically Norway has been built from a poor base to a modern nation-state through hydro-electric power in particular. Over time, any Sámi demands for tangible rights, particularly with respect to the disposition of land and the distribution of any economic surplus from the use of land inhabited by Sámi, were largely ignored by Norwegian leaders.<sup>38</sup> It was only when the country's perceived need for energy came into conflict with Sámi rights and issues relating to the environment that the wider issue of the 'Sami question' became an issue of political concern.<sup>39</sup>

By a Royal Resolution in June 1979, the Norwegian parliament had decided to dam the Alta-Kautokeino watercourse, which flowed through various central areas of *Sapmi*, in order to construct a hydroelectric energy system. This proposal was regarded by reindeer Sámi as a threat to important grazing areas and the broader Sámi Movement considered the construction as an infringement of the Sámi rights to land and water in *Sapmi*.<sup>40</sup> Resistance to the construction was mobilized and the resulting actions of supporters and opponents attracted significant national and international attention, as the response of widespread civil disobedience by both the Sámi and various sympathetic Norwegian environmental groups provoked unprecedented police response.

In Svensson's view the Alta case gave the Sámi the opportunity to broaden the legal argument, 'thus transforming the trial into an Aboriginal rights contest in which sociocultural implications of the ecological change were joined with fundamental human rights principles embedded in international law'.<sup>41</sup> While the Sámi lost the particular case they

achieved, for the first time, recognition from Norway's highest court that they represent a distinct group entitled to special rights—an ethnic minority within the Norwegian State, hence protected under Article 27 of the International Covenant on Civil and Political Rights as well as principles of international law. This built the groundwork for future confrontations.<sup>42</sup>

While the affair revealed some divisions within the Sámi population and the Sámi campaign to halt the dam construction ultimately failed, the episode proved to be a watershed in Sámi ethno-political history in Norway. Public opinion became more positive towards the Sámi and grew further as parts of the community came to regard the building of the dam as a failure which did not achieve its planned purposes.<sup>43</sup> In September 1993, ownership of the Alta hydro-electric plant, including a majority interest in Finnmark Hydro Power AS, was sold by the county government to the Norwegian State, as it could no longer carry the increasing debt burden of the power station.<sup>44</sup>

These developments, coupled with the widespread discussion that had arisen out of the opposition to the construction, served to increase awareness of and legitimize Sámi demands that their rights as an Indigenous population should be respected in Norway. Up until as late as the end of the 1980s, the suggestion that the Sámi were an Indigenous people had been foreign to the wider community, the Norwegian government and even some elements of the Sámi.<sup>45</sup>

The government response to the Alta Affair was to appoint two committees to investigate the current situation and propose reforms in relation to the position of the Sámi in Norway. Taking note of the combined resistance of the Sámi and various conservation groups to the construction of the Alta dam, the Swedish government also appointed a Sámi Rights Commission in 1983,<sup>46</sup> though its mandate was somewhat narrower than its Norwegian counterpart.<sup>47</sup>

One of the Norwegian government appointed committees was mandated to address cultural questions and the other to address political rights and the right to land and water. The seventeen member Sámi Rights Commission, one-third of which represented Sámi interests with the remainder being Norwegian, founded in 1980-81, was required to make recommendations regarding the use of natural resources in Sámi inhabited areas. Its 1984 report on the legal position of the Sámi formed the basis for the *Sámi Act 1987*<sup>48</sup> (which came into force on 24 February 1989) and the establishment of the Sámi parliament in 1989.<sup>49</sup>

The purpose specified in the *Sámi Act 1987* was in almost identical wording to the new Article 110a of the Norwegian Constitution, which was inserted in 1989 and informally referred to as 'the Sámi paragraph'. The *Sámi Act 1987* provides as follows:

It is the obligation of the State authorities to create the conditions necessary for the Saami to protect and develop their language, their culture and their society.

The inclusion of this provision is regarded as:

a Constitutional guarantee for the Saami as an indigenous people, as a legal and political guarantee for the protection and development of the Saami language, culture and society.<sup>50</sup>

The constitutional amendment is formally understood to include recognition of Sámi territorial and resource rights, although these remain as yet undefined. In June 1990 Norway became the first country to ratify ILO Convention No 169 concerning Indigenous and tribal peoples in independent countries and which came into force on 5 September 1991.<sup>51</sup> The government has expressly stated that its provisions apply to the Sámi in Norway.<sup>52</sup> Its interpretation of Article 14 of that Convention<sup>53</sup> is that, by providing what it regards as strongly protected rights of use to land traditionally occupied by Sámi in Norway, this fulfils the Article's requirement of admission of land *ownership*. It therefore runs the risk of being found to be in contravention of the Convention.<sup>54</sup>

Norway was also the first country to ratify the 1992 European Charter for Regional or Minority languages and made express reference to the Sámi language, but no other language, in its ratification document.<sup>55</sup>

These substantive actions should not obscure the reality that the overall policy of Norway towards the Sámi has been very much geared towards assimilation. Norway had been annexed by the Danes for many years, only to then be forced into a Union with Sweden. This historical heritage led to a resurgence of Norwegian nationalism.<sup>56</sup> During discussions relating to the Dissolution of the Norway-Sweden Union in 1905 and the establishment of a northern border with an independent Finland after World War I, this process of assimilation was justified in order to protect Norway from the danger of Swedish influence and 'the Finnish Danger'<sup>57</sup> raised by the presence of a Finnish speaking minority in Northern Norway (the Kvens). In reality, the Sámi were regarded by some as a similar security threat.<sup>58</sup>

During the inter-war period, this process was continued on security and political as well as cultural grounds—the 'superiority of the Norwegian culture'—and, following the decimation of parts of the country during World War II, economic considerations were also important. As one anthropologist put it, the argument of the Norwegian government after the war was based on the following:

I believe that assimilation is necessary and inevitable. The Saami will mix with Norwegians and blend more with Norwegian society. ...What I do is economic politics. It may be that our country will be a poorer country culturally when the Saami culture disappears, but no one can live from culture.<sup>59</sup>

This assimilation policy was also reflected in the Norwegian approach to land. The 1902 Land Regulations only permitted land ownership for Norwegian speakers. Whereas Sweden-Finland made a legal distinction between land uses based on herding and those of agriculture, Norway acknowledged no such difference.<sup>60</sup> As an example, on 24 October 1997 the Supreme Court of Norway handed down its decision in an action brought against a southern Sámi group, the *Riast-Hylling* herding administration. Twenty-seven private landowners were successful in their attempt to prevent reindeer being pastured on their property. The Court relied on a similar 1897 case. The Sámi parliament responded to this decision as follows:

The Sámi Parliament condemn the verdict and emphasise the frightening implications of an apparent reversion to the earlier days of colonisation of Sámi areas. At the same time they fear that this verdict can be the beginning of the final extermination of south-Sámi culture in Norway.<sup>61</sup>

In 1997 the King of Norway apologised to the Sámi people for the 'Norwegianisation' policy pursued by the Norwegian State in the 1950s and 60s.<sup>62</sup> On 1 January 2000 Prime Minister Bondevik apologised to the Sámi for the past Norwegianisation policies aimed at the Sámi and set up a fund for a number of collective remedial measures.

### *The Sámi parliament in Norway*

Norway, Sweden and Finland each have a Sámi parliament comprising individuals elected by and among the Sámi. These are advisory bodies primarily responsible for the review of policies and proposed legislation of concern and relevance to Sámi in each respective country.

The Sámi parliament (*Sameting*) was established in 1989. It is regarded by many as the central element of the undertakings included in the Norwegian Constitution and facilitates the involvement of Sámi in the regulation and administration of issues of concern to Sámi. The Sámi parliament is democratically elected by the Sámi population in Norway.

The *Sámi Act 1987* specifies the following powers of the Sámi parliament:

The Saami Parliament's area of activity includes all questions that the Parliament considers to relate to the Saami.

The Saami Parliament can on its own initiative raise and issue statements on all questions within its area of activity. It can on its own initiative also raise questions before public authorities and private institutions...

The Saami Parliament has the authority to make decisions when this follows from other provisions in the law or is decided in another way.<sup>63</sup>

The Sámi parliament comprises thirty-nine elected representatives, elected on the basis of a special census conducted among Sámi throughout the country. The President of the Sámi parliament, its only full-time salaried official, and the Vice President are also the



leader and deputy leader respectively of the Sámi Parliamentary Council, a group of five members chosen from the Sámi parliament.<sup>64</sup>

The Sámi parliament has its administration based in the town of Karasjok and falls within the administration of the Norwegian Ministry for Labour and Local Government. It has defined its mandate as follows:

- to be the Sámi's elected political body, and
- to carry out the administrative tasks delegated to it by the Norwegian government.<sup>65</sup>

Apart from the Sámi parliament, there are three main Sámi political organisations in Norway: the Confederation of Norwegian Reindeer Herders (NRL) founded in 1948, the Norwegian Sámi National Union (NSR) founded in 1968 and the Sámi Confederation (SLF) founded in 1979.<sup>66</sup>

Under the provisions of the *Sámi Act*, all national, regional and local authorities are required to consult with the Sámi parliament before making any decisions that may effect the Sámi people. Although some administrative authority has been delegated to it, the Sámi parliament primarily acts as an advisory body to the Norwegian parliament, which bears the financial responsibility for activities of the Sámi parliament and its subsidiary bodies. Sufficient funds must be made available by the Norwegian parliament in its annual budget to meet these purposes.<sup>67</sup>

Like recognition of the Sámi's territorial rights to land and water, the extent of the formal authority and jurisdiction of the Sámi parliament is yet to be completely clarified... These remain areas of intense debate among and between Norwegians and Sámi.<sup>68</sup>

### *Sámi land rights*

The Sámi have, since time immemorial,<sup>69</sup> occupied and used land over considerable areas of northern Norway and there are also numerous coastal Sámi. The Sámi notion of land territoriality was, however, different from the system of the European States that colonised them. While it does not involve a concept of private land ownership, it stems originally from the notion of a recognised territorial base and a discernible, but flexible, membership revolving around the Lapp Village.<sup>70</sup> This concept of Sámi social organisation (the *siida* – 'a local community') still influences modern Sámi views of land ownership. For the *boazosápmelaèèat*, the land was considered as common property which they were free to use, whilst the animals themselves were privately owned. However, there has never been a single Sámi model of land use among the various Sámi groups, with their pattern of movement and resource adaptation varying between districts.<sup>71</sup>

Norway and the other colonizing Nordic states viewed the Sámi as nomadic and regarded the lands occupied by the Sámi as ownerless. They interpreted the Sámi approach to land in such a manner as to deny the existence of any prior rights. As a result, they extended their sovereignty over the Sámi and their traditional lands without any regard for these Sámi notions of territoriality.

From the mid 1800s onwards, the state authorities developed a theory that the Sámi were too primitive and nomadic to be recognised as having a proper system of private property rights.<sup>72</sup> This led to the development of the doctrine of the unregistered ground in Finnmark by Norwegian authorities.<sup>73</sup> This doctrine formed a basis for all laws and regulations passed with regard to land in that region up until the present. It declared that the State had full ownership of all land which was not formally in private possession. For the Sámi the question of ownership had been of little practical interest up until the time that the State claimed ownership of land which they had previously used without interference.

In the 1902 Land Regulations for Finnmark provisions were included whereby the sale of any land must further the development of ‘an educated population, who can speak, read and write the Norwegian language, and make daily use of it’.<sup>74</sup>

The question of land and water rights remains unresolved. The State claims to own approximately ninety-six percent of the land in Finnmark county.<sup>75</sup> This is disputed by some groups of Sámi, but the government generally does not accept their claims to land rights in the sense of land ownership. After thirteen years of investigation and deliberation, during which the Sámi remained relatively silent on the issue of land rights, a subgroup of the Sámi Rights Committee (which did not include any Sámi legal experts) completed a report to the Committee which confirmed the Norwegian State’s rights to land and water in Finnmark. The report also concluded that the Sámi had no legal basis for territorial rights, either under Norwegian law or the criteria established in ILO Convention No 169.<sup>76</sup>

This report drew sharp criticism from Sámi representatives. Ole Henrik Magga, the then newly re-elected President of the Sámi parliament made the following comments:

This means we have been made fools of for thirteen years! It is no news that the legal convention of the State is that all belongs to the State. The whole idea behind the Sami Rights Committee was not to repeat what had been legal conventions, but to find better solutions for the future.<sup>77</sup>

Subsequently, the majority report of the Sámi Rights Committee concluded in 1997 that land rights should not be granted on an individual ethnic basis, but rather should be shared among the population in a particular geographical area, irrespective of ethnicity.<sup>78</sup> Apart from a minor exception for the Skolt Sámi, where special sweep-net and sea-salmon fishing rights were proposed, the Committee stated that it ‘*has not drawn any line for the sake of individual ethnicity*’<sup>79</sup> (emphasis in the Committee’s report).

This finding generated heated debate among both Sámi and Norwegians, and a number of Sámi organisations have since declared that the Sámi should be regarded as having original rights to the land which they have traditionally inhabited.<sup>80</sup>

At the same time different models of natural resource management are represented by the Sámi parliament and the Norwegian elected Finnmark county parliament.<sup>81</sup> Added to this, the geographic dimensions to Finnmark (48,000 square kilometres) makes it difficult to create an appropriate model of rights distribution and management for Sámi, given that the Sámi are no longer a majority in many areas of that county.

In the meantime, the management of, and property rights to common land in Finnmark has been transferred to an independent public corporation (the *Statskog SF*), with the state as the only shareholder.<sup>82</sup> This corporation operates according to commercial business principles,<sup>83</sup> which may further diminish the influence of any claims based on cultural or traditional rights. This transfer has reduced the political influence of the Sámi parliament over the management of the land and may represent a sleight-of-hand move designed to provide a paper trail to dispossess Sámi after approximately 8000 years of continuous occupation.

In other parts of the country, a process of land privatisation is taking place, with the Norwegian Reindeer Breeders Association (NRL) working for the rights of reindeer herding as an industry rather than as part of a movement towards Sámi land rights.<sup>84</sup>

In essence, while some significant issues relating to the status of Sámi as an Indigenous people in Norway have been resolved, the issue of Sámi land rights remains to be settled in a manner regarded by many Sámi as being satisfactory or in accordance with international standards relating to Indigenous and human rights. The Norwegian government recognises only usufruct rights. Even these rights are not guaranteed—despite Norwegian claims that they are ‘strongly protected’—and can be weakened by ordinary Norwegian law and the actions of Norwegian authorities. In 1993 and 1994, for example, the Norwegian authorities granted general mineral prospecting licences to two multinational mining companies without even informing, let alone consulting with, the Sámi parliament and various Sámi reindeer organisations.<sup>85</sup> This met with objection from the Sámi parliament.

When the latest session of the Sámi parliament was opened in September 1999, the Norwegian Prime Minister, KM Bondevik, stated that he was interested in strengthening the Sámi parliament’s powers and broadening its role. Yet he was, at the same time ‘abrupt and dismissive’ to suggestions by the Sámi parliament President, Sven-Roald Nystø, that negotiations should be undertaken to agree on land and water rights for Sámi.<sup>86</sup>

While certain language rights and political rights (through the Sámi parliament) have been established, these clearly have their limits. The Sámi parliament does not have authority or jurisdiction with respect to matters relating to land use or reindeer husbandry.<sup>87</sup> Further, no tangible steps have yet been taken to grant a form of Indigenous

land rights for the Sámi. There is no system of collective management of land and resources nor has a form of effective co-management been put into place. The question of whether the Sámi collective use of traditional land should be recognised with the same legal force as western concepts of ownership and possession remains an area of some dispute.<sup>88</sup>

Despite the influence of the Sámi parliament, a more efficient system for the management of resources and the control of land use might be necessary in order to ensure the preservation of certain significant aspects of Sámi culture. This is a common concern for all Norwegians. Eventually, the question of land ownership also requires joint discussion between the Sámi and the wider community.

As a result of pressure from development, construction and urban settlement on traditional resources and livelihoods in north Norway (the three counties of Finnmark, Troms and Nordland), many Sámi have moved to urban areas. In one view, they have 'blended smoothly'<sup>89</sup> there with the majority population and enjoyed greatly increased living standards and equality of citizenship rights without any form of blatant discrimination,<sup>90</sup> but the extent to which this is due to under-communication of their Sáminess is unknown. Yet this blending has been seen to have facilitated a loss, or at least a 'passivity'<sup>91</sup> of Sámi cultural identity and a resultant loss of unity in the call by Sámi for full traditional Indigenous rights.

### *Conclusion*

These are important issues that the Sámi parliament will first need to address internally. Several Sámi politicians have emphasised a policy of moderation. These 'Norwegianized Sami'<sup>92</sup> elements, even within the Sámi parliament itself, may not regard Sámi claims for land and water rights as a high priority and may act to water down<sup>93</sup> any attempts to propel this issue to the top of the agenda. This would tend to aid the assimilationist efforts of the Norwegian State and may not allow for tangible gains for the Sámi.

In addition, the Sámi parliament is faced with political realities of majority and opposition groups, and these internal disagreements and criticisms, often with the next election for the Sámi parliament in mind, also serve to diffuse the more significant issues of concern to Sámi. Only after the various Sámi interest groups agree on a unified approach to the issue of land, resource and wildlife rights (including management) can they hope to achieve some progress on the matter on a broader plane. Most significantly for the future is the affirmation of the Norwegian Supreme Court in the Alta case of the protective relevance of international law in cases involving conflicting interests of the Sámi and the Norwegian State.<sup>94</sup> In this context, the significance of the increasing influence of ILO Convention No. 169 cannot be underestimated.

## Sweden

There are approximately 17,000 Sámi in Sweden, of whom about 2,000 constitute the distinct group of reindeer-breeding Sámi.<sup>95</sup> Another 8,000 live in the Sámi kernel lands in the north and a further 7,000 live in Stockholm, Gothenburg and other cities. As is the case for most of the Swedish population, this last group are generally economically well off.<sup>96</sup>

Unlike the Constitutions of Norway and Finland, the Swedish Constitution makes no specific reference to the Sámi. However, following an increase in the movement for formal recognition of the need for Sámi representation, the Swedish parliament (*Riksdagen*) adopted the *Sámi Act 1992*, which provides the basis for the establishment of a Sámi parliament in Sweden. In all there have been three Swedish government attempts to deal conclusively with the major Sámi issues—particularly land and resource rights. However these remain far from resolved.

### *The Sámi parliament in Sweden*

The issue of the Sámi in Sweden arose as an issue for the wider community in the 1970s. In 1977 the Swedish parliament discussed and approved various proposals based on a Sámi Report which presumed that, as an Indigenous people, the Sámi had a special position in the country.<sup>97</sup> The government established a working group to consider issues of concern to Sámi, which worked in co-ordination with the central national administration. Following the Alta affair in Norway, the Sámi of Sweden became more vocal in their demands for a comprehensive evaluation of their position and called for the establishment of specific laws dealing with Sámi rights.<sup>98</sup>

Various reports were prepared during the late 1980s and a separate *Sámi Act 1992* was approved by the Swedish parliament on 17 December 1992. The *Sámi Act 1992* provided for the establishment of the Sámi parliament, which began to operate on 26 August 1993. Its powers and jurisdiction are set out in the *Sámi Act 1992* and include the following:

The Saami Parliament shall work for a living Saami culture and thereby take initiatives to work for and propose measures that promote this culture.<sup>99</sup>

The mandate of the Swedish Sámi parliament is regarded as more clearly defined than its Norwegian or Finnish counterparts.<sup>100</sup> Perhaps because of this, some commentators see it as less independent than its Norwegian and Finnish counterparts.<sup>101</sup> It is expressly stated to be a State authority and has administrative authority in a number of areas.

It is authorised to ‘deal in the future with questions that concern the Saami culture in Sweden.’<sup>102</sup> In addition, the Swedish Sámi parliament is expressly mandated with specific tasks under the *Sámi Act*. These include:

- administering various State funds and other financial allocations for Sámi affairs,
- appointing members to the Sámi school Boards,
- leading and supervising efforts to reinforce the Sámi language,
- safeguarding and catering to specific Sámi needs, including the interests of reindeer herders concerned about access and use of land and water resources,
- taking part in community planning,
- informing the public and the wider community about the Sámi people.<sup>103</sup>

The first election of the thirty-one members of the Sámi parliament took place in 1993 and it began its activities in August of that year. The members of the Sámi parliament are elected from and by Sámi with Swedish citizenship.<sup>104</sup>

### *Sámi land rights*

As in Norway, there is no clearly demarcated Sámi homeland in Sweden.<sup>105</sup> Sámi ownership of land they have traditionally occupied was, for a time, recognised under Swedish-Finnish law. This concept of ownership had been based on a system whereby each Sámi family used ‘a hereditary or tax’ land within a Sámi village.<sup>106</sup> In 1928 the Swedish parliament introduced a law which downgraded Sámi land rights to something akin to the privileges that had been accorded to the Jews of the region by King Gustavus III in the eighteenth century. The prevailing attitude at this time was that ‘a Lapp should be a Lapp’—a true nomad. They should be entitled to keep their exotic culture and enjoy certain privileges (but not rights) of access to land for reindeer herding purposes as long as they kept to that and did not disturb the pace of progress.<sup>107</sup>

This concept of Lapp Privileges was only recently discounted, following decisions by the Supreme Court of Norway (the 1968 *Altevatn* decision) and the Supreme Court of Sweden (the 1981 *Skattefjaell* decision).<sup>108</sup>

### *The Taxed Mountain Case and its consequences*

In the *Skattefjaell* decision, otherwise known as the *Taxed Mountain Case*, the Swedish Supreme Court concluded that the State was to be regarded as the owner of land in northern Sweden which, under the Sweden-Finnish period, had been recognised as being under Sámi ownership. The court held that the Sámi involved in the case only had limited, usufructuary rights of use of the land.

In addition, the court determined that the Sámi also had reindeer grazing and fishing rights, on the basis of its interpretation of the Swedish Constitution, but were not as conclusive regarding rights of hunting. Sámi were capable of acquiring title to land through its use for traditional Sámi activities, but had not shown sufficient evidence to support this conclusion in the circumstances of the *Taxed Mountain Case*.<sup>109</sup>

In 1993 the Swedish parliament unexpectedly passed a law affecting traditional Sámi exclusive hunting and fishing rights. These changes were effected in the name of equal rights<sup>110</sup> and entered into force one day before the inauguration of the newly established Sámi parliament.<sup>111</sup> These changes allowed for small game hunting above the cultivation line and in reindeer grazing mountains and opened traditional Sámi hunting grounds to all Swedish citizens. Up until these changes, hunting and fishing in traditional Sámi areas had been considered as an exclusive Sámi right.<sup>112</sup> The Sámi right to hunting and trapping recognised in a 1971 Act was declared invalid.<sup>113</sup>

Sámi considered this to be a violation of their rights as it interferes significantly with reindeer herding. The Sámi parliament in its inaugural session adopted a resolution which was highly critical of the policy of the Swedish government. Representatives of 38 Sámi villages brought an action in the Swedish Supreme Administrative Court which failed, partly on technical grounds. They then brought an action before the European Commission of Human Rights. On 25 November 1996, the European Commission of Human Rights refused to act on the complaint about the 1993 law on the basis that domestic remedies (that is, civil action) had not been exhausted.<sup>114</sup>

Questions regarding rights to use land held under private title for reindeer grazing have also come before the courts. In 1990 three Swedish forest companies and seven hundred private landowners asserted that there were no separate traditional or customary Sámi rights to graze reindeer beyond the village borders. They brought an action before the courts to which the National Council of Sámi responded by petitioning the Swedish government and stating:

The mere opening of a case like this means a threat against the Saami industries and culture in the area.<sup>115</sup>

A partial settlement was reached between the parties in 1993.

Subsequently, the private individual landowners brought a number of claims before the Sveg district court which concluded in February 1996 that the Sámi did not in fact have any customary rights to use the land in dispute. This verdict was regarded as a surprise not only to the Sámi but also to the wider community.<sup>116</sup> An appeal has been lodged by the Sámi to the Court of Appeal and it is likely that the matter may end up in the Swedish Supreme Court.<sup>117</sup> This will prove to be very expensive for the Sámi community should they lose the decision.

As is the case with the Sámi parliament in Norway, the Swedish Sámi parliament has no formal legal position or authority with respect to the use and management of traditional Sámi land. These areas can, under Swedish law, be either privately owned or owned by the State. Legislation such as that passed by the Swedish parliament in 1993 and developments such as the current dispute regarding reindeer grazing, further threaten Sámi rights to land and water, as well as their use of other natural resources in Sweden.

*Article 27 of the ICCPR and protection of Sámi reindeer breeding*

One of the most important international legal mechanisms for the development of Indigenous rights is Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which protects the way of life of minorities as part of its general dealing with cultural minority rights. According to provision, persons belonging to ethnic, religious or linguistic minorities shall not be denied the right, in community with other members of the group, to enjoy their own culture. Since Article 27 of the ICCPR protects the traditional way of life of minorities and Indigenous peoples as an essential part of their culture, the cultural link between reindeer hunting as part of Sámi livelihood and an integral part of their culture is vital for the continuing development of their rights.

In the case of *Ivan Kitok v Sweden* (197/1985), the Swedish government stated that reindeer husbandry is so closely connected to Sámi culture that it must be considered part of Sámi culture itself. Ivan Kitok, a Sámi, had challenged Swedish legislation restricting reindeer breeding to members of Sámi communities. Kitok had lost his breeding rights and the Sámi community had chosen not to restore them. The Human Rights Committee affirmed that economic activity can fall within the ambit of Article 27 and found that reindeer husbandry is an essential element of Sámi culture. The Committee had to balance the individual rights of Kitok and the community rights of the Sámi community. It determined that, on the facts of the case, the restrictions on reindeer breeding—for economic and ecological reasons and to foster the well-being of the Sámi community—were reasonable and consistent with the aims of the Article.<sup>118</sup>

*ILO Convention No 169*

Perhaps the most important recent Swedish commission is that which explored whether Sweden can ratify or accede to ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries. The Swedish government had earlier avoided ratification of the convention, arguing that it would not sign it until Norway, which ratified it as a statement of intent rather than as a statement of binding law, was in compliance. The issue has been under consideration for at least five years and the current commission reported in March 1999.<sup>119</sup> It outlined measures that Sweden would be required to make to enable it to comply with the provisions in the Convention. The Report notes that the greatest obstacle to ratification by Sweden had previously been considered to be the fact that it does not fulfil the conditions set down by the Convention with regard to land rights.<sup>120</sup> However, it notes that Sweden already fulfils the requirements set out in the Convention in many respects and that the rules concerning Sámi land rights are in fact the main stumbling block.<sup>121</sup> For example, the Convention requires States to recognise the rights of ownership and possession of the peoples concerned over the land which they traditionally occupy. In the Report, traditionally occupy is seen to denote:



land which the indigenous peoples have traditionally had access to for their subsistence and traditional activities, that is, had predominant influence on.<sup>122</sup>

Applying this definition to land which the Sámi may be considered to occupy, it is asserted that this must apply primarily to the parts of the year-round pastures which the State has owned in modern times. However, the boundaries of these areas are unclear and must be established.<sup>123</sup> The use of the expression ‘rights of ownership and possession’ in the Convention is not considered to necessarily involve formal title to land. However the Convention does assume that the land rights reach a certain minimum level.<sup>124</sup> This minimum level is estimated to correspond to right of use and possession of the land with strong protection under the law.<sup>125</sup>

The Report also states that the land rights of the Sámi that apply today do not reach the appropriate minimum standard since the Sámi are ‘forced to tolerate considerable encroachments on their reindeer breeding rights’.<sup>126</sup> To fulfil the minimum ILO requirements, the Sámi must be ‘more strongly protected against such encroachment’.<sup>127</sup> Above all reindeer breeding rights must be protected in the same way as other land-user rights. To ensure that such protection is effective, the Sámi must be given an opportunity to submit their views in advance on measures that might constitute more than a minor encroachment on reindeer breeding rights. They should also be entitled to have those measures examined by an impartial body with knowledge of reindeer breeding and the land required for that purpose.<sup>128</sup> The Report recommends that where measures are taken that have an adverse effect on reindeer breeding rights, the Sámi should be entitled to compensation.<sup>129</sup> Furthermore, the Sámi must be given the same possibility as other groups to transmit their hunting and fishing rights outside their own community in exchange for payment.<sup>130</sup>

The Report also deals in some detail with the requirement of the Convention that States are to recognise Indigenous peoples’ right to use land which they have traditionally used together with others over time, their right to have land claims examined in a judicial process and the stipulation that they be given the opportunity to exert influence on the use, management and conservation of natural resources when such measures affect them. Like many previous Reports on the situation of the Indigenous people in Sweden, this Report has yet to be acted on.

### *Conclusion*

Access to natural resources is an ongoing and unresolved issue with respect to the preservation of the Sámi culture throughout the Scandinavian countries and is exemplified by the situation of Sweden. As Korsmo suggests, the ‘major regulatory regime developed specifically for the Sami has been a series of reindeer management laws, beginning in 1886’.<sup>131</sup> The latest incarnation identifies a right of all Sámi people—the so-called reindeer herding right, based on time immemorial. This, however, entitles only those

Sámi living and working in the collective Sámi village as full time participants in the reindeer economy to exercise the right.<sup>132</sup> In reality it, therefore, covers only a small minority of Sámi, although it does entail use of land and water for reindeer pasture, hunting and fishing.<sup>133</sup> Nor is it clear to what extent this recognition extends to outlying lands, struggles over which have diminished the effect of the long-standing, original recognition of this form of traditional cultural and economic activity.

This affects many aspects of Sámi society and has been partially responsible for the movement of Sámi from the north to southern areas of the country. Stockholm now has the second highest Sámi population in Sweden. Demographic studies show that while the overall number of Sámi is increasing, the number engaged in traditional herding activities is declining.<sup>134</sup> Although this is not entirely due to the policies of the State, Swedish administrative actions do not encourage these traditional activities, thus placing Sámi culture and identity at some risk given the central importance of the reindeer as a cultural symbol for at least one major group of Swedish Sámi. Swedish government prevarications over Sámi rights, exemplified in the recent delays on ratification of ILO Convention No 169, presage the future challenges for Swedish Sámi.

## **Finland**

Most of the approximately 6,500<sup>135</sup> Sámi living in Finland inhabit the northern-most part of the country, which constitutes their traditional area. This area includes four rural communities, but they constitute a majority in only one of these municipalities, Utsjoki.<sup>136</sup> Due in large part to their small numbers in Finland, the political influence of the Sámi is limited.<sup>137</sup>

Despite this, a number of important steps have been taken to progress the rights of Sámi in Finland. Following amendments in 1995, the Finnish Constitution and the *Sámi Act 1995* recognise this area as the Sámi Homeland.<sup>138</sup> This area covers approximately 35,000 square kilometres within which the Sámi have a right to cultural autonomy by virtue of Article 51(a) of the Finnish Constitution.

In addition, the Sámi language has been given semi-official status in the Sámi Homeland.<sup>139</sup>

### *The Sámi parliament in Finland*

Finland was the first of the Scandinavian countries to establish an elected Sámi body. The first parliamentary elections were held in 1972 and the Sámi parliament began to operate in the autumn of 1973. It was established by Presidential Ordinance to consider questions of concern to Sámi.

The government had earlier established a Sámi Commission to look into the legal position of the Sámi in Finland, which recommended the passing of a specific *Sámi Act*.

According to the commission's recommendations, the Sámi were to be regarded as an Indigenous people of Finland, with a language and culture different from the majority of the population.<sup>140</sup> While the recommendation for a separate Act was not taken to comprehensive debate in the Finnish parliament, the Ordinance was completed in 1973 and made provision both for a Sámi parliament and a Sámi Homeland.<sup>141</sup>

The Finnish Sámi parliament has no decision-making authority. Its formal political role was primarily limited to a right to issue statements, as well as raising various areas of concern for discussion. It originally had twenty members elected on the basis of a public census among Finnish Sámi.

However, by the end of 1995 the Finnish parliament had revised the structure of the Finnish Sámi parliament. The *Sámi Act 1995* had been passed, and the Finnish Constitution had been amended to strengthen the legal position of the Sámi. Section 51a of the Finnish Constitution now provides as follows:

The Saami as an indigenous people shall, according to the provisions in the law, be ensured cultural autonomy within their Homeland area, in relation to their language and culture.<sup>142</sup>

Part of the reasoning behind the government's actions in 1995 were not to change the position of the Sámi in Finland but to give them a political position which more accurately reflected their earlier political and administrative position in the country.<sup>143</sup>

The newly constituted Sámi parliament, the *Sameting*, had its inaugural meeting in 1996 following elections held during 1995.<sup>144</sup>

The *Sameting* comprises twenty-one directly elected representatives, each with a four year term. No fewer than three of the representatives and one vice-representative must come from each of the municipalities located within the Sámi Homeland. The Chairman of the Sámi parliament is also the leader of the executive committee and is elected from among the representatives in the parliament.

Under the *Sámi Act 1995*, the Finnish Sámi parliament is mandated as follows:

To the Saami Parliament belong the areas that relate to the Saami's language and culture and their position as indigenous people.

In the areas that belong to the Saami Parliament, it can take initiatives, make proposals and issue statements to the authorities. In relation to these areas, the Saami Parliament also has the right to make decisions as provided for in this or any other law.<sup>145</sup>

The Sámi parliament has some delegated authority with respect to funds specifically earmarked in the national budget for Sámi related projects.

The *Sámi Act 1995* also expressly declares the Sámi parliament to be the representative body of all Finnish Sámi in both national and international relations.<sup>146</sup> Pursuant to

section 9 of the *Sámi Act 1995*, all national authorities in Finland are obligated to negotiate with the Sámi parliament in matters of concern and relevance to the Sámi. This obligation goes beyond consultation. This obligation extends to the following matters in the Sámi Homeland:

- community planning,
- the management, use, leasing and designation of state lands, conservation areas and wilderness areas,
- applications for mining licences,
- legislative or administrative changes affecting traditional Sámi occupations and livelihoods,
- the development of teaching of the Sámi language and its use in schools and in the social and health services, and
- any other matters affecting the Sámi language or culture.<sup>147</sup>

This obligation does not give the Sámi parliament a power of veto, but it does require that State authorities negotiate with the Sámi parliament to resolve any disagreements that may occur between them with respect to the specified issues.

There is nothing similar to this obligation to negotiate in either Norway or Sweden.<sup>148</sup>

Like Sweden, Finland has not ratified ILO Convention No 169, the main obstacle for both countries being the provisions of Article 14 of that Convention.<sup>149</sup>

Finland has ratified the 1992 European Charter on Regional or Minority Languages, and has specifically made the Charter applicable to both the Sámi language and the Swedish language (a Swedish speaking minority currently represents approximately six percent of the Finnish population).<sup>150</sup>

### *Sámi land rights*

As a result of the legal amendments made by the Finnish parliament in 1995, the Sámi have been granted a right to cultural autonomy within the demarcated area of the Sámi Homeland.

The government of Finland has also been undertaking a preparatory study to investigate what compensation should be made to Sámi for economic losses towards the end of the nineteenth century when they failed to register their claims to land areas traditionally used for hunting and fishing.<sup>151</sup> At that time, the lands surrounding the Sámi villages became the property of the State. It is the view of the Sámi that the Finnish State has taken over the ownership of their traditional lands unlawfully.<sup>152</sup>

Despite the progress that has been made, the Sámi are not convinced that the State will grant them any further formal rights. There is a feeling among Sámi that their reindeer-herding, fishing and hunting areas are shrinking and that formal environmental

protection of these areas is also declining. Overall, the territorial rights that they do have are regarded as relatively weak.<sup>153</sup>

As an example, the reindeer herding Sámi Anni Äärela and Jouni Näkkäljärvi were unsuccessful in an action against the Finland government to have all logging in Kariselkä stopped. The case is on appeal to the Supreme Court. The Sámi parliament supports such attempts to strengthen their traditional economic rights.<sup>154</sup>

In its submission to the Finnish parliament regarding the proposed ratification by Finland of ILO Convention No 169, the Sámi parliament has expressed the view that problems regarding Sámi ownership of their traditional territories and the use of natural resources located in the territories need to be resolved as a condition of ratification.

It is highly likely, however, that the Finnish-speaking population living in the Sámi Homelands would strongly oppose any special rights to the Sámi.<sup>155</sup> They have apparently organised various anti-Sámi activities, which have been a source of concern to the Sámi parliament.<sup>156</sup> They have formed a registered group, the Association for Lapp Culture and Traditions (*Lappalaiskulttuuri – ja perinnedthdistys r.y.*) which is seeking to be elected to the Sámi parliament as Sámi.<sup>157</sup> The members of the Sámi parliament believe that this group has made efforts to obstruct the work of the Sámi parliament.<sup>158</sup>

#### *Article 27 of the ICCPR Protecting the Way of Life of Minorities*

The significance of Article 27 has been mentioned in the context of the *Kitok* case with respect to the Swedish law restricting reindeer breeding. The Article is crucial in relation to the rights of Indigenous people to enjoy their culture.<sup>159</sup> Scheinin divides the significant case law dealing with Article 27 into cases which form part of more general international case law, involving consideration of the Human Rights Committee of the United Nations, and its consideration of the legal interpretation of Article 27 itself. There are Scandinavian domestic cases involving Article 27 in relation to logging and mining activities.<sup>160</sup>

Another relevant case from Canada is *Bernard Ominayak Chief of Lubicon Lake Band v Canada* (167/1984). In this case the Human Rights Committee of the United Nations found a violation of Article 27 as a result of authorities conducting expropriations and granting concessions to private companies to exploit oil, gas, mineral and forest resources located in lands traditionally used by an Indigenous group.

In the *Lansmen* case (*Lansmen et al v Finland*, 511/1992) the reasoning in both *Kitok* and *Lubicon Lake* was adopted by Sámi living in the Angeli area in relation to Finnish authorities granting a licence to a private company to start quarrying building stone close to the village within reindeer herding lands of the Muotkatunturi Herdsmen's Co-Operative. That the complainants were members of a minority within Article 27 and as such had the right to enjoy their own culture was not in doubt. Indeed the Human Rights

Committee expressly acknowledged this, recognising further that reindeer husbandry was an essential element of their culture. However it was considered that there had been no violation of Article 27 since the amount of stone quarried was small, consultations had taken place with the local Sámi and measures had been taken to minimise the impact of the quarrying on reindeer herding activities. Even though the case illustrates a refining of the elements of cultural recognition, the Committee issued a warning to the Finnish government in relation to its future activities. This was to the effect that, in carrying out economic activities, compliance with Article 27 required that the complainants continue to benefit from reindeer husbandry.

According to Scheinin, there is a further legal significance in this decision of the Human Rights Committee—the new element which it introduced emphasising that Article 27 protects not only traditional means of livelihood of national minorities but more generally activities that are characterised as important from a typical or cultural perspective. The result is that Indigenous peoples may invoke the Article, even where their traditional way of life has been adapted to fit modern and technological demands. The State party is expressly considered under a duty to bear this in mind when either extending existing contracts or granting new ones.<sup>161</sup> For Scheinin, framing the duty in this way is of special relevance<sup>162</sup> for Finland, as Sámi there invoke Article 27 to defend their right to enjoy their culture and their land against competing forms of land use by other actors.<sup>163</sup> Pritchard considers that *Lansmann's case* supports the proposition that development which adversely affects Indigenous cultural rights, including places of spiritual and economic significance, will be contrary to Article 27.<sup>164</sup>

## Notes

- <sup>1</sup> There are a number of alternate spellings for the Sámi people. For the sake of convenience, the spelling 'Sámi' has been used throughout this Chapter. However, when direct quotes or translations have been taken from other sources, the spelling used in that source has been retained.
- <sup>2</sup> For many years, Sámi representatives have campaigned to use the word 'Sámi' instead of 'Lapp', which is considered by many Sámi as a derogatory term. The word 'Sámi' now has achieved widely accepted usage. H Beach, 'The Saami of Lapland' in Minority Rights Group (ed), *Polar peoples – Self-determination and development*, Minority Right Publications, 1994, pp 147, 151.
- <sup>3</sup> J Henriksen, 'Strengthening Sami cross boundary institutions and relations' IWGIA, *Indigenous Affairs*, No 3 July-September 1998, p 34.
- <sup>4</sup> JB Henriksen, 'The legal status of Saamiland rights in Finland, Russia, Norway and Sweden' IWGIA, *Indigenous Affairs*, No 2 April-June 1996, pp 4, 5.
- <sup>5</sup> H Gaski, 'Introduction: Sami culture in a new era' in H Gaski (ed), *Sami culture in a new era – The Norwegian Sami experience*, University of Washington Press, 1997, pp 9, 15.
- <sup>6</sup> Beach, above note 2, p 149.
- <sup>7</sup> Id, p 187.
- <sup>8</sup> IWGIA, *The Indigenous world 1996-97*, IWGIA, 1997, p 38.

- <sup>9</sup> Beach, above note 2, p 158.
- <sup>10</sup> T Cramer, 'The Sami in four countries' IWGIA, *Newsletter*, No 1 Jan-March 1993, p 45.
- <sup>11</sup> E Niemi, 'Sami history and the frontier myth' in H Gaski (ed), above note 5, p 64.
- <sup>12</sup> Id, p 65.
- <sup>13</sup> Ibid.
- <sup>14</sup> S Forest, *Territoriality and state-Sami relations*, accessed from the world wide web at <http://arcticcircle.uconn.edu/HistoryCulture/Sami/samisf.html> on 23 August 1999.
- <sup>15</sup> C Smith, 'The development of Sami rights since 1980' in OT Brantenberg, J Hansen and H Minde (eds), *Becoming visible: Indigenous politics and self-government*, The Centre for Sami Studies, University of Tromsø, 1995, pp 65-72.
- <sup>16</sup> Beach, above note 2, p 172.
- <sup>17</sup> M Morner, 'Land rights of the Sami and Indians' in B Jahreskog (ed), *The Sami national minority in Sweden*, Almqvist and Wiksell International, 1982, p 36, 44-45.
- <sup>18</sup> Id, p 45.
- <sup>19</sup> Id.
- <sup>20</sup> Id, p 174.
- <sup>21</sup> H Minde, 'The making of an international movement of Indigenous peoples' [1996] *Scandinavian Journal of History*, Vol 21 No 3, pp 221, 226.
- <sup>22</sup> Id, p 228.
- <sup>23</sup> H Eidheim, 'Ethno-political development among the Sami after World War II' in Gaski (ed), above note 5, p 32.
- <sup>24</sup> Id, p 33.
- <sup>25</sup> A Grahl-Madsen, 'Introduction: The Sami convention' in F Harhoff et al (eds), *The small nations of the North in international and constitutional law*, The Kautokeino Seminar, 1985.
- <sup>26</sup> L Hannikainen, 'The status of minorities, Indigenous peoples and immigrant and refugee groups in four Nordic States' [1996] 65 *Nordic Journal of International Law* 1, p 8.
- <sup>27</sup> Id, p 9.
- <sup>28</sup> Beach, above note 2, p 205.
- <sup>29</sup> F Horn 'Recent attempts to elaborate standards on minority rights' in *Current international law issues, Nordic perspectives: Essays in honour of Jerzy Sztucki*, Nijhoff, 1994, p 81.
- <sup>30</sup> Ibid.
- <sup>31</sup> Ibid.
- <sup>32</sup> Ibid, citing the work of Korpijaakko in particular.
- <sup>33</sup> JB Henriksen, *SAAMI parliamentary co-operation an analysis*, IWGIA, 1999, p 24.
- <sup>34</sup> Hannikainen, above note 26, p 51.
- <sup>35</sup> In 1994 there were estimated to be 206,000 reindeer in Norway, including approximately 10,000 in non-Sámi areas in South Norway. JKH Kalstad, 'Aspects of managing renewable resources in Sami areas in Norway' in Gaski, above note 5, p 112.
- <sup>36</sup> Hannikainen, above note 26, p 40.
- <sup>37</sup> Id, p 35.
- <sup>38</sup> H Minde, 'The Saami movement, the Norwegian Labour Party and Saami rights' in Ahrweiler (ed), *L'image de L'autre: étrangers, minoritaires, marginaux*, Vol 2 Stuttgart, 1984, accessed from the world

wide web at <http://www.uit.no/ssweb/dok/Minde/Henry/84.htm#xo> on 23 November 1999; also R Paine, 'Dam a river, damn a people? Saami (Lapp) livelihood and the Alta/Kautokeino hydro-electric project and the Norwegian parliament' 1982 International Working Group for Indigenous Affairs, Copenhagen.

<sup>39</sup> Ibid.

<sup>40</sup> H Eidheim, 'Ethno-political development among the Sami after World War II' in Gaski, above note 5, p 47.

<sup>41</sup> TG Svensson, 'Right to self-determination: A basic human right concerning cultural survival. The case of the Sami and the Scandinavian State' in AA An-Na'im, *Human rights in cross-cultural perspectives*, University of Pennsylvania Press, pp 363, 372.

<sup>42</sup> Id, p 373.

<sup>43</sup> Hannikainen, above note 26, p 2.

<sup>44</sup> T Brantenberg, 'The end of 13 years of silence: The Sami land rights issue in Norway' IWGIA, *Newsletter*, No 4 October-December 1993, pp 26, 36.

<sup>45</sup> H Minde, *Sami land rights in Norway: A test case for Indigenous peoples*, draft paper dated 24 October 1999, p 8 (copy with authors).

<sup>46</sup> Beach, above note 2, p 183.

<sup>47</sup> Id, p 188.

<sup>48</sup> The text of the *Sámi Act 1987* is set out in (1996) 1 AILR 286.

<sup>49</sup> IWGIA, above note 8, p 39.

<sup>50</sup> Henriksen, above note 33, p 37.

<sup>51</sup> For an outline of a number of the operative paragraphs of ILO Convention No 169 which are directly relevant to this book, see Chapter 2. The text of the ILO Convention No 169 is set out in (1996) 1 AILR 472, pp 472-82.

<sup>52</sup> Henriksen, above note 3, p 36.

<sup>53</sup> See Chapter 2.

<sup>54</sup> Beach, above note 2, p 197.

<sup>55</sup> Hannikainen, above note 26, p 51.

<sup>56</sup> Beach, above note 2, p 176.

<sup>57</sup> Minde, above note 38.

<sup>58</sup> Ibid.

<sup>59</sup> H Eidheim, *Aspects of the Lappish minority situation*, University Press, 1971, quoted in Minde, above note 38.

<sup>60</sup> S Forest, *Territoriality and State-Sami relations*, accessed from the world wide web at <http://arcticcircle.uconn.edu/HistoryCulture/Sami/samisf.html> on 23 August 1999.

<sup>61</sup> IWGIA, *The Indigenous world 1997-98*, IWGIA, 1998, p 42.

<sup>62</sup> *Time Magazine*, 20 October 1997, p 14.

<sup>63</sup> *Sami Act 1987* s 2-1.

<sup>64</sup> Henriksen, above note 33, p 38.

<sup>65</sup> Id, p 39.

<sup>66</sup> Beach, above note 2, p 186.



- 67 Henriksen, above note 3, p 36.
- 68 H Eidheim, 'Ethno-political development among the Sami after World War II' in Gaski (ed), above note 5, p 59.
- 69 Brantenberg, above note 44, p 36.
- 70 Forest, above note 60.
- 71 Ibid.
- 72 Brantenberg, above note 44, p 29.
- 73 E Niemi, 'Sami history and the frontier myth' in Gaski (ed), above note 5, p 71.
- 74 Minde, above note 38.
- 75 Kalstad, above note 35, p 117.
- 76 Brantenberg, above note 44, p 26.
- 77 Quoted in Brantenberg, above note 44, p 29.
- 78 Niemi, above note 73, p 77.
- 79 Committee Report, NOU, 1997, 4.61, quoted in Minde, above note 47.
- 80 JT Solbakk, 'Sami mass media – Their role in a minority society' in Gaski (ed), above note 5, p 181.
- 81 Ibid.
- 82 Kalstad, above note 35, p 118.
- 83 Hannikainen, above note 26, p 55.
- 84 Ibid.
- 85 Henriksen, above note 4, p 8.
- 86 P Jull and H Kajlich, *First Peoples, late admissions: Recognising Indigenous rights*, 5 October 1999, Final draft of paper prepared for the 1999 Fulbright Symposium: 'Beyond the Republic: Modernising the Australian Constitution, 29 September - 1 October 1999, p 5.
- 87 Ibid.
- 88 Minde, above note 45.
- 89 Beach, above note 2, p 203.
- 90 Ibid.
- 91 Ibid.
- 92 Solbakk, above note 80, p 184.
- 93 Ibid.
- 94 Svensson, above note 41, p 373.
- 95 T Cramer, 'Issues and problems for the Swedish Sami 1988' [1988] 57 *Nordic Journal of International Law* 270, p 270.
- 96 Ibid.
- 97 Henriksen, above note 33, p 41.
- 98 Id, p 42.
- 99 *Sami Act* chapter 2 s 1, as quoted in Henriksen, above note 33, p 43.
- 100 Ibid.
- 101 Hannikainen, above note 26, p 34.
- 102 *Sami Act* chapter 1 s 1, as quoted in Henriksen, above note 33, p 43.
- 103 Henriksen, above note 3, p 38.

- <sup>104</sup> Henriksen, above note 4, p 10.
- <sup>105</sup> Henriksen, above note 3, p 38.
- <sup>106</sup> Henriksen, above note 4, p 6.
- <sup>107</sup> Beach, above note 2, p 176.
- <sup>108</sup> Cramer, above note 10, p 47.
- <sup>109</sup> Henriksen, above note 4, p 12.
- <sup>110</sup> Hannikainen, above note 26, p 34.
- <sup>111</sup> Id, p 35.
- <sup>112</sup> Henriksen, above note 4, p 12.
- <sup>113</sup> IWGIA, above note 8, p 41.
- <sup>114</sup> Decision as to the admissibility of Application no 27033/95 by Konkama and thirty-eight other Sámi villages against Sweden.
- <sup>115</sup> A Jonsson, 'The cultural struggle over reindeer winter grazing in southern Sapmi', IWGIA, *Indigenous Affairs*, No 2 April-June 1998, pp 34, 35.
- <sup>116</sup> Ibid.
- <sup>117</sup> Ibid.
- <sup>118</sup> S Pritchard, 'The International Covenant on Civil and Political Rights and Indigenous Peoples' in S Pritchard, *Indigenous Peoples, the United Nations and human rights*, Zed Books, The Federation Press, 1998, pp 184-202, 197.
- <sup>119</sup> Swedish Government Publication, 'Samerna – ett ursprungsfolk i Sverige - Fragen om Sveriges anslutning till ILO:s konvention nr 169' SOU, 1999, p 25.
- <sup>120</sup> Id, p 24.
- <sup>121</sup> Id, p 25.
- <sup>122</sup> Id, p 26.
- <sup>123</sup> Ibid.
- <sup>124</sup> Ibid.
- <sup>125</sup> Ibid.
- <sup>126</sup> Ibid.
- <sup>127</sup> Ibid.
- <sup>128</sup> Ibid.
- <sup>129</sup> Ibid.
- <sup>130</sup> Ibid.
- <sup>131</sup> F Korsmo, 'Resonance and reduction of Indigenous claims in western legal thought: The place of the origin' (unpublished article, courtesy of the author), p 1.
- <sup>132</sup> Ibid.
- <sup>133</sup> Ibid.
- <sup>134</sup> Beach, above note 2, p 193.
- <sup>135</sup> Henriksen, above note 3, p 37.
- <sup>136</sup> B Broms, 'Recent Sami language legislation in Finland' in G Alfredsson and P Macalister-Smith (ed), *The living law of nations – Essays on refugees, minorities, Indigenous peoples and the human rights of other vulnerable groups*, Engel Publishers, 1996, p 259.
- <sup>137</sup> Hannikainen, above note 26, p 45.

- <sup>138</sup> Broma, above note 136.
- <sup>139</sup> Hannikainen, above note 26, p 45.
- <sup>140</sup> Henriksen, above note 33, p 30.
- <sup>141</sup> Ibid.
- <sup>142</sup> As translated in Henriksen, id, p 32.
- <sup>143</sup> Id, p 33.
- <sup>144</sup> Id, p 30.
- <sup>145</sup> *Sámi Act 1995*, s 5, as translated in Henriksen, id, p 31.
- <sup>146</sup> *Sámi Act 1995*, s 6.
- <sup>147</sup> Henriksen, above note 3, p 36.
- <sup>148</sup> Henriksen, above note 33, p 34.
- <sup>149</sup> See Chapter 2.
- <sup>150</sup> Hannikainen, above note 26, p 38.
- <sup>151</sup> Broma, above note 136.
- <sup>152</sup> Hannikainen, above note 26, p 46.
- <sup>153</sup> Ibid.
- <sup>154</sup> IWGIA, above note 51, p 44.
- <sup>155</sup> Hannikainen, above note 26, p 47.
- <sup>156</sup> The Finnish Sami parliament, 'Land rights, linguistic rights and cultural autonomy for the Finnish Sami People' IWGIA, *Indigenous Affairs*, No 3/4 July-Dec 1977, p 48.
- <sup>157</sup> Id, p 51.
- <sup>158</sup> Ibid.
- <sup>159</sup> Pritchard, above note 118, p 199.
- <sup>160</sup> M Scheinin, 'Land rights and the right to culture' in I Seurujarvi-Kari and UM Kulonen, *Essays on Indigenous identity and rights*, Helsinki University Press, 1996.
- <sup>161</sup> Ibid.
- <sup>162</sup> Ibid
- <sup>163</sup> Ibid.
- <sup>164</sup> Pritchard, above note 118, p 199.



# Chapter 11 ■

## Australian Land Rights Legislation

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### Introduction

This Chapter offers an overview of the land-holding and governance structures established by land rights legislation in the several jurisdictions of Australia. The material has been drawn together for comparative purposes. Any revision of the governance structures under native title legislation may be able to draw on the experiences of land rights and other governance bodies, some of which have been in operation for several decades.

The discussion of each jurisdiction's laws is divided into a general section on land-holding and governance structures, and material on the degree of self-government allowed for by the legislation. The main indicia of self-government examined are control over access to lands, control over mining activity and general decision-making powers. These provide a good opportunity for comparison across the Australian jurisdictions.

### The relationship of Indigenous peoples to land

The authors proceed from the premise that the relationship of Indigenous peoples to land is qualitatively different from that of other Australians. In a paper written for the Council for Aboriginal Reconciliation, Dr Dermot Smyth stresses the importance for non-Indigenous Australians to recognise the breadth of the Indigenous concept of 'country'.

'Country' refers to more than just a geographical area: it is shorthand for all the values, places, resources, stories and cultural obligations associated with that geographical area. For coastal Aboriginal peoples, 'country' includes both land and sea areas which are regarded as inseparable from each other.<sup>1</sup>

Indigenous peoples have a spiritual connection to the land and see themselves as custodians of it rather than owners in the common law sense. For Indigenous peoples, the natural features of Australia have specific spiritual origins described in dreamtime stories and songlines making the land and sea particularly significant.<sup>2</sup>

I received the title in the land from those old people and there is nothing I can do: I cannot refuse that title because it is inside me.<sup>3</sup>

The survival of the indigenous foundations of life are woven into the land. Without it, our laws, culture, languages and history struggle to find form in a land that we are dispossessed of.<sup>4</sup>

Membership of a particular clan and thus association with a particular clan country is given at birth. Membership confers access to clan resources and imposes certain ceremonial obligations.<sup>5</sup> Each Indigenous community has its own system of law.

By Dreaming Law no country is dominated by another.<sup>6</sup>

Generally, the relationship of non-Indigenous Australians with land is proprietary rather than spiritual. While particular places may have strong emotional significance to certain families or communities, this is generally based on pride in ownership or length of association. The sense of identity derives not from being part of the land, but of exercising control over it through formal rights of exclusive possession and occupation. In this regime land is, first and foremost, a commodity.

Aboriginal and Torres Strait Islander groups operate according to highly developed systems of laws. The non-Indigenous community has been slow to recognise this.<sup>7</sup> The phrase 'native title' is a relatively new term for the concept through which Australian common law recognises rights under ancient Indigenous systems of land law.<sup>8</sup> The phrase 'land rights' is an earlier term which refers to the political struggle of Indigenous Australians for recognition of their territorial rights, and for the partial recognition of such rights under Australian statute law.

### *Recognition under Australian law*

The first case to reach an Australian court brought by Indigenous Australians asserting their territorial rights under common law was unsuccessful. In *Milirrpum v Nabalco Pty Ltd* (the Gove Land Rights case)<sup>9</sup> Justice Blackburn of the Supreme Court of the Northern Territory felt bound by the precedents to conclude that 'the doctrine [of native title] does not form, and never has formed, part of the law of any part of Australia'.

If the common law could not accommodate Indigenous territorial rights, legislation would be necessary for the purpose. For the Northern Territory, legislation recommended by the Aboriginal Land Rights Commission was enacted in 1976. Some states also enacted land rights legislation.<sup>10</sup>

The limitations to what was being offered, specifically in Queensland in 1982, led Torres Strait Islander plaintiffs to commence a fresh action for judicial recognition of their native title at common law. The litigation took over ten years to conclude.

In 1992 the Meriam people of the Murray Islands in the Torres Strait irrevocably changed the way the non-Indigenous legal system must accommodate Indigenous land rights in Australia. They successfully asserted their native title to land before the High Court of Australia in *Mabo v Queensland (Mabo (No 2))*.<sup>11</sup> The *Mabo* decision was revolutionary to the extent that it correctly applied the common law after years of misapplication. The application of the doctrine of *terra nullius* to Australia had been more revolutionary; not so much an overthrowing of an old regime as a disavowal of its existence.<sup>12</sup> The doctrine is the archetypal example of Colonial solipsism:<sup>13</sup>

We learned that [English colonial] law told them a story called *terra nullius*, which meant that if you go to a land where the people don't look like you or live like you, then you can pretend they don't exist and take their land.<sup>14</sup>

According to the High Court, native title is good against the whole world.<sup>15</sup> However, it is not an easily defined set of rights. The elements of native title depend on the traditional laws and practices of the particular group of Indigenous people holding it.

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.<sup>16</sup>

Generally, native title will embrace rights of occupation, rights to participate in ceremonial activity, including hunting and fishing, and the right to exclude others from the land. However, it is not helpful to focus on developing a definitive list of native title rights.

There is something untranslatable inherent in Indigenous relationships to land that will never be captured by a declaration of the connection as a bundle of rights.<sup>17</sup>

It is essentially the way that we live, the beliefs that we practice, the values that we ascribe to that make up our identity. It is what the High Court calls Native Title but essentially it's the foundations of our society and the way our society's maintained itself.<sup>18</sup>

Deciding what native title encompasses should be a matter for individual Indigenous groups.

Where the Crown alienates land by granting an interest that is inconsistent with a continuing right to enjoy native title, the latter is extinguished to the extent of the inconsistency.<sup>19</sup> For example, the grant of an estate in freehold (which confers a right to exclusive possession) extinguishes native title over that land for the purposes of non-Indigenous law.<sup>20</sup> According to non-Indigenous courts, native title cannot be revived.<sup>21</sup>

The relationship of native title to land rights conferred under statutory schemes is not simple and may present a particular problem when land rights have been granted other than on the basis of native title/traditional ownership. The tendency has been to provide legislatively that a grant of statutory land rights will not displace native title rights and interests.

The following discussion considers land rights legislation in the several jurisdictions, commencing with the landmark Commonwealth legislation for the Northern Territory.

## Northern Territory

### Land-holding and governance structures

#### *Introduction*

In the Northern Territory Aboriginal people can acquire land either under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) or as an 'excision' from a pastoral

lease under the *Pastoral Land Act 1992* (NT).<sup>22</sup> Both mechanisms are available in addition to the rights Aboriginal people may have as native title holders.

In *Pareroultja v Tickner* the full bench of the Federal Court held that a grant of an estate in fee simple to a Land Trust under the ALRA does not extinguish native title.<sup>23</sup> In the leading judgment Justice Lockhart stated as follows:

A grant of an estate in fee simple to a Land Trust under the Land Rights Act would ordinarily be made for the benefit of Aboriginals who have native title to the land. The Land Rights Act protects the interests of traditional Aboriginal owners. ...A grant of land in fee simple to a Land Trust under the Land Rights Act does not prevent Aboriginals having the benefit of native title from continued occupancy, use or possession of their land to the extent that it is in conformity with Aboriginal tradition governing the rights of the relevant Aboriginals with respect to that land.<sup>24</sup>

This principle cannot be extended to all land rights legislation throughout Australia. Where such legislation confers title other than on the basis of traditional rights it will almost certainly extinguish native title if the grantees are people other than the native title holders, unless there is a statutory provision to the contrary.<sup>25</sup>

In addition to grants to Land Trusts under the ALRA and excisions from pastoral leases, Aboriginal communities may exercise some control over certain traditional lands within national parks in the Northern Territory.

## **Aboriginal Land Rights Act**

### *Introduction*

The ALRA is Australia's oldest land rights regime and has set the benchmark for other such legislation.<sup>26</sup> It accords traditional Aboriginal owners greater rights at law than other land rights regimes elsewhere in Australia and has been used to claim over 40 per cent of land in the Northern Territory.<sup>27</sup> Indigenous peoples in the Northern Territory fought long and hard for the legislation. For example, in 1966 Gurindji pastoral workers walked off Wave Hill Station in protest against appalling living conditions and inadequate wages. Their protest quickly developed into a political campaign for land rights.<sup>28</sup> The Gurindji people set up camp on traditional Aboriginal land at Daguragu where they stayed until the Wave Hill lease was handed to elder Vincent Lingiari by Prime Minister Whitlam in 1975.<sup>29</sup>

The other key struggle to note was the claim by Yolgnu people in Eastern Arnhem Land for recognition of their territorial rights as against the Commonwealth grant of bauxite leases, which led to the negative judicial decision in the Gove Land Rights case.

An Aboriginal Land Rights Commission was established by the federal government in February 1973. Commissioner Woodward's first report, submitted in July that year,



recommended that two regional Aboriginal land councils be set up in the Northern Territory to assist Aboriginal Territorians in formulating proposals for legislation. The additional suggestions made by Woodward about land councils were concerned mainly with administrative arrangements for expediting their establishment and provided little detail on possible decision-making structures.<sup>30</sup>

In his second report, submitted in May 1974, Commissioner Woodward made more concrete recommendations about the administration and funding of Aboriginal organisations. His findings were based on a number of underlying conclusions including the following:

- Aboriginal people must be fully consulted about all steps proposed to be taken;
- Aboriginal communities should have as much autonomy as possible in running their own affairs; and
- Aborigines should be free to follow their traditional methods of decision-making.<sup>31</sup>

Legislation to provide for Aboriginal land rights in the Northern Territory was originally introduced by the Whitlam Labor government as part of its Aboriginal Affairs legislative package.<sup>32</sup> In the second reading speech the Minister for Aboriginal Affairs articulated the policy behind the proposed legislation.

This legislation will at last give Aboriginal ownership in our law over land which, according to traditional law, belongs to them, and they to it. Future generations of Aboriginals will continue to reap the benefits of the land base this Bill will provide for Aboriginal people of the Northern Territory.<sup>33</sup>

The Aboriginal Land (Northern Territory) Bill 1975 (Cth) lapsed when parliament was prorogued following the dismissal of the Whitlam government. The conservative Fraser government introduced substantially similar legislation in June 1976. The new Minister for Aboriginal Affairs' statements supporting the legislation echoed those of the previous government.

It is a fundamental change in social thinking in Australia to recognise that within our community there are some people, the Aborigines, who live by a unique and distinct system of customary laws.<sup>34</sup>

The introduction of legislation to grant land rights in the Northern Territory is an essential, progressive measure in the social and political history of Australia.<sup>35</sup>

Under the ALRA, land can be granted to Aboriginal people if it is 'scheduled' to the Act or has been successfully claimed according to the procedures outlined in it.<sup>36</sup> A number of areas of land were listed in Schedule 1 to the ALRA when it was enacted including many former Aboriginal reserves. The Act has been amended on a number of occasions to include further land in this Schedule.<sup>37</sup>

The ALRA enables traditional Aboriginal owners to lodge land rights claims over Crown land.<sup>38</sup> Traditional Aboriginal owners are defined in the legislation as:

a local descent group of Aboriginals who:

- (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
- (b) are entitled by Aboriginal tradition to forage as of right over that land.<sup>39</sup>

In 1987 a ten-year sunset clause was inserted in the ALRA. 5 June 1997 was the last date on which a new claim for land rights could be made.<sup>40</sup> A total of 249 claims were lodged with the Aboriginal Land Commissioner up to this date.<sup>41</sup> At the time of writing, 51 of these claims have been finalised, 26 have been withdrawn and 12 claimed areas have been added to Schedule 1 of the ALRA.<sup>42</sup> According to ATSIC's 1998-99 Annual Report, Aboriginal people had 'gained inalienable freehold title to 568,041.07 square kilometres of land, representing 42.20 per cent of the Northern Territory'.<sup>43</sup>

The ALRA also allows for claims over alienated Crown land in which 'all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals', for example, land under pastoral lease.<sup>44</sup>

Whether the land has been included in Schedule 1 or has been successfully claimed, a freehold estate is granted by the Governor-General to a recipient Aboriginal Land Trust. The ALRA restricts dealings in the land in such a way that it has been characterised as 'inalienable freehold' title. The land can only be leased at the direction of the relevant Land Council and, in certain circumstances, only with the consent of the Minister.<sup>45</sup> The land may not be sold, although it can be surrendered to the Crown.<sup>46</sup>

Dealings in land must generally be done with the consent of the Minister and at the direction of the Land Council for the area.<sup>47</sup> However, an estate or interest may be granted to an Aboriginal Council, association or Aboriginal business without Ministerial consent for any period up to 21 years. The same applies to interests or estates granted to the federal or Northern Territory governments or to any other person for a period of up to 10 years.<sup>48</sup> Such grants must still only be done on a direction from the Land Council. A crucial protection for the traditional Aboriginal owners is contained in section 19(5):

A Land Council shall not give a direction under this section for the grant, transfer or surrender of an estate or interest in land unless the Land Council is satisfied that:

- (a) the traditional Aboriginal owners (if any) of that land understand the nature and purpose of the proposed grant, transfer or surrender and, as a group, consent to it;
- (b) any Aboriginal community or group that may be affected by the proposed grant, transfer or surrender has been consulted and has had adequate opportunity to express its views to the Land Council; and
- (c) in the case of a grant of an estate or interest—the terms and conditions on which the grant is to be made are reasonable.

The alienation provisions of the ALRA are most commonly used for the lease of land for community and governmental purposes. For example, medium term leases are granted

for health clinics, hospitals, schools and for medical staff and teacher accommodation. Residential leases are rarely granted.

### *Aboriginal Land Trusts*

The only land holding structure under the ALRA is the Aboriginal Land Trust. Land Trusts are established by the Minister to hold title to land ‘for the benefit of Aboriginals entitled by Aboriginal tradition to the use and occupation of the land concerned...’.<sup>49</sup> They are bodies corporate with perpetual succession which may sue and be sued in their own name.<sup>50</sup>

A Land Trust must exercise its power as owner of the land for the benefit of the Aboriginal people concerned.<sup>51</sup> However, a Trust may not exercise its functions in relation to land except in accordance with a direction given to it by the Land Council for the area.<sup>52</sup> A Land Trust must not receive moneys owing to it. Instead, these may be paid to the relevant Land Council.<sup>53</sup>

The members of an Aboriginal Land Trust are appointed by the Minister after being nominated by the relevant Land Council.<sup>54</sup> The trustees nominated by the Land Council and appointed by the Minister are usually senior men and women who are traditional Aboriginal owners for the trust area. Occasionally, the members are younger people who are promoted for their understanding of English and/or non-Indigenous culture. There is provision for a Land Trust not to have a chairperson.<sup>55</sup> All members of the Land Trust must be living in the Land Council area in which the land held by the Land Trust is situated, although they do not have to be living on land held by the Land Trust.<sup>56</sup> Members are appointed for three years.<sup>57</sup>

Aboriginal Land Trusts are essentially passive holders of title. They have no direct funding and are almost entirely reliant on the relevant Land Council to convene meetings and provide advice. Although strictly separate in the legal sense, it could not be said that an Aboriginal Land Trust is able, in effect, to act independently of the Land Council concerned. Trusts were established as a means of fulfilling the non-Indigenous requirement for an identifiable title holder to land. This model was chosen because ‘it is in harmony with traditional Aboriginal social organisation’.<sup>58</sup>

### *Aboriginal Land Councils*

Aboriginal Land Councils are the principal administrative structures for the functioning of the land rights scheme established by the ALRA. They are expected to perform a liaison role between government, the traditional Aboriginal owners of land and the general public. Councils are funded from consolidated revenue, the allocation being calculated according to the amount of royalties received for mining on Aboriginal land.<sup>59</sup>

Aboriginal Land Councils are bodies corporate established by the Minister in relation to a particular geographical region of the Northern Territory.<sup>60</sup> Currently there are two large Land Councils. The Northern Land Council (NLC) represents Indigenous peoples in the northern half of the Northern Territory. The Central Land Council (CLC) represents those in the southern half.<sup>61</sup> There are also two small Land Councils: the Tiwi Land Council for Bathurst and Melville Islands; and Anindilyakwa Land Council for Groote and Bickerton Islands.

The NLC and the CLC have become major players not just in the Northern Territory struggle for land rights but also in the national campaign. Their relatively independent source of funding has meant that they have been able to challenge the decisions of both the Northern Territory and the federal governments legally and politically. They play a more prominent role than purely administering Aboriginal land and the claims process under the ALRA.

The statutory functions of the Land Councils are as follows:

- to ascertain and express the wishes of Aboriginal people living in the Council area in regard to land management and legislative reform,
- to protect the interests of traditional Aboriginal owners and other Aborigines with an interest in Aboriginal land,
- to assist Aborigines to take measures to protect sacred sites in the Council area,
- to consult the traditional Aboriginal owners of Aboriginal land in relation to any proposed use of that land,
- to negotiate with persons wishing to obtain an interest in Aboriginal land, including land under claim,
- to obtain and pay for legal advice for Aboriginal people claiming land under the ALRA, and
- to supervise and provide administrative assistance for Aboriginal Land Trusts.<sup>62</sup>

In performing their functions Land Councils must consult with the traditional Aboriginal owners and any other interested Aboriginal people and must not take any action in connection with land held by an Aboriginal Land Trust without the consent of the traditional Aboriginal owners. They must also have given other affected Aboriginal communities the opportunity to express their views.<sup>63</sup> Where the traditional Aboriginal owners of an area of land are required to have consented, as a group, to a particular act or thing under the ALRA, the consent shall be taken to have been given if:

- (a) in a case where there is a particular process of decision making that, under the Aboriginal tradition of those traditional Aboriginal owners or of the group to which they belong, must be complied with in relation to decisions of that kind—the decision was made in accordance with that process; or

(b) in a case where there is no such process of decision making—the decision was made in accordance with a process of decision making agreed to and adopted by those traditional Aboriginal owners in relation to the decision or in relation to decisions of that kind.<sup>64</sup>

A Land Council must conciliate disputes over land between Aboriginal people, Land Trusts, Aboriginal Councils and associations in its area.<sup>65</sup>

In other respects Land Councils resemble federal statutory authorities. They have the power to do all things necessary in connection with the performance of their functions, including employing staff and engaging advisers.<sup>66</sup> They must prepare estimates for the approval of the Minister in each financial year<sup>67</sup> and seek the Minister's consent for any borrowings.<sup>68</sup> Land Councils must maintain bank accounts<sup>69</sup> and keep proper accounts and records of their transactions and affairs.<sup>70</sup> Annual reports must be provided to the Minister which include the audited financial statements in respect of that reporting year.<sup>71</sup> In addition, Land Councils can be audited by the federal Auditor-General.<sup>72</sup>

Membership of a Land Council is in accordance with a method approved by the Minister, the only requirement being that the members be Aboriginal people living in the area of the Council.<sup>73</sup> The members of a Land Council may elect a Chairperson and a Deputy Chairperson at a Council meeting.<sup>74</sup> They hold office for three years.<sup>75</sup> In the 1997-98 financial year, the CLC had 83 members and the NLC had 78.<sup>76</sup>

The larger Land Councils are based in the major administrative capitals, the NLC in Darwin and the CLC in Alice Springs. They also operate at a regional level.<sup>77</sup> This reflects the make-up of the members of the Land Councils who are appointed to represent regions within the Land Councils' areas. Members are typically nominated by communities for their traditional seniority or ability to liaise with the non-Aboriginal world rather than by direct election. Such membership reflects a more traditional basis of authority rather than a Western democratic model.

Land Council decisions are made by majority vote.<sup>78</sup> A Land Council may make rules for the convening and conduct of meetings with the approval of the Minister.<sup>79</sup> The ALRA contains useful mechanisms for the administration of less contentious matters: a Land Council can delegate certain of its powers to the Chairperson or a specially formed committee.<sup>80</sup>

### *Reviews of the ALRA*

The ALRA was first reviewed after being in operation for only four years.<sup>81</sup> Western Australian barrister Barry Rowland QC was asked to examine representations on the practical application of the Act and to consult with affected groups. The terms of

reference specifically stated that the examination was to be 'without detriment to the basic principles of the Act'.<sup>82</sup> Rowland focussed on technical difficulties with the legislation, both actual and anticipated, particularly those arising from the mining provisions.

In September 1983, the federal government commissioned a review of the ALRA which had been in operation for 7 years. Justice Toohey, then of the Federal Court, reported in December of that year. His recommendations included several aimed at reforming the structure and organisation of Land Councils. Justice Toohey suggested that Land Councils consider representation in terms of traditional estate boundaries as well as in terms of communities.<sup>83</sup> He also recommended that they authorise the establishment of regional committees with broad decision making powers including identifying traditional owners.<sup>84</sup> The latter reform has been implemented.

In August 1998, a review of the ALRA by Darwin Barrister John Reeves QC was tabled in the federal parliament.<sup>85</sup> The Reeves Report recommended numerous changes to the Act and other legislation affecting land rights in the Northern Territory. One of the main proposed Reeves reforms is the replacement of the existing four Land Councils by 18 regional land councils overseen by a new Northern Territory Aboriginal Council.<sup>86</sup> Under the scheme, Aboriginal people who have a traditional affiliation to an area of land within a region or who are permanent residents of the region would be entitled to be members of that region's council.

Under the proposed reforms, each regional council would have a board of directors, chief executive officer and staff. Regional councils would undertake all the functions currently performed by the Land Councils except: completing the land claims process, sacred sites assistance and assistance with commercial ventures. In addition, each regional council would:

- hold Aboriginal land in its region on trust for the benefit of all Aboriginal people who are entitled by tradition to use that land,
- regulate the use of Aboriginal land, for example, by determining applications to mine,
- assist in the social and economic advancement of Aboriginal people living in the region, and
- co-ordinate the implementation of social and economic development programs administered by the proposed Northern Territory Aboriginal Council, ATSIC, the Commonwealth and the Northern Territory government.<sup>87</sup>

Reeves envisaged the Northern Territory Aboriginal Council as a co-ordinating body, overseeing the activities of regional councils and funding their administrative costs. It would also complete outstanding land claims, act as the sole native title representative body in the Northern Territory and receive and distribute mining royalties (including administering the Aboriginal Benefits Reserve).<sup>88</sup>

Governance of Aboriginal land will be centralised in a superordinate non-traditional institution, the [Northern Territory Aboriginal Council].<sup>89</sup>

Reeves' recommendations have been subject to considerable scrutiny and criticism by many in the Indigenous and non-Indigenous communities.<sup>90</sup> In particular, concern has been raised about the potential for a reduction in current levels of autonomy and for disturbance to traditional Aboriginal authority systems:

The recent Review of the Aboriginal Land Rights act features recommendations that, if implemented, will totally transform the nature of Aboriginal Land Rights in the NT. Control of Aboriginal land by identified traditional owners will end and the two large mainland Land Councils will be abolished. Instead a system of administration effectively superintended by the relevant NT Minister would be instituted.<sup>91</sup>

In December 1998, the Minister for Aboriginal and Torres Strait Islander Affairs referred the Reeves Report to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs for response within six months. The Committee reported in August 1999<sup>92</sup>. Its report was based on certain core principles:

1.26 There should be no diminution of Aboriginal rights under the Land Rights Act. Title should remain inalienable and held by traditional Aboriginal owners through land trusts for estates in fee simple. Land use decisions should also be made with the informed consent of traditional Aboriginal owners in accordance with Aboriginal tradition. Thus, traditional Aboriginal owners (if any) of the land in question should understand the nature and purpose of any land use proposals and as a group give their consent. In addition, any other Aboriginal community or group that may be affected by land use decisions should also be consulted and have adequate opportunity to express its view...

1.27 Aboriginal people should have the right to manage their land in accordance with Aboriginal tradition and should be able to participate in all levels of decision making. In an economic context, any legislation should facilitate rather than hinder the economic development of Aboriginal land according to the wishes of Aboriginal people.

1.28...Aboriginal people should have as much autonomy as possible in running their own affairs. Traditional Aboriginal decision making methods should be respected. Similarly, Aboriginal people should be free to associate and organise in ways they see fit...

Such principles led the Committee to its first recommendation, that the Act should not be amended without:

- traditional Aboriginal owners in the Northern Territory first understanding the nature and purpose of any amendments and as a group giving their consent; and
- any Aboriginal communities or groups that may be affected having been consulted and given adequate opportunity to express their views.

Among the Committee's 45 recommendations, it rejected Reeves' recommendations to replace existing Land Councils by 18 Regional Land Councils, to establish a Northern Territory Aboriginal Council and to replace the permit system for access to Aboriginal land.

They went on to recommend that the Minister appoint project teams to consult and to advise on various recommendations.

At the time of writing, it is not known whether the Commonwealth government will proceed with some or all of the Reeves recommendations.

### *Excisions*

Legislation was enacted by the Northern Territory in 1989 to allow certain Aboriginal people to claim small areas of land on pastoral leases which are, otherwise, outside the definition of claimable land (unless owned by Aborigines).<sup>93</sup> If an excision claim is successful an enhanced freehold title is granted to the Aboriginal claimants. The freehold is enhanced to the extent that there are restrictions on the land's disposal, on its compulsory acquisition, and on mining on the land.<sup>94</sup> Only a small number of excisions have been granted and these generally cover no more than 1 per cent of the total area of the lease.<sup>95</sup> Excised lands are described as Aboriginal community living areas in the legislation.

The excisions legislation, now included in Part 8 of the *Pastoral Land Act 1992* (NT), was a result of a Memorandum of Understanding between the then Prime Minister and the Chief Minister of the Northern Territory.<sup>96</sup> One of the principal terms of the Understanding was that, in return for the enactment by the Northern Territory of appropriate excisions legislation, the Commonwealth would block further land claims to stock routes and reserves under the ALRA.<sup>97</sup>

Aboriginal people making an application to the Minister for an excision under the *Pastoral Land Act 1992* (NT) must prove residence on the pastoral lease or 'historical residential association' as well as 'need'.<sup>98</sup> The Minister may refer the application to the Community Living Areas Tribunal.<sup>99</sup> In making its recommendation on the application the Tribunal must take into account matters such as whether the excision will reduce the economic viability of the pastoral lease, whether the applicants already have land (including under the ALRA) and whether they have adequate housing.<sup>100</sup> It is clear from the legislation that the Northern Territory parliament wished to distinguish the excisions legislation from the ALRA and its focus on traditional Aboriginal ownership of land.<sup>101</sup>

The Minister makes the final decision on the application. If it is successful, title is granted to the land holding body. Such bodies are usually associations established under either the *Aboriginal Councils and Associations Act 1976* (Cth) or the *Associations Incorporation Act 1978* (NT).<sup>102</sup>



The CLC recently expressed its dissatisfaction with the excision provisions of the *Pastoral Land Act 1992* (Cth):

[T]he legislation is seriously flawed as it contains restrictive eligibility criteria that mean relatively few Aboriginal people dispossessed by the pastoral industry can benefit.<sup>103</sup>

The majority of applicants who fit the historical residential association criteria are now elderly. Many of those who fit the 'ordinarily resident' criteria do so because they have worked on pastoral leases away from their traditional country, yet under Aboriginal law they are not entitled to live permanently on these pastoral leases. Applicants who live with relatives, often in overcrowded accommodation, in settlements, towns or communities, are subjected to an exhaustive process of having to prove so-called need.<sup>104</sup>

## National parks

### *Introduction*

Both Kakadu National Park and Uluru-Kata Tjuta (Ayers Rock-Mount Olga) National Park are Aboriginal land managed by the Australian National Parks and Wildlife Service under lease-back from the Aboriginal land owners. The provisions of the *National Parks and Wildlife Conservation Act 1975* (Cth), now repealed and replaced by the *Environmental Reform (Consequential Provisions) Act 1999* (Cth), apply to the Parks which are co-managed by boards of management.<sup>105</sup> There are also several national parks in the Northern Territory that are co-managed by government agencies and the traditional Aboriginal owners pursuant to statutory regimes.<sup>106</sup>

### *Cobourg Peninsula Sanctuary*

*Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1987* (NT) establishes the Cobourg Peninsula Sanctuary Land Trust, a statutory body corporate.<sup>107</sup> Title in the Cobourg Peninsula Sanctuary is vested in the Land Trust in trust for 'the group'.<sup>108</sup> The NLC determines which Aborigines are members of the group.<sup>109</sup> The members are entitled to use and occupy the Sanctuary and Cobourg Marine Park.<sup>110</sup> Their title is inalienable.<sup>111</sup> The Land Trust consists of a chairperson and three other members appointed by the NLC.<sup>112</sup>

The Sanctuary is established in perpetuity as a national park 'for the benefit and enjoyment of all people' and must be used in accordance with any plan of management in force.<sup>113</sup> The NT government pays an annual fee to the NLC for the use of the Sanctuary as a national park.<sup>114</sup> The NLC forwards this money to the group.<sup>115</sup>

The Sanctuary is partly administered by the Cobourg Peninsula Sanctuary and Marine Park Board.<sup>116</sup> Of the 8 Board members appointed by the Minister, 4 are nominated by the NLC from the members of the group.<sup>117</sup> The Chairperson and Deputy Chairperson of the Board must be elected from the NLC nominees.<sup>118</sup> The Board's statutory functions include:

- preparing plans of management for the Sanctuary and/or Marine Park,
- protecting and enforcing the right of the group to use and occupy the Sanctuary and Marine Park,
- determining access rights for persons who are not members of the group,
- advising the Minister on mineral exploration, and
- ensuring adequate protection of sites of spiritual or other importance in Aboriginal tradition.<sup>119</sup>

The Parks and Wildlife Commission of the Northern Territory has statutory responsibility for preparing plans of management and also has the control and management of the Sanctuary and Marine Park.<sup>120</sup> Any difference of opinion between the Board and the Commission, is resolved by a resolution of the Board.<sup>121</sup> Under the legislation, plans of management are ‘detailed description[s] of the manner in which it is proposed that the Sanctuary and/or Marine Park shall be managed’.<sup>122</sup> When preparing a plan, the Commission must consider a number of factors including:

- the protection of areas and things of significance to Aborigines,
- any limitations imposed by Aboriginal tradition on the use of any part of the sanctuary,
- the conservation and management of native flora and fauna, and
- the employment and training of Aborigines.<sup>123</sup>

Before it becomes operative, a plan of management must be approved by the NLC.<sup>124</sup> Plans are subject to disallowance by the parliament.<sup>125</sup>

### *Nitmiluk National Park*

Statutory arrangements similar to those for Cobourg Peninsula Sanctuary apply to Aboriginal land in Nitmiluk (Katherine Gorge) National Park although they are predicated on vesting of title under the ALRA. The Jawoyn Aboriginal Land Trust leases land to the Conservation Land Corporation as a national park ‘for the benefit and enjoyment of all people’.<sup>126</sup> The Aboriginal traditional owners of the Park and Aborigines who have traditionally used the land are entitled to use and occupy it.<sup>127</sup>

The Nitmiluk (Katherine Gorge) National Park Board, a statutory body corporate, has 13 members appointed by the Minister including 8 traditional Aboriginal owners of the Park nominated by the Jawoyn Association Aboriginal Corporation.<sup>128</sup> The Board has a number of functions including preparing plans of management for the Park, protecting the rights of Aborigines entitled to use and occupy the Park and ensuring adequate protection of sites of spiritual importance.<sup>129</sup> The Parks and Wildlife Commission of the Northern Territory is responsible for facilitating the preparation of plans of management and managing the Park in accordance with such plans.<sup>130</sup> It pays an annual rent of \$100,000 and 50 per cent of all revenue to the NLC.<sup>131</sup> Under the terms of the current

99 year lease, the Conservation Land Corporation and the Parks and Wildlife Commission must consult regularly with the Jawoyn Association regarding the control and management of the Park.<sup>132</sup>

The factors that must be taken into account when a plan of management is prepared are similar to those stipulated in the Cobourg Peninsula Sanctuary legislation.<sup>133</sup> The written consent of the Jawoyn Association Aboriginal Corporation is required before a plan can be forwarded to the Minister for tabling in the parliament.<sup>134</sup> However, the process for developing the plan is slightly different. Under the *Nitmiluk (Katherine Gorge) National Park Act 1989* (NT), the Board must advertise in the government Gazette for representations on draft plans of management from interested members of the public.<sup>135</sup>

Another difference between the Acts is the procedure if a plan of management is disallowed by parliament. Where the NT Legislative Assembly disallows a plan twice under the *Nitmiluk (Katherine Gorge) National Park Act 1989* (NT), the Minister can forward it to either an Aboriginal Land Commissioner (appointed under the ALRA) or a 3 person panel appointed under the legislation for advice.<sup>136</sup>

Park revenue received by the Board or the Conservation Land Corporation must be paid to the Parks and Wildlife Commission which holds it on behalf of the Nitmiluk (Katherine Gorge) National Park Board.<sup>137</sup> The Chief Minister of the Northern Territory has statutory power to give the Board general written directions on how to perform certain of its functions and exercise its powers.<sup>138</sup> This power was not conferred on the Minister in regard to Cobourg Peninsula Sanctuary.

## Self-government

### *Aboriginal Land Rights Act*

#### *Access*

Aboriginal people who have a traditional right to enter, use and occupy Aboriginal land are entitled under section 71 of the ALRA to enter, use and occupy that land. The right is subject only to the proviso that they do not interfere with the use or enjoyment of an estate or interest in land granted to a non-Aboriginal person, for example, to the Department of Health for a health clinic.<sup>139</sup> Other members of the general community must have a legal right to enter Aboriginal land, otherwise they will have committed an offence.<sup>140</sup>

The Northern Territory has legislated to provide a permit system for entry to Aboriginal land. Permits are issued by the Land Council responsible for the area, traditional land owners and by the Minister (to government employees) under the *Aboriginal Land Act 1978* (NT).<sup>141</sup> There is also provision for the Chief Minister to close waters within two kilometres of Aboriginal land.<sup>142</sup> Thus, the right of entry for people other than those entitled by Aboriginal tradition to enter and use those closed areas is by permit.<sup>143</sup>

The Reeves Report recommended the removal of the requirement for permits to enter Aboriginal land on the basis that the current system is too administratively complex and is racially discriminatory.<sup>144</sup> Reeves also recommended that the ALRA be amended to enable the NT government compulsorily to acquire an interest (other than a freehold interest) in Aboriginal land for a public purpose.<sup>145</sup>

### *Mining*

The traditional Aboriginal owners of land have extensive control over mining on their land. This continues to be controversial with the resource development sector. In the second report of the Aboriginal Land Rights Commission, Commissioner Woodward stated:

I believe that to deny Aborigines the right to prevent mining on their land is to deny the reality of their land rights.<sup>146</sup>

Generally, an exploration licence for mining may not be granted over Aboriginal land without the consent of the Minister and the Land Council.<sup>147</sup> However, the Governor-General can declare that the national interest requires that a licence be granted.<sup>148</sup> Prospective miners must submit a comprehensive proposal to the Land Council which then forms the basis for consultations with the traditional Aboriginal owners.<sup>149</sup> The Land Council must consult both with the traditional Aboriginal owners of the land in question and with any Aboriginal communities that may be affected by the proposal. A Land Council may not consent to the grant of a licence unless:

- (a) it is satisfied that the traditional Aboriginal owners (if any) of the land understand the nature and purpose of the terms and conditions and, as a group, consent to them;
- (b) it is satisfied that the terms and conditions are reasonable; and
- (c) it has agreed with the miner upon the terms and conditions.<sup>150</sup>

If exploration does go ahead, a miner wishing to proceed from exploration to mining must submit a further comprehensive proposal to the Land Council which includes particulars for mining activities, access, water and timber requirements, proposals for rehabilitation, infrastructure requirements and payment.<sup>151</sup> Mining cannot occur without an agreement based on such a proposal and the Minister's consent.<sup>152</sup> Any such agreement may include compensation for damage or disturbance although not for the value of the minerals extracted.<sup>153</sup>

The Reeves Report recommended that the power to veto mining be transferred to regional councils subject to the existing national interest provisions. Under the proposed regime, regional councils would be empowered to negotiate legally enforceable agreements directly with mining companies. In addition, the ALRA and the *Mining Act 1980* (NT) would be amended to provide for licences to enter Aboriginal land for specific periods to conduct reconnaissance exploration.<sup>154</sup> This would considerably reduce traditional Aboriginal owners' control over exploration on their land.

ATSIC engaged the National Institute of Economic and Industry Research to conduct an independent review. Its report was presented in July 1999 under the title *The National Competition Policy Review of Part IV (the mining provisions) of the Aboriginal Land Rights (Northern Territory) Act 1976*. According to ATSIC:

The review found that Part IV of the Land Rights Act has been successful in safeguarding Aboriginal control over Aboriginal land, and to this extent provides a balance that accords with the purpose of the Act. It has also provided a process of negotiation by which an increasing proportion of Aboriginal land in the Territory has been made available for mineral exploration.<sup>155</sup>

An amount equivalent to the royalties received by the Commonwealth or the Northern Territory in relation to mining on Aboriginal land is paid into the Aboriginal Benefit Reserve (formerly the Aboriginals Benefit Trust Account).<sup>156</sup> That money is distributed according to a formula in the ALRA to Land Councils for their administrative costs to the traditional Aboriginal owners for the land on which the mining has taken place and to affected Aboriginal communities.<sup>157</sup>

#### *Decision making processes*

Neither Land Trusts nor Land Councils have the power to make by-laws. Under section 25 of the ALRA, Land Councils have an obligation to attempt to conciliate any dispute about land between Aborigines, Land Trusts, Aboriginal councils or incorporated Aboriginal associations. A court can adjourn proceedings at any time to enable a Land Council to attempt conciliation in a land dispute.<sup>158</sup>

#### *Excisions*

##### *Access*

Aboriginal land excised from a pastoral lease is freehold and, as such, the general law of the Northern Territory applies to it. The Aboriginal association that holds the land has the right to exclusive possession and is entitled to the protection of the common law against trespass.

##### *Mining*

The grant of a community living area is subject to any mining tenement or exploration licence under the *Mining Act 1980* (NT).<sup>159</sup> However, once the excision has been made, no further mining interest may be granted within one kilometre of a point on the land designated by the relevant Aboriginal association.<sup>160</sup> Outside this area Aboriginal community members must rely on the general protections provided by the *Mining Act 1980* (NT).

#### *Decision making processes*

Many of the Aboriginal associations that have title to a community living area are incorporated under the *Associations Incorporation Act 1978* (NT). This legislation gives

communities considerable flexibility in shaping the operation and membership of each body.<sup>161</sup> The usual controls over finances are included, as are provisions for winding up.<sup>162</sup>

Once incorporated an association is a body corporate with perpetual succession which may acquire, hold and dispose of real or personal property (subject to certain restrictions) and sue and be sued in its own name.<sup>163</sup> There is no requirement for the association to have an executive committee although there must be some person or persons who have the 'management of the association'.<sup>164</sup> There are no requirements concerning meetings of the association. An association must file an audited financial statement with the Registrar annually.<sup>165</sup>

While Aboriginal communities are free to determine the internal structure of their association, the Registrar and the Minister have broad oversight powers. Either may investigate the affairs of an association if he or she has information that calls for an investigation.<sup>166</sup> On the basis of such a report the Registrar may apply to the Supreme Court for the appointment of a judicial manager.<sup>167</sup> Further, the Registrar may, after certain requirements have been met, dissolve an association that is not carrying out its objects or is not in operation.<sup>168</sup>

Associations that hold real property are subject to particular constraints under the *Associations Incorporation Act 1978* (NT). Special purpose leases and 'prescribed property', which includes property purchased with funding from the Northern Territory or federal governments, may only be transferred with the consent of the Minister.<sup>169</sup> Special purpose leases have been used in the past to grant Aboriginal people small areas of land within town boundaries and on pastoral leases.<sup>170</sup>

Land that has been granted to an Aboriginal association as a community living area under the *Pastoral Land Act 1992* (NT) is subject to even tighter control. The Minister may not give his or her permission to transfer of the land.<sup>171</sup> The only way in which such land may be transferred is if it has been abandoned for a period of five years.<sup>172</sup>

### *National parks*

#### *Kakadu and Uluru National Parks*

The land is vested under ALRA, so the provisions of that legislation, outlined previously, apply.

#### *Cobourg Peninsula Sanctuary*

The Aboriginal owners of Cobourg Peninsula Sanctuary are able to control access to their lands to some extent through their representation on the Cobourg Peninsula Sanctuary Board. However, the Board's by-law making power in this respect is balanced by the obligation to ensure the Sanctuary is accessible as a national park.

The NLC has considerable control over Cobourg Sanctuary lands, through its role in determining membership of the group for whom the land is held in trust, appointing members to the Land Trust and nominating members of the Cobourg Peninsula Sanctuary Board. The NLC represents many Aborigines who have no connection with the Cobourg lands so this could be seen as a fairly indirect means of self-government for the traditional owners of the Sanctuary. However, the legislation requires the NLC to consult with the traditional owners and get majority approval before consenting to any actions in Cobourg Sanctuary.<sup>173</sup> The NLC has lodged an ALRA claim over the Cobourg Peninsula Region.<sup>174</sup>

Mineral exploration and recovery can only be conducted on the Sanctuary in accordance with the plan of management.<sup>175</sup> Miners must pay fees to the NLC.<sup>176</sup> These must be paid out by the NLC as if they were royalty payments under the ALRA.<sup>177</sup>

The Cobourg Peninsula Sanctuary Board has a broad by-law making power encompassing matters such as fishing, use of firearms, water pollution, restrictions on access and entrance fees.<sup>178</sup>

#### *Nitmiluk National Park*

The traditional owners and users of Nitmiluk National Park are entitled to continue occupying it and the Jawoyn Association has a majority on the Park Board. However, the Chief Minister's ability to direct the Board on the exercise of its functions could undermine this level of control. The NLC has lodged an ALRA claim over the Katherine Region.<sup>179</sup>

As the Nitmiluk National Park land is vested in the Jawoyn Association under the ALRA, the provisions of that Act in relation to mining apply.<sup>180</sup>

The Nitmiluk National Park Board has the same by-law making power as the Cobourg Peninsula Sanctuary and Marine Park Board.<sup>181</sup> In addition, the legislation makes specific mention of the power to make by-laws regulating the consumption of alcohol in the Park.<sup>182</sup>

#### *Indigenous local government*

There are no provisions for Land Councils or Land Trusts to perform local government functions under the ALRA. Where Aboriginal communities fall outside the boundaries of a local government municipality those functions are provided by either an association or a community government council. Associations are incorporated under the *Associations Incorporation Act 1978* (NT) or the *Aboriginal Councils and Associations Act 1976* (Cth).<sup>183</sup> They are provided with Northern Territory government funding for local government functions but do not have the power to make by-laws or levy rates.

Community government councils are constituted under the *Local Government Act 1993* (NT).<sup>184</sup> They were not designed specifically for Indigenous governance but the structure is used most frequently by Aboriginal communities as they are commonly located in remote areas. There are few differences between mainstream local government councils and community government councils except size and location. They have the same functions and powers<sup>185</sup> including the making of by-laws and levying of rates, and are subject to the same regulatory requirements.<sup>186</sup>

In terms of governance powers, the main difference between local government councils and community government councils is that the latter are subject to community government schemes.<sup>187</sup> Schemes are a type of management and development plan. A draft scheme may only be proposed by the Minister after an application has been received from 10 members of the community and a meeting has been held to discuss the application with the community.<sup>188</sup> There must be majority community support for the scheme and the proposed council functions before the scheme can be approved by the Chief Minister.<sup>189</sup>

Community government schemes may encompass such matters as the eligibility of persons to be members and to vote, the conduct of elections and procedures for the calling and conduct of meetings.<sup>190</sup> A scheme may also contain provisions about commercial development, health, education or training, housing, roads and sewerage within the community government council's area.<sup>191</sup> The functions of a community government council are ultimately determined by the scheme. In the event of a conflict between a scheme and the *Local Government Act 1993* (NT), the former prevails.<sup>192</sup>

While there are no special provisions in the *Local Government Act 1993* (NT) regarding Aborigines, community government schemes can provide Aboriginal community members with scope to affect the structure and functions of their community government council. Such flexibility needs to be weighed against the powers of the Minister and the Chief Minister with regard to the approval of the scheme. Whereas incorporation as a community government council brings the community squarely within the purview of the Minister and the relevant government department, incorporation under the *Associations Incorporation Act 1978* (NT) or the *Aboriginal Councils and Associations Act 1976* (Cth) provides some degree of autonomy from the Territory government.

Martin Mowbray has suggested that the degree of pressure exerted on Aboriginal communities by the Northern Territory government to choose the community council model amounts to coercion.<sup>193</sup> He argues that the *Local Government Act 1993* (NT) is fundamentally inconsistent with the principles of consultation and accountability which underlie the land rights regime:

Overall, the NT government has used its Local Government Act to undermine the Land Rights Act and by-pass Land Councils.<sup>194</sup>



The Northern Land Council has consistently expressed concern that the NT government ‘has continued to create new community government councils which operate on Aboriginal Land without the consent or involvement of the traditional Aboriginal owners of that land as required by the ALRA’.

In an effort to address this issue the NLC has developed Land Use Agreements (as required by the ALRA) with Community Government Councils and other local governing bodies operating on Aboriginal land. These Land Use Agreements will provide certainty to local governing bodies when conducting activities that affect the land on which they operate. They will also provide protection and certainty to the traditional owners of the land.<sup>195</sup>

The NLC went on to express concern at aspects of proposed reforms to local government in the Northern Territory.

## Conclusion

The structure of Aboriginal Land Trusts together with the powers and responsibilities of Land Councils provides a communal form of ownership and decision making in the Northern Territory. The principal characteristic of the land holding and management structure of the ALRA regime is the diffuse nature of control. It is difficult for individuals to control decisions about land management.

When combined with the other means through which Indigenous people can participate in the management of traditional lands in the Northern Territory—Aboriginal associations, community government councils and national park boards—the governance structures under the ALRA provide the most effective means of autonomy of any Australian jurisdiction. However, the administrative structures under the Act were largely based on non-Indigenous governance paradigms. Some possibility of tension remains between non-Indigenous bureaucratic requirements and customary Indigenous decision making processes.

## South Australia

### Land-holding and governance structures

#### *Aboriginal Lands Trust lands*

South Australia was the first Australian jurisdiction to pass legislation allowing for the transfer of reserve lands to Aboriginal people. The *Aboriginal Lands Trust Act 1966* (SA) established a state-wide land trust to act on behalf of the traditional owners of land covered by the legislation.<sup>196</sup> The Governor can transfer any Crown land reserved for Aborigines to the Trust. If an Aboriginal Council has already been established for the area it must consent before any such transfer can be made.<sup>197</sup> There is no provision in the *Aboriginal Lands Trust Act 1966* (SA) for additional lands to be reserved to the Trust. However, as a body corporate the Trust can acquire property.<sup>198</sup>

The Aboriginal Lands Trust consists of a Chairperson and two other members appointed by the Governor. Additional members can be appointed on the recommendation of Aboriginal Councils, established under the regulations to the *Family and Community Services Act 1972* (SA), or of communities residing on Trust lands. All members must be Aboriginal.<sup>199</sup> As well as its function as a land-holding body, the Trust is increasingly involved in enterprise development and land management.<sup>200</sup>

There is no claims procedure under South Australian land rights legislation. The *Aboriginal Lands Trust Act 1966* (SA) was reviewed between 1988 and 1990. The confidential report submitted to the Minister for Aboriginal Affairs was considered by the South Australian Cabinet but has never been publicly released.

### *Anangu Pitjantjatjara and Maralinga Tjarutja lands*

In 1976 the Pitjantjatjara, Yankunytjatjara and Ngaanyatjara peoples formed the Pitjantjatjara Council as a vehicle for making claims to their traditional lands.<sup>201</sup> In response to intense lobbying by the Council, in 1977 the Premier of South Australia, the late Don Dunstan, appointed a Working Party to examine the feasibility of establishing a separate Pitjantjatjara lands trust to cover the North West Reserve, Everard Park, Indulkana, Ernabella and Fregon. The terms of reference specifically stated that any proposals arising from the inquiry were not to 'contravene the wishes of any of the Pitjantjatjara communities'.<sup>202</sup>

When the Working Party reported in June 1978 it recommended that legislation be enacted transferring title to the lands in the north-west of South Australia to the Pitjantjatjara.<sup>203</sup> The Working Party went on to make a series of detailed recommendations about a variety of subjects including access to and mining on Pitjantjatjara lands.<sup>204</sup> Importantly, they stated that the 'Pitjantjatjara peoples should have full powers of management of lands'.<sup>205</sup>

In November 1978, the Pitjantjatjara Land Rights Bill (SA) was introduced into the South Australian House of Assembly. It was referred to a select committee. Before the committee could report, Premier Dunstan retired from politics suddenly.<sup>206</sup> When the select committee reported in May 1979 it recommended only minor changes to the draft bill.<sup>207</sup> Despite this, a final vote on the Bill was never taken. The Tonkin Liberal government came to office in September 1979. Again, the Pitjantjatjara peoples campaigned fiercely for land rights.<sup>208</sup> On 19 March 1981, the *Pitjantjatjara Land Rights Act 1981* (SA) became law. It gave land rights to some Pitjantjatjara peoples although the majority of the lands of the Western Desert people were not covered by the legislation.<sup>209</sup>

The *Pitjantjatjara Land Rights Act 1981* (SA) vests ownership of a large former reserve in a corporate body, Anangu Pitjantjatjara, comprising all the traditional owners in the area.<sup>210</sup> A traditional owner is defined in the legislation as:

an Aboriginal person who has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them.<sup>211</sup>

The legislation was the first negotiated land rights settlement in Australia.<sup>212</sup>

Anangu Pitjantjatjara has a statutory responsibility to protect the interests of traditional owners and to obtain their consent for development proposals.<sup>213</sup> The daily administration of the lands is undertaken by an Executive Board of the corporate body which must act on its resolutions.<sup>214</sup> The freehold title granted by the Act is inalienable.<sup>215</sup>

The *Maralinga Tjarutja Land Rights Act 1984* (SA) establishes a similar scheme for land directly south of the Pitjantjatjara lands, formerly used for atomic testing by the British government. The relevant body corporate is Maralinga Tjarutja. The lands are administered by the Council of Maralinga Tjarutja which consists of all persons 'who are for the time being leaders of the traditional owners'.<sup>216</sup> In conducting its business the Council must consult with the traditional owners and have regard to their customs.<sup>217</sup>

Together the *Pitjantjatjara Land Rights Act 1981* (SA) and the *Maralinga Tjarutja Land Rights Act 1984* (SA) have resulted in the transfer of 18 per cent of land in South Australia to Indigenous owners.<sup>218</sup>

There is a Pitjantjatjara Lands Parliamentary Committee and a Maralinga Lands Parliamentary Committee.<sup>219</sup> These Committees are responsible for monitoring the operation of the relevant Act and the way the lands are managed. Each prepares an annual report for the parliament.

## Self-government

### *Aboriginal Lands Trust lands*

#### *Alienation and access*

The Aboriginal Lands Trust can dispose of most of its lands with ministerial consent and subject to authorisation by both houses of parliament.<sup>220</sup> The Trust has followed a policy of leasing its land to Aboriginal people where possible and allowing them to make the land management decisions.<sup>221</sup> There are no provisions in the *Aboriginal Lands Trust Act 1966* (SA) that empower the Trust to restrict access to its lands.

#### *Mining*

When reserve land is transferred to the Aboriginal Lands Trust mineral resources remain vested in the Crown.<sup>222</sup> However, the rights of entry, prospecting, exploration and mining conferred by the *Mining Act 1971* (SA) and the *Petroleum Act 1940* (SA) only apply to Trust lands by proclamation of the Governor.<sup>223</sup> The proclamation can include conditions on and modifications of those rights.<sup>224</sup> There is provision for mining

royalties paid to the Crown to be transferred to the Trust from general revenue.<sup>225</sup> The Trust has no statutory power over the conditions on which mining activities can proceed.

#### *Decision making processes*

There are no general provisions in the *Aboriginal Lands Trust Act 1966* (SA) relating to by-laws or decision making on Trust lands. However, the Act gives the Trust a special role in regard to alcohol. It can make a recommendation to the Governor that he or she declare, by proclamation, part of Trust lands to be a public place for the purposes of the *Public Intoxication Act 1984* (SA).<sup>226</sup> The Trust can only recommend a proclamation if it has first been proposed by the Aboriginal communities that would be affected by it.<sup>227</sup> A proclamation of this nature can empower an authorised officer appointed with the concurrence of the Trust to search premises or vehicles for alcohol and confiscate and dispose of it.<sup>228</sup> The Governor may only make, vary or revoke regulations in regard to alcohol on the recommendation of an Aboriginal community.<sup>229</sup>

The *Aboriginal Lands Trust Act 1966* (SA) establishes an Aboriginal Lands Business Advisory Panel to assist Aboriginal persons and communities residing on Trust lands to establish and manage businesses and community enterprises.<sup>230</sup> The Panel consists of seven members including the chairperson of the Aboriginal Lands Trust. Five members are nominated from the business sector by the Minister after consultation with the Aboriginal Lands Trust Parliamentary Committee.<sup>231</sup>

#### *Anangu Pitjantjatjara and Maralinga Tjarutja lands*

##### *Access*

Those other than Pitjantjatjara or traditional Maralinga owners must have a permit to enter the lands of Anangu Pitjantjatjara or Maralinga Tjarutja.<sup>232</sup> Conditional entry can be granted.<sup>233</sup> Applications for access must be made in writing to either the Pitjantjatjara Executive Board or the Council of Maralinga Tjarutja.<sup>234</sup>

Maralinga Tjarutja has less control over access to its lands than Anangu Pitjantjatjara. An Aboriginal person who is not a traditional owner can enter Maralinga lands without a permit if invited by a traditional owner.<sup>235</sup> In addition, the public is entitled to use certain roads to cross the lands without obtaining permission although reasonable notice must be given.<sup>236</sup>

##### *Mining*

*Pitjantjatjara Land Rights Act 1981* (SA) and the *Maralinga Tjarutja Land Rights Act 1984* (SA) do not vest ownership of minerals or petroleum in the communities.<sup>237</sup> Despite this, Anangu Pitjantjatjara and Maralinga Tjarutja have some control over mining on their lands.<sup>238</sup> A mining tenement may only be granted to a person who has their permission to enter the lands for that purpose.<sup>239</sup> If Anangu Pitjantjatjara or

Maralinga Tjarutja refuses an application, imposes conditions unacceptable to the miner or takes longer than 120 days to make a decision, the miner can request arbitration.<sup>240</sup> Where the application relates to Maralinga lands, an attempt must be made to resolve the matter by conciliation prior to arbitration.<sup>241</sup> The arbitrator has to take into account a number of factors including the effect on the Pitjantjatjara or Maralinga people and the preservation of the environment.<sup>242</sup> The arbitrator is a judicial officer or experienced legal practitioner, depending on the nature of the application.<sup>243</sup>

The *Maralinga Tjarutja Land Rights Act 1984* (SA) has additional provisions concerning mining on land that incorporates sacred sites. Section 16 empowers Maralinga Tjarutja to keep a confidential register of sacred sites on its lands. The register can contain sites for which particular boundaries have been identified and those where the boundaries have not yet been determined.<sup>244</sup> When an application is made for a mining tenement on Maralinga lands, the Minister of Mines and Energy and the Minister of Aboriginal Affairs must consult with Maralinga Tjarutja to determine whether the land contains a sacred site listed in the register.<sup>245</sup> Mining tenements for land including sacred sites must make necessary provision for the protection of the site by excluding land from the tenement or imposing conditions on it.<sup>246</sup> Maralinga Tjarutja must consent to any such conditions.<sup>247</sup>

Mining royalties are divided between the South Australian government, Anangu Pitjantjatjara or Maralinga Tjarutja and a fund maintained by the Minister of Aboriginal Affairs to benefit South Australian Aborigines generally.<sup>248</sup> Apart from their share of statutory royalties, there is provision for Anangu Pitjantjatjara and Maralinga Tjarutja to receive fair compensation for the disturbance to their lands and way of life that is likely to arise from a mining tenement.<sup>249</sup> Maralinga Tjarutja is limited to receiving amounts payable as compensation under the *Mining Act 1971* (SA) or the *Petroleum Act 1940* (SA).<sup>250</sup>

#### *Decision making processes*

Any Pitjantjatjara or member of the Maralinga people who does not agree with a decision of Anangu Pitjantjatjara or Maralinga Tjarutja is entitled to appeal to the Tribal Assessor appointed by the Minister of Aboriginal Affairs.<sup>251</sup> Proceedings before the Assessor are conducted on the lands with minimal formality and are not subject to the rules of evidence.<sup>252</sup> However, directions made by the Assessor are enforceable by an order of the Local Court.<sup>253</sup>

Anangu Pitjantjatjara has the power to make by-laws in relation to alcohol, petrol sniffing, gambling and any other matters prescribed by regulation.<sup>254</sup> By-laws are subject to disallowance by the parliament.<sup>255</sup> Maralinga Tjarutja does not have this power although it can make recommendations to the Governor regarding regulations to restrict the supply and consumption of alcohol on its lands.<sup>256</sup>

Pitjantjatjara and Maralinga lands do not lie within a local governing body area for the purposes of federal or South Australian legislation, thus no municipal council has jurisdiction over the communities. A 1994 local government project conducted by Anangu Pitjantjatjara recommended against the creation of a new local government body for Pitjantjatjara lands.<sup>257</sup>

The imposition of bureaucratic requirements is of course necessary to ensure accountability. However there has to be some limit on how many different systems of accountability the communities are expected to comply with at one time.<sup>258</sup>

## Victoria

### Land-holding and governance structures

#### *Aboriginal Lands Acts*

There is no formal claims procedure for land rights in Victoria.<sup>259</sup> The small amount of Aboriginal land is governed by six acts.

The *Aboriginal Lands Act 1970* (Vic) returned reserves at Lake Tyers and Framlingham to Aboriginal ownership.<sup>260</sup> The legislation establishes separate trusts for each of the former reserves which are granted as freehold estates.<sup>261</sup> The Trusts have power to develop the land and conduct any business on it.<sup>262</sup> Land can only be disposed of by unanimous resolution of the relevant Trust.<sup>263</sup> Each of the members of the bodies corporate that constitute the Trusts are entitled to shares that are transferable subject to certain conditions.<sup>264</sup> The Trusts are administered by elected committees of management.<sup>265</sup>

The *Aboriginal Lands Act 1991* (Vic) revokes the reservation of three missions<sup>266</sup> and authorises the granting of that land to certain Aboriginal organisations.<sup>267</sup> These grants of inalienable freehold are subject to the condition that the land must be used for Aboriginal cultural and burial purposes.<sup>268</sup>

#### *Lake Condah and Framlingham Forest*

In the mid-1980s the Cain Labor government repeatedly tried to pass limited land rights and cultural heritage legislation but was blocked by the Legislative Council in which the Opposition parties had the majority.<sup>269</sup> As a means of circumventing this deadlock, the Victorian government requested that the Commonwealth pass similar legislation.<sup>270</sup> This led to the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) which vests ownership of the respective areas in Aboriginal Corporations.<sup>271</sup> Half of a square kilometre of land at Lake Condah is vested in the Kerrup-Jmara Elders' Aboriginal Corporation and 11 square kilometres of land at Framlingham Forest is vested in the Kirrae Whurrong Aboriginal Corporation.<sup>272</sup> The Corporations can transfer land to another Aboriginal Corporation but it cannot be otherwise disposed of.<sup>273</sup>

### *Northcote*

In 1981 an Aboriginal community centre was established in Watt Street in Northcote, a suburb of Melbourne. The land was temporarily reserved by order of the Governor-in-Council.<sup>274</sup> The following year, the Victorian parliament passed the *Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982* (Vic) vesting the land in the Aborigines' Advancement League, which had been acting as the management committee for the Centre.<sup>275</sup> The grant was made subject to the condition that the land continue to be used for an Aboriginal community centre.<sup>276</sup>

In 1989 a similar process was followed for land adjacent to the area managed by the League that had been temporarily reserved for public recreation. The *Aboriginal Land (Northcote Land) Act 1989* (Vic) vested the land in the League which had since become an incorporated body.<sup>277</sup> Again, the grant was subject to conditions, this time that the land 'continue to be used for Aboriginal cultural and recreational purposes'.<sup>278</sup>

### *Manatunga*

Under the *Aboriginal Land (Manatunga Land) Act 1992* (Vic) Crown land at Robinvale in the north-west of the state was transferred to the Murray Valley Aboriginal Cooperative.<sup>279</sup> The land must be used for Aboriginal cultural purposes. The Act is brief and makes no mention of the Cooperative's structure or powers in regard to the land. Presumably these matters are determined by the legislation under which the Cooperative was formed.<sup>280</sup>

## **Self-government**

### *Aboriginal Lands Acts*

There are no specific provisions in the *Aboriginal Lands Act 1970* (Vic) concerning resource development, thus the general law applies. In addition, the Framlingham Aboriginal Trust and the Lake Tyers Aboriginal Trust have power to develop any land held by them.<sup>281</sup> The communities' ability to self govern is limited to the powers of a proprietor operating through corporate forms and procedures.<sup>282</sup>

The *Aboriginal Lands Act 1991* (Vic) does not cover resource development or detail specific by-law making powers. Again, the general mining laws of Victoria apply.

### *Lake Condah and Framlingham Forest*

#### *Access*

The Kerrup-Jmara Elders' Aboriginal Corporation and the Kirrae Whurrong Aboriginal Corporation can regulate who visits their land through their by-laws. This includes charging visitors for access.<sup>283</sup> However, with the exception of certain roads, the

legislation preserves legal rights of access to Lake Condah and Framlingham Forest prior to vesting in the Corporations.<sup>284</sup> Persons performing official duties can also enter the lands.<sup>285</sup>

### *Mining*

Minerals in the land vested in the Kerrup-Jmara Elders' Aboriginal Corporation and the Kirrae Whurrong Aboriginal Corporation remain the property of the state of Victoria.<sup>286</sup> However, the Corporations have substantial control over mining activity.<sup>287</sup> Any applicant for a mining tenement must apply to the relevant Corporation in writing for permission to carry out their operations.<sup>288</sup> Approval can be conditional.<sup>289</sup> If the applicant miner objects to the conditions imposed it can apply to the Minister who must attempt to resolve the matter by conciliation.<sup>290</sup> Failing this, an arbitrator must be appointed by the applicant and the relevant Corporation to review the Corporation's decision.<sup>291</sup> The arbitrator must take a number of factors into account including the effect of mining operations on the lifestyle, culture and traditions of the traditional owners of the land and the preservation of the natural environment.<sup>292</sup>

Each Corporation must compile a confidential register of sites on their lands that are sacred or significant.<sup>293</sup> When assessing an application for a mining tenement the Minister must consult with the relevant Corporation to ascertain whether the land involved includes any registered sacred or significant site.<sup>294</sup> The Minister must give the applicant any information about the site he or she considers appropriate.<sup>295</sup> In addition, the Corporation is deemed to have requested that the Minister make a declaration of preservation for the site under the *Aboriginal and Torres Strait Islanders Heritage Protection Act 1984* (Cth).<sup>296</sup>

The applicant miner must notify the Minister of the terms of any mining agreement that includes payment to the Corporations.<sup>297</sup> Payment must be reasonable in light of any disturbance or likely disturbance to the land or the traditional owners.<sup>298</sup> In some circumstances, payment cannot exceed that which would be payable under Victorian resource exploration legislation.<sup>299</sup>

### *Decision making processes*

The *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) provides for a Committee of Elders in each community. The Committees comprise members of the Corporation who are considered to be elders by Aboriginal traditional practice and by recognition of the relevant community.<sup>300</sup> At least half the members of the Kirrae Whurrong Committee of Elders must be residents of Framlingham Reserve.<sup>301</sup> These committees have considerable powers and responsibilities, including determining who is eligible to be a member of the relevant Corporation and the management of sacred sites



on the lands.<sup>302</sup> The Committees can determine disputes relating to traditional beliefs and customs.<sup>303</sup> A decision of a Committee is final and binding on all members of the Corporation.<sup>304</sup>

The Act establishes a trust fund for each Corporation.<sup>305</sup> Prescribed amounts are paid into the funds from consolidated revenue.<sup>306</sup> The Minister is also obliged to establish an Aboriginal Advancement Reserve to further the social and economic advancement of Aboriginal people living in Victoria.<sup>307</sup> Monies in the Corporation funds are distributed by the Minister, half to the relevant Corporation and half to the Advancement Reserve. All of these funds are administered by the Minister.

The Kerrup-Jmara Elders' Aboriginal Corporation and the Kirrae Whurrong Aboriginal Corporation have full management of their lands and significant community governance powers, including the ability to make by-laws.<sup>308</sup> The by-law making power extends to a variety of matters including economic enterprise, cultural activities, declaration of sacred sites, cutting and removing of timber, hunting, shooting and fishing, control of visitors and control of motor traffic. The by-laws can create offences for their contravention.<sup>309</sup> The regulations may provide for certain financial penalties for these offences.<sup>310</sup> By-laws are subject to disallowance by the parliament.<sup>311</sup>

### *Northcote*

The *Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982* (Vic) and the *Aboriginal Land (Northcote Land) Act 1989* (Vic) are brief and contain no provisions concerning access to the land. This is not surprising given the restricted purpose for which it can be used. The land can only be mined with the consent of the Aborigines' Advancement League.<sup>312</sup> As an incorporated association, the League's powers are those of a freehold landowner, subject to the statutory condition that its lands be used for Aboriginal cultural and recreational purposes.

### *Manatunga*

The *Aboriginal Land (Manatunga Land) Act 1992* (Vic) is brief and contains no provisions regarding access to the land. It specifically states that land granted under it is to be subject to Victorian resource development legislation on the same basis as any other land in the state.<sup>313</sup> Mineral resources remain the property of the state of Victoria.<sup>314</sup> The Act makes no provision for decision making by the Murray Valley Aboriginal Cooperative. Again, the general Victorian law of co-operatives applies.

## **Conclusion**

Indigenous peoples in Victoria have limited access to and control of community lands, particularly those groups who rely on grants under the *Aboriginal Lands Acts* of 1970 and 1991 and specific purpose grants, such as those at Northcote and Manatunga. While the

communities at Lake Condah and Framlingham Forest own small parcels of land, they have a relatively high degree of control over its management.

## New South Wales

### Land-holding and governance structures

#### *Aboriginal Land Rights Act*

##### *Introduction*

The *Aborigines Act 1969* (NSW) was repealed by the *Aboriginal Land Rights Act 1983* (NSW) and land formerly vested in the Aboriginal Lands Trust was transferred to the relevant Local Aboriginal Land Council (LALC) or the NSW Aboriginal Land Council.<sup>315</sup> The Act also introduced a mechanism for making claims to certain Crown land.<sup>316</sup> In NSW, Aboriginal land claims do not rely on traditional affiliation with the land.<sup>317</sup> This is appropriate given the extent to which Aboriginal communities in NSW have been alienated from their land by the process of colonisation.<sup>318</sup> The legacies of this history of alienation are acknowledged in the Preamble to the Act:

Land in the State of New South Wales was traditionally owned and occupied by Aborigines:

Land is of spiritual, social, cultural and economic importance to Aborigines:

It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land:

It is accepted that as a result of past government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation.<sup>319</sup>

Land councils can assert ownership of claimable Crown lands as defined in section 36(1) of the legislation. This effectively means they can claim unoccupied Crown land that is not needed for a public purpose. Under the *Aboriginal Land Rights Act 1983* (NSW) land is granted as freehold except in the Western Lands Division where claimants can be granted leases in perpetuity outside urban areas.<sup>320</sup> Grants are subject to any pre-existing native title rights.<sup>321</sup>

##### *Land Councils*

The statutory scheme for administering Aboriginal land in NSW has three tiers: LALCs, Regional Aboriginal Land Councils and the NSW Aboriginal Land Council. For the purposes of this Chapter they will be referred to collectively as Land Councils.

LALCs are bodies corporate that perform a number of important functions in regard to Aboriginal land holding.<sup>322</sup> There are currently 119 throughout NSW. All adult Aborigines on the Council roll are members.<sup>323</sup> Functions include acquisition and management of land, consideration of applications to mine on Aboriginal lands and

making land rights claims.<sup>324</sup> LALCs also perform broader community welfare functions, such as upgrading and extending Aboriginal housing and conciliating disputes.<sup>325</sup> LALCs and the NSW Aboriginal Land Council can purchase or lease land.<sup>326</sup> Before purchasing land, a LALC must have the written approval of the NSW Aboriginal Land Council.<sup>327</sup>

Each LALC has an elected executive of Chairperson, Secretary and Treasurer<sup>328</sup> and is represented by two members at the relevant Regional Aboriginal Land Council.<sup>329</sup> Regional Aboriginal Land Councils are bodies corporate that act as co-ordinating agencies for certain geographical areas and as a conduit between LALCs and the NSW Aboriginal Land Council.<sup>330</sup> Their statutory functions include assisting LALCs to prepare claims to Crown land and assisting the NSW Aboriginal Land Council to conciliate disputes between LALCs.<sup>331</sup>

The NSW Aboriginal Land Council is the peak body representing the interests of Aboriginal land holders and claimants in NSW.<sup>332</sup> It is a body corporate.<sup>333</sup> Each elected full time councillor represents a Regional Aboriginal Land Council.<sup>334</sup> The Council has an important policy and decision making role. For example, it gives advice about the listing of land of cultural significance under the *National Parks and Wildlife Act 1974* (NSW).<sup>335</sup> The Council also performs a number of significant support and financial management functions including the administration of the NSW Aboriginal Land Council Account and the Mining Royalties Account.<sup>336</sup>

### *National parks*

The *National Parks and Wildlife Act 1974* (NSW) contains a number of provisions aimed at safeguarding Aboriginal cultural interests in national parks. For example, the Minister may declare any place that in his or her opinion is of special significance with respect to Aboriginal culture to be an 'Aboriginal place'.<sup>337</sup> Such a declaration imposes obligations on the government to preserve and protect the place. Similarly the Governor can declare an area to be an 'Aboriginal area' to preserve and protect Aboriginal relics or places on the land.<sup>338</sup> Again, the government has the care and management of these areas.<sup>339</sup> These declarations are based on decisions by non-Indigenous governments.

There is also scope under the Act for Indigenous peoples to participate in the management of community lands in national parks. Part 4A of the *National Parks and Wildlife Act 1974* (NSW) enables LALCs to claim Crown land that would ordinarily be claimable under the *Aboriginal Land Rights Act 1983* (NSW) but for the fact that it is needed for the essential public purpose of nature conservation.<sup>340</sup> The LALC must lease the reserved land back to the government.<sup>341</sup>

The *National Parks and Wildlife Act 1974* (NSW) contains a second mechanism for Indigenous communities to claim land in national parks. Land listed in Schedule 14 of the Act is 'identified as being of cultural significance to Aboriginals'.<sup>342</sup> Land can only be

added to the Schedule by an Act of parliament.<sup>343</sup> Part 4A provides a claim like mechanism for reclassifying land in national parks. When land is listed in Schedule 14 (or successfully claimed under section 36 or 36A of the ALRA), the original reservation is revoked and the land is vested in the NSW Aboriginal Land Council or a LALC, subject to any native title claims. The land must then be leased back to the government and reserved again.<sup>344</sup>

Under any Part 4A lease, the Minister must pay the rent stipulated in the lease agreement to compensate the LALC for the fact that it does not have the full use and enjoyment of the lands.<sup>345</sup> Each area of land reserved under Part 4A of the *National Parks and Wildlife Act 1974* (NSW) is administered by a board of management.<sup>346</sup> Boards are made up of between eleven and thirteen members appointed by the Minister, the majority of whom must be Aboriginal owners.<sup>347</sup> The boards' chief function is the care, control and management of lease lands.<sup>348</sup>

Aborigines who own land in national parks are exempt from certain prohibitions. For example, plants can be picked for ceremonial or cultural purposes provided the species is not threatened.<sup>349</sup>

## Self-government

### *Aboriginal Land Rights Act*

#### *Access*

Access to Aboriginal land in NSW is governed by general property law. Their freehold interest entitles Land Councils to exclusive possession of the land and common law remedies for trespassing.

The *Aboriginal Land Rights Act 1983* (NSW) provides mechanisms for LALC members to have access to non-Aboriginal land for the purpose of hunting, fishing or gathering. This can be done by way of negotiated agreement with the owners of the land or court ordered permit.<sup>350</sup>

#### *Mining*

Land owned by a LALC or the NSW Aboriginal Land Council includes minerals other than gold, silver, coal and petroleum.<sup>351</sup> This is the case whether the land was transferred from the Aboriginal Lands Trust,<sup>352</sup> transferred as a result of a land claim,<sup>353</sup> purchased<sup>354</sup> or transferred by the Minister after consensual or compulsory acquisition.<sup>355</sup>

Generally, mining cannot occur on a LALC's land without its consent.<sup>356</sup> Consent can be conditional and may include an obligation to pay royalties.<sup>357</sup> A LALC cannot consent to a mining operation without the approval of the NSW Aboriginal Land Council or the NSW Land and Environment Court.<sup>358</sup> The Council and the Court can only refuse

approval on the ground that giving consent would be ‘inequitable to the LALC concerned or detrimental to the interests of members of other LALCs’.<sup>359</sup> All fees and royalties for mining on land owned by a LALC are payable to the NSW Aboriginal Land Council which must deposit them in the Mining Royalties Account.<sup>360</sup> LALCs have statutory power to explore for and exploit mineral resources or other natural resources.<sup>361</sup>

### *Decision making processes*

Land Councils’ power to acquire and manage land is heavily circumscribed by the *Aboriginal Land Rights Act 1983* (NSW). There are numerous restrictions on the disposal of land and on the way money in the NSW Aboriginal Land Council Account can be spent.<sup>362</sup> In addition, the Minister has broad supervisory powers. For example, he or she can appoint an investigator to inquire into various matters such as a Council’s efficiency and effectiveness.<sup>363</sup> The Minister can also appoint an administrator to a Land Council in certain circumstances.<sup>364</sup>

The Governor can declare that the NSW Aboriginal Land Council has ceased to function if the Minister is of the opinion that the Council has ‘wilfully failed or neglected to exercise any of its functions’.<sup>365</sup> On the recommendation of the NSW Aboriginal Land Council, the Minister can declare that a Regional Aboriginal Land Council or a LALC is dissolved.<sup>366</sup> This can occur at the request of the relevant Council or where the NSW Aboriginal Land Council is satisfied that it has ceased to function.<sup>367</sup>

The Minister has statutory power to determine rules of conduct to be observed by Land Councils and their members.<sup>368</sup>

For the purposes of public accountability, Councils are equated with public authorities in terms of administrative review and anti-corruption legislation.<sup>369</sup> The Independent Commission Against Corruption recently released the report of its investigation into NSW Land Councils.<sup>370</sup> The Commission made 26 recommendations aimed at reducing the likelihood of corruption. These included recommendations for greater openness in decision making processes and greater clarity in management roles.<sup>371</sup> The Commission also recommended greater centralisation of some aspects of Council business, for example, that membership requirements be revised to apply to the system as a whole rather than a particular LALC.<sup>372</sup> (See Chapter 12 for further discussion).

The Minister can require the NSW Aboriginal Land Council to submit quarterly financial statements about the amounts and purpose of grants to Land Councils.<sup>373</sup> This is in addition to annual budgetary obligations.<sup>374</sup> The Minister has directed the NSW Aboriginal Land Council to establish and monitor a uniform system of accounting for Land Councils.<sup>375</sup>

The *Aboriginal Land Rights Act 1983* (NSW) provides for the appointment of a NSW public servant as a Registrar.<sup>376</sup> The Registrar's primary function is to prepare and maintain a register of Aboriginal owners. The register should include the name of every Aborigine who has a cultural association with land in NSW.<sup>377</sup> The Registrar can refer various kinds of disputes between NSW Land Councils or their members to the Land and Environment Court, at the request of the NSW Aboriginal Land Council or on his or her own initiative.<sup>378</sup> The Registrar is responsible for approving the rules of all Land Councils in NSW.<sup>379</sup>

### *National parks*

#### *Access*

Boards of management for lands leased under the *National Parks and Wildlife Act 1974* (NSW) are responsible for considering proposals for cultural activities, such as hunting and gathering, on lease lands.<sup>380</sup>

An example of a lease for Schedule 14 land under the *National Parks and Wildlife Act 1974* (NSW) is the 30 year agreement entered in 1998 by the Minister for the Environment with Mutawintji LALC for the land comprising Mutawintji National Park, Mutawintji Historic Site and Mutawintji Nature Reserve. The Board of management for the land operates according to joint management principles set out in the lease.<sup>381</sup> It can restrict public access to Mutawintji lands.<sup>382</sup>

The Board [has] power to preclude or restrict public access to ceremonial places or other cultural sites by zoning or other mechanism including restrictions based on gender necessary for the cultural protection of such ceremonial places or other cultural sites.

The Board may, at the request of the Land Council or a group of Aboriginal owners or on its own volition:

- declare the whole or part of the lands a 'no grog' area for short periods for cultural reasons; and
- declare a defined area of the lands to be a 'no grog' area for any term or permanently, by prohibiting the possession and/or consumption of alcohol within the lands or the defined area.<sup>383</sup>

#### *Mining*

It is illegal to prospect or mine for minerals in a national park in NSW unless expressly authorised by an Act of parliament.<sup>384</sup> The *Mining Act 1992* (NSW) and the *Petroleum Act 1955* (NSW) do not apply in national parks.<sup>385</sup> However, the Minister can approve prospecting being carried out on behalf of the government.<sup>386</sup> The mineral rights that Land Councils have under the *Aboriginal Land Rights Act 1983* (NSW) do not extend to land leased back to the NSW government for nature conservation under the *National Parks and Wildlife Act 1974* (NSW).<sup>387</sup>

*Decision making processes*

Boards of management that administer Aboriginal land under the *National Parks and Wildlife Act 1974* (NSW) must comply with any plan of management that is in force for the lease lands and are subject to the control and direction of the Minister.<sup>388</sup>

**Queensland****Land-holding and governance structures***Introduction*

Indigenous land holding in Queensland has multiple bases. Aboriginal reserves are the oldest form of land tenure established for the purported benefit of Indigenous communities.<sup>389</sup> The reserve system was partly replaced in the 1980s by a system of deeds of grant in trust (DOGITs) to Aboriginal and Torres Strait Islander communities. In 1991 the DOGIT regime was supplemented by legislation intended to increase Indigenous control over former reserve and DOGIT land. The legislation also established a limited land claim process. The Aurukun and Mornington Island Shire Councils were established in 1978 under separate legislation.

This Chapter provides a brief overview of each type of land occupancy by and tenure held by Indigenous peoples in Queensland. The main governance structures, community councils, are then discussed in relation to each species of land holding. Where separate but similar legislation applies to Aborigines and Torres Strait Islanders, only that relating to Aborigines is cited.<sup>390</sup> (This is purely to save space—the authors acknowledge that Torres Strait Islanders are a distinct people with a unique history and culture.<sup>391</sup>)

*Reserves*

The reserve system was an integral part of both the protection regime of the early twentieth century and the later assimilationist policies of successive Queensland governments. The protection regime, characterised by legislation such as the *Aboriginals Protection and Restriction of the Sale of Opium Acts* of 1897 and 1901, allowed the Minister to remove any Aboriginal person to an Aboriginal reserve.<sup>392</sup> Reserves were governed by non-Indigenous superintendents. The Governor-in-Council could make regulations for residence and behaviour on reserves including the prohibition of ‘aboriginal rites or customs that, in the opinion of the Minister, [were] injurious to the welfare of aboriginals living upon a reserve’.<sup>393</sup> Other powers included control over Aboriginal people’s property and the marriage of Aboriginal people to certain Aboriginal and non-Aboriginal people.<sup>394</sup> The legislation specifically governing Torres Strait Islanders did not provide for their removal to reserves. Instead, it allowed for the establishment of island councils with local government functions.<sup>395</sup>

The legislation governing Aboriginal people was made less draconian with the enactment of the *Aborigines Act 1971* (Qld) but the Queensland government retained significant powers of supervision and management.<sup>396</sup> This included power over the creation and revocation of Aboriginal reserves.<sup>397</sup> Aboriginal reserves were, and remain, areas of land reserved for a public purpose by the Governor-in-Council. A public purpose could include an Aboriginal reserve but it was also possible for the Governor-in-Council to reclassify the reserve for other purposes such as roads, quarries or ports.<sup>398</sup> The Governor-in-Council could also revoke a reserve so that the land could be used for commercial purposes. An infamous example of a revocation occurred at Weipa in 1959 when a reserve of 354,000 hectares was reduced to 124 hectares to make way for bauxite mining by Comalco.<sup>399</sup>

The Minister had the power to grant fixed term leases of up to 30 years over land on a reserve.<sup>400</sup> Leases of up to 75 years were sometimes granted.<sup>401</sup> Currently, the Governor-in-Council can grant leases of up to 30 years over reserve land, subject to certain conditions and provided any trustees are consulted.<sup>402</sup> The *Aboriginal Land Act 1991* (Qld) allows the continuation of leases on transferable land, including Aboriginal reserves.<sup>403</sup>

### *DOGITs*

The reserve system was partly replaced with a system of DOGITs made to the councils for Indigenous residents on each reserve.<sup>404</sup> The changes occurred through a series of amendments to the *Land Act 1962* (Qld) from 1982 to 1988.<sup>405</sup> The fundamental change in policy was that Aboriginal and Torres Strait Islander people were given some degree of control over the land on which they lived and greater security of tenure.<sup>406</sup> Under the DOGIT system, the trustees manage the land for the Indigenous grantees. The role of trustee can be performed by a statutory body, an incorporated body, a group of individuals or a named individual.<sup>407</sup> The relevant community council commonly acts as trustee.<sup>408</sup>

DOGITs quickly replaced reserves throughout Queensland and each comprises an area of land which is generally at least the size of the former reserve.<sup>409</sup> Aboriginal reserves still exist as granted under the *Land Act 1962* (Qld) but they are subject to the *Land Act 1994* (Qld).<sup>410</sup>

The DOGIT granted to Aboriginal and Torres Strait Islander communities is essentially inalienable in nature. Only an Act of parliament can reduce or cancel an existing grant.<sup>411</sup> The DOGIT scheme does not include a land claim mechanism or a way for Indigenous people to apply for the granting of further DOGITs. Existing interests survive when a DOGIT is made.<sup>412</sup>

The *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld) allows for leases of DOGIT land by community councils and leases in perpetuity to Aboriginal



organisations or community councils.<sup>413</sup> The practice of granting perpetual leases on DOGITs undermines the inalienability of DOGIT land by removing community control in favour of individual residents (or corporations comprised solely of such residents).<sup>414</sup> This scheme was enacted to pursue a Queensland government policy of promoting individualised free enterprise in Indigenous communities. It may be at some considerable cost to traditional (and communal) responsibilities for land.<sup>415</sup>

Aboriginal or Torres Strait Islander people living on DOGIT land may take forest products or quarry material provided they do not sell them.<sup>416</sup> In addition, an Aboriginal Council on DOGIT land may authorise the gathering or digging of forestry products or quarry material for use on that land.<sup>417</sup>

The Queensland government can reserve areas of land within DOGITs for a public purpose.<sup>418</sup> Each reservation must be for a stated amount of land but the grant need not identify the location of that parcel.<sup>419</sup> This enables the government to have a kind of floating charge over DOGIT land. All Crown improvements on DOGIT land are also reserved from the grant.<sup>420</sup>

Like Aboriginal reserves, DOGITs can be converted to inalienable freehold under the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld). On the granting of the inalienable freehold under those Acts, the DOGIT is cancelled.<sup>421</sup> There is provision for part of DOGIT land to be converted to Aboriginal land and part to remain under deed.<sup>422</sup>

### *Aurukun and Mornington Island Shire Councils*

The Fraser government attempted to protect the Aurukun and Mornington Island reserves, which were run by church missions, from take-over by the Queensland government, by passing the *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978* (Cth). However, 'the Governor-in-Council sat in the middle of the night and de-gazetted these reserves leaving it to [the Queensland] parliament to resurrect them some days later as shires'.<sup>423</sup> The *Local Government (Aboriginal Lands) Act 1978* (Qld) established the Council of the Shire of Aurukun and the Council of the Shire of Mornington as local government councils.<sup>424</sup> Both Councils were granted 50 year leases.<sup>425</sup> They must operate in accordance with the *Local Government Act 1993* (Qld).<sup>426</sup>

Aurukun and Mornington Island were the major Aboriginal former reserve communities not to be granted DOGITs.<sup>427</sup> This anomaly was the product of a major confrontation on the issue of Aboriginal self-management between the Queensland and federal governments. Frank Brennan recalls that the Queensland government was concerned about the fostering of an outstation movement at both reserves by the Uniting Church trustees and wanted to assert control over the communities.<sup>428</sup> There was also a high level of conflict

about mining on the lands.<sup>429</sup> When the *Aboriginal Land Act 1991* (Qld) came into operation, Aurukun and Mornington Island Shire Council lease land became eligible for conversion to inalienable Aboriginal freehold. (See the discussion of this conversion process below.)

### *Aboriginal and Torres Strait Islander Land Acts*

In 1991 the Goss Labor government enacted limited land rights legislation in Queensland. Both the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) had a stormy passage through parliament due to Indigenous concern about the lack of consultation on the bills and dissatisfaction with the final form of the legislation. During the policy debate Premier Goss was at pains to ensure that the government was not seen to be supporting land rights on the Northern Territory model:

...Mr Goss knew land rights was an unpopular issue with the Queensland electorate. According to his priorities he had better things to do with his credibility than spend it on selling a land rights package which actually redistributed rights between Aborigines and other Queenslanders. He was happy to lead his caucus...to a gradual accommodation of Aboriginal interests and to a commitment for increased access by Aborigines to land provided no other citizens' interests were reduced and provided no citizens had anything at all to fear...<sup>430</sup>

The *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) are an advance on the previous Indigenous land holding system in Queensland but weaker than the land rights regimes in both the Northern Territory and NSW. The Acts allow for the transfer of land occupied by Indigenous peoples to a new form of inalienable freehold title.<sup>431</sup> The land is held by the grantees as trustees for the 'benefit of Aboriginal people and their ancestors and descendants'.<sup>432</sup>

To be eligible for this conversion to Aboriginal land or Torres Strait Islander land,<sup>433</sup> the area concerned must be transferable within the terms of the legislation.<sup>434</sup> The *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) deem existing Aboriginal reserves, DOGITs and the Aurukun and Mornington Island shire leases to be transferable land.<sup>435</sup> When the Minister appoints the trustees of the land he or she must consider the views of Aboriginal people and, as far as is practicable, act in a way that is consistent with Aboriginal tradition.<sup>436</sup> The Crown is entitled to continue in occupation when an area becomes Aboriginal land under the legislation.<sup>437</sup>

The *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) also establish a limited claim procedure for land that has been transferred under the legislation<sup>438</sup> and Crown land that has been declared by regulation to be claimable.<sup>439</sup> Where an area successfully claimed includes national park land, the grant is subject to the grantees leasing it to the Queensland government in perpetuity for conservation management.<sup>440</sup> This is referred to collectively as granted land in the legislation.<sup>441</sup>

Land that has been transferred to inalienable freehold under the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) can only be taken outside the claim process by specific regulation.<sup>442</sup> Such a regulation may only be made if the land is primarily ‘used or occupied by Aboriginal people for residential or community purposes’ or the majority of Aboriginal people ‘concerned with the land’ are opposed to it being claimable.<sup>443</sup> This provision enables communities with historical connections to land to block claims by the traditional Aboriginal owners.<sup>444</sup>

The *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) also exclude certain land from claim including areas within city or town boundaries, state forest or timber reserves, roads and stock routes.<sup>445</sup> All grants are subject to native title rights and interests.<sup>446</sup>

Any group of Indigenous people may claim land under the *Aboriginal Land Act 1991* (Qld) or the *Torres Strait Islander Land Act 1991* (Qld) on one or more of the following grounds: traditional affiliation, historical association, or economic or cultural viability.<sup>447</sup> To establish a claim on the ground of traditional affiliation, the members of the group must show that they ‘have a common connection with the land based on spiritual and other associations with, rights in relation to, and responsibilities for, the land under Aboriginal tradition’.<sup>448</sup> In determining the claim, the Land Tribunal must consider the views of the elders of the group.<sup>449</sup>

In establishing a land claim on the basis of historical association, a group of Aborigines must demonstrate that they or their ancestors have lived on or used the land (or land in the district) for a substantial period.<sup>450</sup> Again, the Land Tribunal must consider the views of the elders of the group.<sup>451</sup> A grant will be made on the ground of economic or cultural viability if the Tribunal is satisfied that this would ‘assist in restoring, maintaining or enhancing the capacity for self-development, and the self-reliance and cultural integrity, of the group’.<sup>452</sup>

The lodgement of a claim entitles the claimants to go before the relevant Land Tribunal established under the *Aboriginal Land Act 1991* (Qld) or the *Torres Strait Islander Land Act 1991* (Qld).<sup>453</sup> If the claim is established the Tribunal may recommend to the Minister that a grant be made.<sup>454</sup> If the claim is based on traditional or historical affiliation the Tribunal must recommend that the land be granted in fee simple. If, however, the claim is based on economic or cultural viability the Tribunal can only recommend that the land be granted as a lease, either in perpetuity or for a fixed term.<sup>455</sup> The Tribunal recommends trustees for the land having regard to any Aboriginal tradition applicable to the land.<sup>456</sup> Section 61(2) of the *Aboriginal Land Act 1991* (Qld) establishes a hierarchy between competing claimants. A claim based on traditional affiliation is to be preferred by the Tribunal to one based on historical association or economic/cultural viability. An historical association claim is to be preferred over one based on economic/cultural viability.

The Minister must be satisfied that the land should be so granted to the group before a direction is given to the registrar of titles to prepare the grant or lease.<sup>457</sup> In addition, the Minister must appoint grantees to act as trustees of the land.<sup>458</sup> Both provisions provide a degree of Ministerial control over the granting of land and appointment of trustees which may not fully accord with the recommendations of the Tribunal. However, in exercising his or her powers with respect to the appointment of trustees, the Minister is bound to consult the Aboriginal people concerned and, unless exceptional circumstances exist, act in a way consistent with Aboriginal tradition and the views of the Aboriginal people concerned.<sup>459</sup>

The grounds for claim under the *Aboriginal Land Act 1991* or the *Torres Strait Islander Land Act 1991* (Qld) are considerably wider than the land rights model in the Northern Territory, encompassing historical association as well as traditional affiliation. This seems to reflect the degree to which Aboriginal people in Queensland have been forcibly moved off their traditional lands and placed on government or church reserves and missions.

Members of Aboriginal or Torres Strait Islander communities can take marine products or fauna by traditional means from their lands for consumption by members of the community.<sup>460</sup> However, they may not do so for sale.<sup>461</sup>

#### *Community councils and Indigenous local government*

There is no provision in the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) for the establishment or funding of representative land councils. Aboriginal land and Torres Strait Islander land is instead administered by community councils acting as trustees.<sup>462</sup> Community councils are bodies corporate which may sue and be sued and are capable of holding real and personal property.<sup>463</sup> Council members hold tenure for four years.<sup>464</sup> A voters' roll is established in accordance with the *Local Government Act 1993* (Qld).<sup>465</sup> There is no provision for an Indigenous person with traditional or historical association with a shire area to vote for an Indigenous council if they are not resident in that area. The membership requirements, membership procedures and financial administration of community councils are governed by regulation.<sup>466</sup>

Community councils take over local government functions for their area and are charged with good government 'in accordance with the customs and practices of the Aborigines concerned'.<sup>467</sup> Their statutory functions include constructing and maintaining roads, providing sanitation and drainage, water conservation, village planning and fence construction.<sup>468</sup>

Finally, the Acts establish the Aboriginal Co-ordinating Council and the Island Co-ordinating Council.<sup>469</sup> These bodies comprise the chairpersons of each Aboriginal or Island Council and another representative member from each.<sup>470</sup> The Councils can act on behalf of their constituents, advising on the 'progress, development and well-being' of

their respective Indigenous peoples including making recommendations to the Minister or the chief executive.<sup>471</sup> The Councils have played a prominent role in Queensland Indigenous affairs but have been unable to match the political impact nationally of some of the major land councils. The Island Co-ordinating Council formed the basis of the ATSIC Torres Strait Regional Council which was later reconstituted as the Torres Strait Regional Authority.<sup>472</sup>

In 1991 the Queensland Legislation Review Committee recommended that new community government legislation be enacted to ensure equal participation in government by Aboriginal and Torres Strait Islander communities.<sup>473</sup> Under the proposed legislation, each community government structure would have broad local government powers and service delivery responsibilities including the administration of justice, education, housing and conservation of natural resources.<sup>474</sup> No such legislation has been enacted. The reforms in the recently enacted *Community Services Legislation Amendment Act 1999* (Qld) are chiefly aimed at improving councils' financial management and accountability. However, the Act also removes the requirement that a council area must be a trust area. Under the Act the Governor in Council has power to declare that a council by-law has no effect if this is 'necessary to protect State interests'.<sup>475</sup>

In 1996 the then Queensland Office of Aboriginal and Torres Strait Islander Affairs introduced an alternative governing structures program in response to perceived inadequacies in the community government system.<sup>476</sup> This governance program has been absorbed into the general community development program administered by the Department of Aboriginal and Torres Strait Islander Policy and Development. The program provides funding for localised planning and development activities.<sup>477</sup>

## Self-government

### *Reserves*

Aboriginal and Torres Strait Islander reserves were, on the whole, not controlled by Aboriginal and Torres Strait Islander people. Typically they were held in trust for Aboriginal people with the Department of Aboriginal and Islander Affairs acting as trustee.<sup>478</sup> In some circumstances the trustee was a church organisation or the (non-Indigenous) local government authority.<sup>479</sup> The Aboriginal and Islander Affairs Corporation acts as trustee for surviving reserves.<sup>480</sup>

The *Aboriginal Land Act 1991* (Qld) changed the trustee relationship for reserve land that was transferred to Aboriginal inalienable freehold. Questions of access become subject to either the *Community Services (Aborigines) Act 1984* (Qld) or the *Aboriginal Land Act 1991* (Qld) regime for transferred land. The relevant provisions of these Acts are considered below.

Land that is not under the control of a community council is subject to the general law of trespass.<sup>481</sup> Indigenous communities have no control over mining on reserve land.

## DOGITs

### *Access*

Roads within DOGIT land are often excised from the deeds allowing full public access.<sup>482</sup> Members of the public can enter a DOGIT and be in any public place, road, park or place of business on it.<sup>483</sup> Entry to other areas of a DOGIT is generally only at the request of a community resident<sup>484</sup> although public servants and those acting under statutory authority can both enter and reside on a DOGIT.<sup>485</sup> In effect, access to DOGIT communities is much like any small Queensland town although the right to reside in the community, apart from those with statutory rights to do so, is controlled by the community council.<sup>486</sup>

### *Mining*

Community councils have little control over mining on DOGIT land. Minerals, petroleum and quarry materials are reserved to the Crown.<sup>487</sup> The only safeguard is that a mining tenement, authority to prospect, permit, claim, licence or lease land under the *Mineral Resources Act 1989* (Qld), cannot be issued without the consent of the Governor-in-Council who must consider the views and recommendation of the trustees of the land (the community council in most cases).<sup>488</sup>

### *Decision making processes*

The Governor-in-Council can make model by-laws for DOGIT land by regulation.<sup>489</sup> This includes by-laws protecting trust land, regulating trust business and imposing penalties for contraventions of by-laws.<sup>490</sup> A by-law may state that all or part of DOGIT land is a public place for the purposes of legislation conferring duties about such places on police.<sup>491</sup> If a local government body is acting as trustee, it can make model by-laws for DOGIT land under the *Local Government Act 1993* (Qld) and adopt a model by-law consistent with the Land Act.<sup>492</sup>

If DOGIT land is managed by a community council or has been converted to Aboriginal land by law, the provisions of the *Community Services (Aborigines) Act 1984* (Qld) and the *Community Services (Torres Strait Islanders) Act 1984* (Qld) apply.<sup>493</sup>

### *Aurukun and Mornington Island Shire Councils*

#### *Access*

The *Local Government (Aboriginal Lands) Act 1978* (Qld) sets out who is entitled to enter or reside on Aurukun and Mornington Island community lands. Residence is limited to Indigenous people who had a lawful right to be on the reserves on 5 April 1978, their

descendants and spouse(s) and those who once lawfully resided on the reserves and now have the consent of the relevant Council to resume such residence.<sup>494</sup> Certain government officials and employees may also be resident on the shire lands or remain there temporarily.<sup>495</sup>

### *Mining*

The terms of the original leases for the Aurukun and Mornington Island Shire Council lands allowed for limited fishing, hunting, foraging, timber and quarrying rights. The Councils could also negotiate mining agreements for their land and take a share of the profits.<sup>496</sup> However, this has been overtaken by the provisions of the *Aboriginal Land Act 1991* (Qld) which apply the provisions relevant to reserves in the *Mineral Resources Act 1989* (Qld) to all transferable land. This is discussed further in the subsequent section.

### *Decision making processes*

Each Council can make local by-laws authorising certain classes of persons to reside on shire lands and excluding other classes of persons.<sup>497</sup> Councils must have the consent of the grantees to these local laws and must achieve the general agreement of the Aboriginal people concerned through consultation.<sup>498</sup> A large part of the *Local Government (Aboriginal Lands) Act 1978* (Qld) is taken up with the control of possession and consumption of alcohol in Aurukun Shire.<sup>499</sup> The Aurukun Alcohol Law Council is empowered to declare controlled and dry places.<sup>500</sup>

### *Aboriginal and Torres Strait Islander Land Acts*

#### *Access*

The access provisions of the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) do not generally improve Indigenous community control over Aboriginal land. Roads are specifically excluded from Aboriginal land.<sup>501</sup> Access to Aboriginal land is guaranteed to the public under the *Community Services (Aborigines) Act 1984* (Qld) and the *Community Services (Torres Strait) Act 1984* (Qld) as discussed above in relation to DOGITs.<sup>502</sup> In addition, the Crown can continue in occupation rent free.<sup>503</sup> government officers, employees, servants and agents are guaranteed access to land used by the Crown.<sup>504</sup>

Community Councils must have the consent of the grantees to any by-laws about who is permitted to enter or who is excluded from their lands.<sup>505</sup> The grantees must have explained to the 'Aboriginal people particularly concerned with the land' the nature, purpose and effect of the proposed by-law, have given them an adequate opportunity to express their views on it and have obtained their general agreement.<sup>506</sup>

### *Mining*

The *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) contain an important protection. The trustees (who may not necessarily be Indigenous

people) may not grant an interest in transferred or granted land, including a mining interest, unless the following steps have been taken:

- they have explained to the Aboriginal people particularly concerned with the land the nature, purpose and effect of the proposed grant, consent or agreement; and
- the Aboriginal people are given adequate opportunity to express their views on, and are generally in agreement with, the grant, consent or agreement; and
- they have subsequently given the Aboriginal people notice of not less than 1 month of their intention to make the grant, give the consent or enter the agreement.<sup>507</sup>

The provision appears to be a weaker version of the requirements to consult traditional Aboriginal owners under s.19(5) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

A deed of grant for transferred or granted land must include a reservation to the Crown of all minerals and petroleum.<sup>508</sup> Forest products or quarry materials 'of vital State interest' may also be reserved to the state by regulation. Reasonable compensation must be paid to the grantees for the reservation.<sup>509</sup>

The *Mineral Resources Act 1989* (Qld) applies to Aboriginal land as if it were a reserve.<sup>510</sup> This means that the grantees only have a veto over prospecting permits.<sup>511</sup> A mining claim or exploration permit can be granted with the consent of the owner (the grantees) or the Governor-in-Council.<sup>512</sup>

When a miner wishes to proceed to the mining stage and applies for a mining lease the owner of the land can object.<sup>513</sup> If a conference between the miner and the owner fails then the matter is referred to the Mining Warden. The Mining Warden makes recommendations to the Minister.<sup>514</sup> The Minister may reject the application or recommend to the Governor-in-Council that the lease be granted.<sup>515</sup>

The trustees of Indigenous land are entitled to receive a prescribed per centage of any mining royalties paid to the Crown.<sup>516</sup>

An Aboriginal Council can authorise the gathering or digging of forestry products or quarry material on Aboriginal or Torres Strait Islander land if the grantees have authorised it or reasonable compensation has been paid to them, and provided the materials are not reserved to the Crown.<sup>517</sup>

#### *Decision making processes*

Community councils can make by-laws on a number of matters including: discipline, health, housing, planning and development and consumption of alcohol.<sup>518</sup> By-laws can wholly or partly adopt local government laws.<sup>519</sup> A notice of intention to make a new by-law must be displayed in a prominent council area and include a deadline for lodging objections with the clerk of the council.<sup>520</sup> By-laws are subject to the approval of the



Governor-in-Council.<sup>521</sup> When a by-law is submitted to the Governor-in-Council it must be accompanied by any objections submitted to the clerk.<sup>522</sup>

The state government plays a significant role in overseeing community councils. On instructions from the Minister, the Governor-in-Council can dissolve a community council.<sup>523</sup> He or she must appoint an administrator in such circumstances and that person is deemed to be the community council.<sup>524</sup> Other supervisory provisions include the power of the Aboriginal and Islander Affairs Corporation and the Auditor-General to enter community lands and inspect a council's accounts.<sup>525</sup>

The *Community Services (Aborigines) Act 1991* (Qld) and *Community Services (Torres Strait) Act 1991* (Qld) include innovative provisions on community policing and Indigenous courts. The Acts give the weight of the general law of Queensland to by-laws authorising Indigenous police to do certain acts.<sup>526</sup> Indigenous police are appointed by the council for the area and are charged with maintaining peace and good order.<sup>527</sup> Commissioned Queensland police have the same powers on DOGITs and Aboriginal and Torres Strait Islander land as they have elsewhere.<sup>528</sup>

The Acts establish an Aboriginal or Torres Strait Islander Court for each trust area. These courts are constituted by two justices of the peace both of whom must be Indigenous residents of the community, or failing that, members of the community council.<sup>529</sup> The Indigenous courts determine complaints about breaches of community by-laws.<sup>530</sup> In addition, the courts may determine disputes about other matters that are governed by the usages and customs of the community provided they are not breaches of state or federal law.<sup>531</sup> Decisions of Indigenous courts have the status of magistrates' decisions under the *Justices Act 1886* (Qld) for the purposes of appeal rights.<sup>532</sup>

## Conclusion

Indigenous land holding and management structures in Queensland are a complex web of inherited idiosyncrasies and relatively innovative recent legislation. Community councils have a broad role but continue to be subject to considerable government oversight and control.

## Tasmania

### Land-holding and governance structures

#### *Aboriginal Land Council*

Relative to many of the mainland jurisdictions, the Tasmanian parliament was late to pass land rights legislation.<sup>533</sup> This was probably due to longstanding official commitment to the fiction that Tasmanian Aborigines died out with Truganini in 1876.<sup>534</sup> The *Aboriginal Lands Act 1995* (Tas) establishes the Aboriginal Land Council (the Council), a body

corporate of eight Aborigines elected to represent five regions.<sup>535</sup> Its main function is to 'use and sustainably manage Aboriginal land and its natural resources for the benefit of all Aboriginal persons'.<sup>536</sup> Aboriginal land is that vested in the Council in trust for Aborigines under section 27 of the Act.<sup>537</sup> The twelve areas originally vested in the Aboriginal community are culturally significant but amount to only 0.06 per cent of land in the state.<sup>538</sup> There is no land claim procedure but the Council can purchase additional land.<sup>539</sup>

There is no explicit reference to the nature of the title of Aboriginal land in the *Aboriginal Lands Act 1995* (Tas). Certain sections imply that it is freehold. For example, the Council is referred to as the owner of Aboriginal land<sup>540</sup> and can lease land to certain persons.<sup>541</sup> Aboriginal land vests subject to any estate existing in the land immediately before the date the Act commenced.<sup>542</sup> Aboriginal land may not be compulsorily acquired by the Tasmanian government.<sup>543</sup>

The Council administers the Aboriginal Land Council of Tasmania Fund which includes money raised from leases and licences of Aboriginal land and grants from the federal or state government.<sup>544</sup> The money in the Fund is used for general administration and wages payable under the Act.<sup>545</sup>

### *Council membership*

The Chief Electoral Officer of Tasmania is required to prepare guidelines concerning the eligibility of persons to be included on the roll for Council elections 'on the basis that the person is or is not an Aboriginal person'.<sup>546</sup> Guidelines issued on 29 July 1996 state that to be included on the electors' roll, a person must be able to:

provide authentic documentary evidence that shows a direct line of ancestry linked back through an identifiable family name to traditional Aboriginal society; and demonstrate communal recognition of acceptance by members of the broader Aboriginal community.<sup>547</sup>

The Guidelines state that the required documentary evidence will usually be in the form of a verifiable family tree, or archival or historical documentation that links a person to a traditional family or person. Photographic evidence or family folklore alone will not normally be sufficient to prove Aboriginal ancestry.<sup>548</sup> In practical terms, evidence of communal recognition will usually be established for the purposes of the Guidelines by a combination of signed statements from individual Aboriginal community members from a different family group and from community organisations.<sup>549</sup>

The Guidelines apply the definition of Aboriginal person in the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) as interpreted by the Federal Court in *Gibbs v Capewell*.<sup>550</sup> This definition was recently litigated by parties challenging the eligibility of electors in ATSIC Regional Council elections in Tasmania.<sup>551</sup> In that decision Merkel J

found that the three criteria to consider when determining whether someone is Aboriginal are descent, self-identification and community recognition. This finding reiterates the leading judgment of Brennan J in *Mabo*:

Membership of the Indigenous people depends on biological descent from the Indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional leadership among those people.<sup>552</sup>

Before attempting to have some effective role in the way community land is administered, Aborigines have to clear the difficult hurdle of being recognised as such for the purposes of Tasmanian laws. The process is dominated by non-Indigenous standards of proof that fundamentally undermine self-determination. Merkel J acknowledged this in *Shaw v Wolf*:

It is unfortunate that the determination of a person's Aboriginal identity, a highly personal matter, has been left by a parliament that is not representative of Aboriginal people to be determined by a Court which is also not representative of Aboriginal people.<sup>553</sup>

Sixty days before nominations are called for in an Aboriginal Land Council of Tasmania election, the Chief Electoral Officer must make the electoral roll available for inspection.<sup>554</sup> Objections about exclusions from or inclusions on the roll can be made by any person.<sup>555</sup> Persons lodging objections and those to whom objections relate have the right to appeal decisions of the Chief Electoral Officer to the Supreme Court of Tasmania within seven days of notification.<sup>556</sup>

The contemporary nature of the *Aboriginal Lands Act 1995* (Tas) is highlighted by section 18(2) which provides that the Council must perform its functions 'for the benefit of all Aboriginal persons and in the interests of reconciliation with the broader Tasmanian community'.

## Self-government

### *Access*

With the exception of the land at Oyster Bay and Mount Cameron West, the public has a general right of access over Aboriginal land in Tasmania.<sup>557</sup> Access to the Aboriginal land at Risdon Cove is limited to daylight hours when no significant Aboriginal cultural event is being held.<sup>558</sup>

The *National Parks and Wildlife Act 1970* (Tas) specifically states that it does not preclude Aboriginal cultural activity on park lands provided the Minister is satisfied it is not likely to have a detrimental effect on fauna and flora.<sup>559</sup> 'Cultural activity' is defined in that Act as hunting, fishing or gathering by an Aboriginal person for his or her personal use based on Aboriginal custom as passed down to that person.<sup>560</sup>

### *Mining*

Land is vested in the Aboriginal Land Council of Tasmania to a depth of 50 metres and includes minerals other than oil, atomic substances, geothermal substances and helium.<sup>561</sup> Under s.76(1) of the *Mineral Resources Development Act 1995* (Tas), any person with an interest in an area of land for which a mining lease is sought may object to the granting of such a lease. Disputes are resolved by the Mining Tribunal. The Tribunal is established as a division of the Magistrates' Court but proceedings are relatively informal.<sup>562</sup> For example, the Tribunal is not bound by the rules of evidence.<sup>563</sup> Despite this, it has the same enforcement powers as the Supreme Court of Tasmania.<sup>564</sup>

### *Decision making processes*

While the Aboriginal Land Council of Tasmania represents all Aborigines in that state, it has a statutory obligation to take into account the interests of local Aboriginal communities when managing Aboriginal land.<sup>565</sup> There is also provision for local communities to be directly involved in the management of Aboriginal land.<sup>566</sup>

One of the Council's statutory functions is the preparation of management plans for Aboriginal land.<sup>567</sup> Local Aboriginal groups can also prepare management plans but they must be submitted to the Council for approval.<sup>568</sup> Local Aboriginal groups are those nominated by the Council for a particular geographic area.<sup>569</sup>

When deciding whether a local Aboriginal group or person should be involved in the management of Aboriginal land the Council must consider:

the extent to which a local Aboriginal group or person has an association or connection with the land; the extent to which a local Aboriginal group or person has the desire and capacity to manage the land; and the importance of the land to all Aboriginal persons.<sup>570</sup>

Under the *Aboriginal Lands Act 1995* (Tas) the right to construct drains, sewers and waterways is reserved to the Crown.<sup>571</sup>

Decisions of the Aboriginal Land Council of Tasmania are subject to internal review in certain circumstances, including the involvement of local Aboriginal groups in land management.<sup>572</sup> Review is only available if the request is signed by 50 Aborigines eligible to vote at a Council election.<sup>573</sup> The Council has no statutory power to make by-laws.

Aboriginal land that is used principally for Aboriginal cultural purposes is exempt from land tax.<sup>574</sup> In addition, the Aboriginal Land Council of Tasmania is exempt from general council rates, construction rates and contributions to the cost of fire brigades.<sup>575</sup> The Council continues to be liable for rates and charges for services such as water supply, sewage, garbage removal and stormwater removal.<sup>576</sup>

## Conclusion

The Premier of Tasmania, Mr Bacon, recently handed Wybalenna mission on Flinders Island back to the Aboriginal Land Council to be co-managed by traditional Aboriginal owners of the Island.<sup>577</sup> The mission was the site of Aboriginal genocide in the 1830s and '40s. Despite this gesture towards reconciliation, Tasmanian Aborigines continue to have control of a tiny amount of their traditional lands. Even where they are recognised as owners by non-Indigenous laws and bureaucracy, their control over access to the land and their role in its management is minimal.

## Western Australia

### Land-holding and governance structures

#### *Introduction*

Despite that fact that it has the third highest proportion of Indigenous residents of any Australian jurisdiction, Western Australia is the only state not to have any form of land rights legislation.<sup>578</sup>

In 1974 the Western Australian Royal Commission into Aboriginal Affairs made some commentary on the findings of the Woodward Royal Commission in the Northern Territory<sup>579</sup> but did not make any recommendations in regard to land rights.<sup>580</sup>

...whatever is done in the way of establishing the Aboriginal descendants of the original occupiers of this land on land, it should be clear that the process is being achieved either as a matter of legal right or humanitarian and benevolent gesture and for the present, I am of the opinion it occurs for humanitarian and benevolent reasons.<sup>581</sup>

Between May 1983 and September 1984, Perth barrister Paul Seaman QC conducted an Aboriginal Land Inquiry at the request of the Western Australian Minister with Special Responsibility for Aboriginal Affairs.<sup>582</sup> Seaman conducted extensive public hearings with Indigenous and non-Indigenous people and received over 230 written submissions.<sup>583</sup> Seaman recommended that legislation be drafted to enable incorporated Aboriginal bodies to claim Aboriginal reserves, unallocated Crown lands, unused public lands, conservation reserves and mission lands.<sup>584</sup> Seaman also recommended the establishment of a Tribunal to determine any land claim which could not be dealt with by negotiation between public authorities and Aboriginal people.<sup>585</sup> The recommendations of the Aboriginal Land Inquiry have never been implemented.

#### *Reserves*

##### *Introduction*

Under the *Land Act 1933* (WA) the Governor could grant a lease, either fixed term or in perpetuity, of Crown land to an Aboriginal person.<sup>586</sup> Land could also be reserved for

specific purposes, including for the benefit of Aboriginal inhabitants.<sup>587</sup> Reserves were classified by the Minister: Class A reserves 'forever remain dedicated to the purpose declared' unless reclassified by legislation;<sup>588</sup> Class B reserves remain reserved from alienation until the Governor proclaims otherwise;<sup>589</sup> and all other reserves are designated as Class C.<sup>590</sup> Reserves can be vested in, leased to or granted to Aboriginal organisations and communities.<sup>591</sup>

The *Land Act 1933* (WA) was repealed by the *Land Administration Act 1997* (WA). The Minister can transfer land in fee simple, or grant a lease of Crown land, either fixed term or in perpetuity, to an Aboriginal person.<sup>592</sup> Land can also be reserved for a specific purpose, including for the benefit of Aboriginal inhabitants.<sup>593</sup> The only classification that remains is Class A (though prior Class B and Class C reserves remain).<sup>594</sup>

Aboriginal people continue to be entitled to enter upon any unenclosed and unimproved parts of land under a pastoral lease to seek their sustenance in their accustomed manner.<sup>595</sup>

Aboriginal reserves in Western Australia include:

- Crown land reserved under the *Land Administration Act 1997* (WA),
- Crown land reserved under the *Land Act 1933* (WA),
- reserves proclaimed under the now repealed *Native Welfare Act 1963* (WA), and
- reserves proclaimed for 'persons of Aboriginal descent' under the *Aboriginal Affairs Planning Authority Act 1972* (WA).<sup>596</sup>

#### *Aboriginal Affairs Planning Authority*

Aboriginal reserves vest in the Aboriginal Affairs Planning Authority, a statutory body corporate.<sup>597</sup> The power to proclaim the reservation of additional Crown lands under the *Aboriginal Affairs Planning Authority Act 1972* (WA) can only be exercised on the recommendation of the Minister who must first refer the matter to the Authority. The Minister lays his or her own proposed recommendation and the report of the Authority before the parliament.<sup>598</sup> If either house of the parliament rejects the recommendation, the Minister cannot present it to the Governor.<sup>599</sup>

The Aboriginal Affairs Planning Authority has a statutory duty to promote the well being of persons of Aboriginal descent in Western Australia and to take their views into account, as expressed by their representatives.<sup>600</sup> Its functions include:

- fostering the involvement of persons of Aboriginal descent in their own enterprises in all aspects of commerce, industry and production, including agriculture,
- making available such services as may be necessary to promote the effective control and management of land held in trust for persons of Aboriginal descent, and

- taking, instigating or supporting such action as is necessary to promote the economic, social and cultural advancement of persons of Aboriginal descent in Western Australia.<sup>601</sup>

### *Aboriginal Lands Trust*

The Aboriginal Affairs Planning Authority can transfer reserve land to the Aboriginal Lands Trust.<sup>602</sup> The Aboriginal Lands Trust is a statutory body corporate comprising a chairperson and six other members of Aboriginal descent appointed by the Minister.<sup>603</sup> The Trust has a number of specific statutory functions including ensuring that land is managed in accordance with wishes of the Aboriginal inhabitants of the area 'so far as that can be ascertained and is practicable'.<sup>604</sup>

The Aboriginal Lands Trust can only sell or lease reserve land with the prior approval of the Minister.<sup>605</sup> In addition, the Minister can issue general or specific directions which the Trust must follow in exercising its functions.<sup>606</sup> In administering the *Aboriginal Affairs Planning Authority Act 1972* (WA), the Minister is required to have regard to the recommendations of the Authority and the Trust but is not bound to give effect to them.<sup>607</sup>

In 1996 the Western Australian Aboriginal Affairs Department reviewed the Aboriginal Lands Trust. The review recommended that title to lands managed by the Trust be transferred to Aboriginal corporations in trust for Aboriginal people by the year 2002.<sup>608</sup> It also proposed that members of the Trust be nominated by Aboriginal organisations with community membership to ensure regional representation.<sup>609</sup>

### *Aboriginal Communities Act*

Aboriginal communities in Western Australia have no control over local government issues, such as public order or the availability of alcohol, on reserve lands. However, they may have access to greater self-government under the *Aboriginal Communities Act 1979* (WA) which enables certain groups to manage and control community lands. The Act applies to certain specified communities and to any incorporated Aboriginal community that the Governor proclaims to be within the ambit of the legislation.<sup>610</sup> The Governor is also responsible for proclaiming the boundaries of community lands.<sup>611</sup>

## **Self-government**

### *Reserves*

#### *Access*

Certain people can enter reserve lands without incurring liability for trespass. These are Aborigines, Western Australian and federal members of parliament, persons fulfilling legal duties and persons authorised by the regulations.<sup>612</sup> All other persons must apply for a permit to enter the lands. Before granting such a permit the Minister must consult the

Aboriginal Lands Trust.<sup>613</sup> If the Minister's decision differs materially from the views expressed by the Trust he or she must lay a report on the matter before the parliament.<sup>614</sup> The Authority can authorise entry to reserve lands for any purpose if the Minister is of the opinion that it would 'benefit the Aboriginal inhabitants'.<sup>615</sup>

Under the *Aboriginal Affairs Planning Authority Act 1972* (WA), the Governor may declare that the right to exclusive use and benefit of any area of reserve land is restricted to the Aboriginal inhabitants of the area.<sup>616</sup> Regulations can be made in regard to such areas providing for the compilation of documentary evidence about the entitlement of persons to use or benefit from specific areas of land, including customary use of natural resources.<sup>617</sup>

The 1996 review of the Aboriginal Lands Trust recommended that Aboriginal communities manage their own entry permits for reserve lands. It also proposed that communities be able to take action against trespassers without the intervention of the Commissioner of Aboriginal Affairs.<sup>618</sup>

### *Mining*

The Crown retains title to all mineral resources on reserves in Western Australia.<sup>619</sup> Mining can be carried out on lands reserved under Part III of the *Aboriginal Affairs Planning Authority Act 1972* (WA) with the consent of the Minister for Mines.<sup>620</sup> Before granting his or her consent the Minister must consult with the Minister for Aboriginal Affairs.<sup>621</sup> There is no obligation to consult the Aboriginal Affairs Planning Authority.

Mining tenements on reserve lands are subject to the miner receiving an entry permit.<sup>622</sup> Before deciding whether to grant a permit the Minister must consult the Aboriginal Lands Trust.<sup>623</sup> In practice the Trust consults the relevant Aboriginal community. Agreements between applicant miners and communities have included provision for training, sacred sites and payment for disruption.<sup>624</sup>

Royalties for mineral exploration and mining must be paid to the Crown.<sup>625</sup> However, section 28(a) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) empowers the Authority to receive royalties for the use of its land or natural resources, pursuant to negotiations or the regulations. This power has been delegated to the Aboriginal Lands Trust by proclamation.<sup>626</sup>

The 1996 review of the Aboriginal Lands Trust recommended that the Trust pay all mining revenue to the Aboriginal communities affected by the mining. It also recommended that the Western Australian government review the scheme for the payment of mining royalties to the Trust.<sup>627</sup>



*Decision making processes*

Neither the Aboriginal Affairs Planning Authority nor the Aboriginal Lands Trust has a specific statutory power to make by-laws. However, the Authority has ‘all such powers, rights and privileges as may be reasonably necessary to enable it to carry out its duties and functions’.<sup>628</sup>

Section 18 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) establishes the Aboriginal Advisory Council.<sup>629</sup> The Council comprises Aboriginal people chosen by Aborigines living in Western Australia according to a method approved by the Minister.<sup>630</sup> The purpose of the Council is to advise the Authority on ‘matters relating to the interests and well-being of persons of Aboriginal descent’.<sup>631</sup> The Minister is required to have regard to the Council’s recommendations but is not bound to give effect to them.<sup>632</sup>

*Aboriginal Communities Act*

The council of a community to which the *Aboriginal Communities Act 1979* (WA) applies is empowered to make by-laws with respect to a range of matters including access to the lands, traffic on the lands, erection of buildings and supply of alcohol.<sup>633</sup> By-laws apply to all persons on community lands whether or not they are members of the community.<sup>634</sup> By-laws cannot override the exercise of any other statutory function such as policing.<sup>635</sup> They do not come into effect until approved by the Minister and the Governor and are disallowable by parliament.<sup>636</sup>

Proceedings to enforce community by-laws are dealt with summarily under the *Justices Act 1902* (WA).<sup>637</sup> The by-laws operate in addition to general state and federal law. There is no scope for breaches to be resolved by community mechanisms or according to Indigenous laws.

Aboriginal reserves may constitute or be part of a Western Australian local government area for the purposes of the *Local Government Act 1960* (WA). Thus communities are potentially governed by federal law, state law, local government law and community by-laws.

**Conclusion**

Indigenous communities in Western Australia have limited means of having their traditional ownership of land recognised under state law. The administration of reserve lands is subject to a high level of ministerial and executive control. The *Aboriginal Communities Act 1979* (WA) provides greater scope for Indigenous input in the management of community lands although it too is circumscribed by non-Indigenous legal and bureaucratic requirements.

## Australian Capital Territory

### Land-holding and governance structures

#### *Wreck Bay Aboriginal Community Council*

The only land rights legislation that applies in the Australian Capital Territory is the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth).<sup>638</sup> Under the Act, the Crown made an initial transfer of land at Jervis Bay to the Wreck Bay Aboriginal Community.<sup>639</sup> There is also provision for land to become Aboriginal land by ministerial declaration.<sup>640</sup> The Minister may make grants of vacant Crown land in this way if it adjoins Aboriginal land and is of significance to the Aborigines who are members of the community.<sup>641</sup> parliament can disallow the declaration.<sup>642</sup> There are separate provisions that enable the Minister to declare areas within Booderee National Park or Booderee Botanic Gardens to be Aboriginal land.<sup>643</sup> However, the Wreck Bay Aboriginal Community Council is compelled to grant a 99 year lease of any such land to the Commonwealth so it can continue to be used by the general public.<sup>644</sup>

When an area becomes Aboriginal land under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) it is automatically vested in the Wreck Bay Aboriginal Community Council.<sup>645</sup> The Council, established under Part II of the Act, is a body corporate subject to the *Commonwealth Authorities and Companies Act 1997* (Cth). For the purposes of the application of that Act, the members of the executive committee that administers the Council are its directors.<sup>646</sup>

The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) does not specify the nature of the title vested in the Council when areas are declared as Aboriginal land. However, section 55 amends the *Jervis Bay Territory Acceptance Act 1915* (Cth) to provide:

Subject to the Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth), Crown lands in the Territory shall not be sold or disposed of for any estate of freehold.

This provision implies that land vested under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) is freehold.

The vesting of land under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) is subject to the Commonwealth's right to continue existing occupation or usage for as long as required.<sup>647</sup>

There is no claims procedure under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth). However, one of the statutory functions of the Council is to make representations to the Minister concerning land that it considers should become Aboriginal land.<sup>648</sup> The Council can only challenge a decision not to declare the land to be Aboriginal under administrative law procedures.<sup>649</sup>

The Wreck Bay Aboriginal Community Council has a number of statutory functions including land use planning, management and maintenance of Aboriginal land, providing community services and protecting and conserving natural and cultural sites on Aboriginal land.<sup>650</sup> All adult Aborigines resident in the Jervis Bay Territory on 24 May 1986 were entitled to be registered as members of the Council.<sup>651</sup> The names of adult Aborigines who are members of the community can be added to the register by a motion of a general meeting.<sup>652</sup> The Council is administered by an executive committee of chairperson, deputy chairperson, secretary and six others elected from the registered membership.<sup>653</sup>

The Wreck Bay Aboriginal Community Council has no power to dispose of land vested in it under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) but it can lease areas for a number of purposes.<sup>654</sup> For example, 99 year leases can be granted to Council members for domestic purposes and 25 year leases for business purposes.<sup>655</sup> On his or her death a member who has a domestic purposes lease or sub-lease can transmit that interest to a relative, either by will or under the laws of intestacy.<sup>656</sup> The Council may grant a person a licence to use Aboriginal land.<sup>657</sup>

## Self-government

### *Access*

The Council can restrict access to areas of Aboriginal land that have been declared significant sites by the Minister.<sup>658</sup> People who are not members of the community can only enter these areas for official purposes.<sup>659</sup> However, the Minister can declare that the public continues to have access to a place that forms part of Aboriginal land provided it is not used for domestic purposes and is not a significant site.<sup>660</sup>

### *Mining*

Any minerals on or below the surface of Aboriginal land in the Jervis Bay Territory are reserved to the Commonwealth.<sup>661</sup> Mining can only take place pursuant to an agreement between the Wreck Bay Aboriginal Community Council, the Commonwealth and the miner.<sup>662</sup> The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) specifically states that laws applying in the Territory that authorise entry onto land for the purpose of mining or exploration for minerals do not apply on Aboriginal land.<sup>663</sup>

### *Decision making processes*

The Wreck Bay Aboriginal Community Council is empowered to make by-laws on certain matters for Aboriginal land that is the Jervis Bay Territory but outside Booderee National Park and Booderee Botanic Gardens.<sup>664</sup> These include economic and cultural activities, land management, conservation of flora or fauna, hunting, shooting and fishing and the regulation of motor traffic. The by-laws can apply any regulation made under

the *National Parks and Wildlife Conservation Act 1975* (Cth) including in modified form.<sup>665</sup> By-laws are disallowable by the parliament.<sup>666</sup>

The Minister is required to appoint an officer from his or her Department or from ATSIC as Registrar of the Wreck Bay Aboriginal Community Council.<sup>667</sup> One of the functions of the Registrar is to inquire into grievances between members concerning actions taken under the Act.<sup>668</sup> There is no mechanism in the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) to enable members to resolve disputes themselves although the by-laws may be relevant in some circumstances, for example, in regard to disagreements over the management of Aboriginal land.<sup>669</sup>

The Wreck Bay Aboriginal Community Council is exempt from rates and taxes, imposed by laws applying to the Jervis Bay Territory, on Aboriginal land.<sup>670</sup> However, it has no power to levy monies for community services. The Council needs Ministerial approval to enter any contract under which it is liable for more than \$100,000.<sup>671</sup>

## **Conclusion**

The Wreck Bay Aboriginal Community Council has some control over the way Aboriginal land in the Jervis Bay Territory is managed. Although it can only regulate access to significant sites, it has significant by-law making powers and a veto power over mining.

## Notes

- <sup>1</sup> D Smyth, *Understanding country: The importance of land and sea in Aboriginal and Torres Strait Islander societies*, Council for Aboriginal Reconciliation, 1994, p 1.
- <sup>2</sup> Id, p 4. Recently, writer David Malouf has spoken of the need for non-Indigenous Australians to come to terms with the way Aboriginal people possess the world at an imaginative level as well as physically and legally: *A spirit of play: The making of Australian consciousness & Boyer Lectures 1998*, ABC Books, 1999, p 39.
- <sup>3</sup> G Yunupingu, 'We know these things to be true' The Third Vincent Lingiari Memorial Lecture, 20 August 1998, p 7. Reproduced on the Reconciliation and Social Justice Library hosted by <www.austlii.edu.au>. Yunupingu is an elder of the Gumatj clan at Yirrkala on the Gove Peninsula. He is Chairperson of the NLC.
- <sup>4</sup> I Watson, 'The future we leave our children: Dream or nightmare?' [Dec 1998] *Rights Now* 7.
- <sup>5</sup> Smyth, above note 1, p 6.
- <sup>6</sup> DB Rose, *Dingo makes us human: Life and land in an Aboriginal Australian culture*, Cambridge University Press, 1992, p 121.
- <sup>7</sup> In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (the Gove Land Rights case) Blackburn J acknowledged that Indigenous law was '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' (at 267) but held that the doctrine of communal native title has never formed part of the law of any part of Australia. See N Williams, *The Yolngu and their land: A system of land tenure and the fight for its recognition*, Stanford University Press, 1986.
- <sup>8</sup> The principle has a longer history in other former British colonies such as the United States: see Chapter 4. In particular, the position in the Australian common law can be contrasted with that in Canada: see Chapter 3. There the Supreme Court has recently held that aboriginal title derives from the unique source of native occupation and possession of lands prior to assertions of British sovereignty: *Delgamuukw v British Columbia* (1997) 79 DLR (4th) 185. See the paper on the *Delgamuukw* decision prepared for ATSIIC by R Blowes: <www.atsic.gov.au/native/delgamuukw/>.
- <sup>9</sup> Above note 7.
- <sup>10</sup> For further detail see H McRae, G Nettheim and L Beacroft, *Indigenous legal issues: Commentary and materials*, second edition LBC, 1997, Ch 4; Title 1.3 in *The Laws of Australia*, LBC.
- <sup>11</sup> (1992) 175 CLR 1. There is a wealth of commentary on the decision. See, for example, MA Stephenson and S Ratnapala (eds), *Mabo: A judicial revolution*, UQP, 1993; R Bartlett, *The Mabo decision*, Butterworths, 1993, pp v-xxvi; *Essays on the Mabo decision*, Law Book Company, 1993.
- <sup>12</sup> One of the ways that international law has historically recognised the acquisition of sovereignty is by the settlement of land classified as deserted or *terra nullius*. In this way territory of so-called 'backward peoples' was occupied without apparent conquest: *Mabo* at 32.
- <sup>13</sup> Settlers in other European colonies 'did not deny that the indigenes were the original owners of the soil, whatever else they might have done in the course of colonisation': H Reynolds, *The law of the land*, Penguin, 1987, pp 3-4. See also G Nettheim, 'Native title, fictions and "convenient falsehoods"' (1998) 4 *Law Text Culture* 70.
- <sup>14</sup> Yunupingu, above note 3, p 2.
- <sup>15</sup> '[N]ative title is effective...as against the whole world unless the State, in valid exercise of its legislative or executive power, extinguishes the title': *Mabo* at 75.
- <sup>16</sup> *Mabo* at 58.
- <sup>17</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native title report July 1994 - June 1995*, HREOC, 1995, p 50.

- <sup>18</sup> S Perera and J Pugliese, “‘If native title is us, its inside us’: Jabiluka and the politics of intercultural negotiation - Interview with Jacqui Katona’ (1998) 10 *Australian Feminist Law Journal* 1, p 8.
- <sup>19</sup> *Mabo* at 69.
- <sup>20</sup> See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native title report January-June 1994*, HREOC, 1995, Ch 3.
- <sup>21</sup> *Fejo v Northern Territory of Australia* (1998) 195 CLR 96. See L Strelein, ‘Fiction over fact: Extinguishing native title in the Larrakia Case’ (1999) 4(18) *Indigenous Law Bulletin* 18.
- <sup>22</sup> 46,277 out of 195,101 people in the NT identified as Indigenous at the 1996 ABS Census. This is 23.7 per cent of the population: <www.abs.gov.au>.
- <sup>23</sup> (1993) 117 ALR 206. The Reeves Report recently recommended that the *Native Title Act 1993* (Cth) (NTA) be amended to provide that a past or future grant of land under the ALRA extinguishes all native title rights in that land: J Reeves, *Building on land rights for the next generation: The review of the Aboriginal Land Rights (Northern Territory) Act 1976*, ATSIIC, 1998. See below for further detail on the Reeves recommendations.
- <sup>24</sup> (1993) 117 ALR 206 at 215.
- <sup>25</sup> G Nettheim, ‘The relationship between native title and statutory title under land rights legislation’ in MA Stephenson (ed), *Mabo: The native title legislation*, UQP, 1995, pp 183-200.
- <sup>26</sup> See W Deane, ‘Preface’ in G Yunupingu (ed), *Land rights - Past, present and future*, UQP, 1997, p x.
- <sup>27</sup> C Athanasiou, ‘Land rights or native title’ (1998) 4(12) *Indigenous Law Bulletin* 14, p 15.
- <sup>28</sup> See A Wright (ed), *Take power like this old man here: An anthology of writings celebrating twenty years of land rights in Central Australia 1977-97*, IAD Press, 1998, pp 1-35.
- <sup>29</sup> The events are recounted by Sir William Deane in ‘Some signposts from Daguragu’, The Inaugural Vincent Lingiari Memorial Lecture, Council for Aboriginal reconciliation, 1996. The Gurindji purchased the land at Wave Hill with money from the Aboriginal Land Fund. They received inalienable freehold title to the land under the ALRA in 1986. The Aboriginal Land Commissioner recommended that the grant be made in *Report 20* submitted to the federal government in April 1985: Aboriginal Land Commissioner, *Report for the Year Ended 30 June 1998*, ATSIIC, 1998, p 21. For an overview of politics and Indigenous Australia see the time-line in: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fifth Report 1997*, HREOC, 1998, pp 54-75.
- <sup>30</sup> Aboriginal Land Rights Commission, *First report*, AGPS, 1973, p 41. Woodward also made a number of comments about how land could vest in Aboriginal groups: pp 45-48.
- <sup>31</sup> Aboriginal Land Rights Commission, *Second report*, Government Printer of Australia, 1975, pp 9-11.
- <sup>32</sup> Aboriginal Land (Northern Territory) Bill 1975 (Cth): Parliamentary Debates, House of Representatives, 16 October 1975, p 2222. The package included land fund, loans fund and Aboriginal associations legislation.
- <sup>33</sup> Parliamentary Debates, House of Representatives, 16 October 1975, p 2225.
- <sup>34</sup> Parliamentary Debates, House of Representatives, 4 June 1976, p 3082.
- <sup>35</sup> Id, p 3084. For an overview of the impact of the ALRA in the past 20 years see G Yunupingu (ed), above note 26.
- <sup>36</sup> Grants of Sch 1 land are made under ALRA ss.10, 12. ‘Aboriginal land’ is defined as land held under freehold title that has been granted to the traditional Aboriginal owners either as a result of a land claim or as a result of its inclusion in Sch 1: s.3(1).
- <sup>37</sup> See *Aboriginal Land Rights (Northern Territory) Amendment Act 1978* (Cth), *Aboriginal Land Rights Legislation Amendment Act 1982* (Cth), *Aboriginal Land Rights (Northern Territory) Amendment Act 1985* (Cth), *Aboriginal Land Rights (Northern Territory) Amendment Act 1989* (Cth), *Aboriginal Land*

*Rights (Northern Territory) Amendment Act 1993 (Cth), Aboriginal Land Rights (Northern Territory) Amendment Act 1994 (Cth), Aboriginal Land Rights (Northern Territory) Amendment Act 1995 (Cth), Aboriginal Land Rights (Northern Territory) Amendment Act (No 2) 1995 (Cth), Aboriginal Land Rights (Northern Territory) Amendment Act 1997 (Cth), Aboriginal Land Rights (Northern Territory) Amendment Act (No 1) 1999 (Cth), Aboriginal Land Rights (Northern Territory) Act (No 2) 2000 (Cth), Aboriginal Land Rights (Northern Territory) Act (No 3) 2000 (Cth).*

- <sup>38</sup> ALRA ss.11, 12.
- <sup>39</sup> ALRA s.3. Aboriginal tradition is defined as ‘the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships’ (s 3).
- <sup>40</sup> ALRA s.50(2A).
- <sup>41</sup> Aboriginal Land Commissioner, *Report for the year ended 30 June 1998*, ATSIC, 1998, pp 10-20.
- <sup>42</sup> Id, pp 21-24. Outstanding claims include matters where no inquiry has commenced, matters where the inquiry is incomplete, repeat claims and claims to stock routes: pp 25-29.
- <sup>43</sup> Aboriginal and Torres Strait Islander Commission, *1998-99 Annual Report*, ATSIC, 1999, p 147.
- <sup>44</sup> ALRA s.50(1)(a).
- <sup>45</sup> ALRA ss.19, 20. The role of Land Councils is outlined their heading below.
- <sup>46</sup> ALRA s.19(4).
- <sup>47</sup> ALRA subs 19(2)-(4A).
- <sup>48</sup> ALRA s.19(7).
- <sup>49</sup> ALRA s.4(1).
- <sup>50</sup> ALRA s.4(3). Two or more areas of land held by different Land Trusts can be amalgamated: ALRA ss.4(1C), 10, 11. It is also possible for an area of land the subject of a claim under s.50(1)(a) of the ALRA to be split between a number of Trusts: ALRA s.11.
- <sup>51</sup> ALRA s.5(1)(b).
- <sup>52</sup> ALRA s.5(2).
- <sup>53</sup> ALRA s.6.
- <sup>54</sup> ALRA ss.7(1), (3).
- <sup>55</sup> ALRA s.7(1A).
- <sup>56</sup> ALRA s.7(6).
- <sup>57</sup> ALRA s.7(7).
- <sup>58</sup> Aboriginal Land Rights Commission, *Second report*, Government Printer of Australia, 1975, p 14.
- <sup>59</sup> ALRA ss.35(1), 64(1).
- <sup>60</sup> ALRA ss.21(1), (2) and 22(1).
- <sup>61</sup> See CLC, *The land is always alive: The story of the Central Land Council*, CLC Alice Springs, 1994; Wright (ed), above note 28.
- <sup>62</sup> ALRA ss.23(1)(a), (b), (ba), (c), (e), (f), (h).
- <sup>63</sup> ALRA s.23(3).
- <sup>64</sup> ALRA s.77A.
- <sup>65</sup> ALRA s.25(2).
- <sup>66</sup> ALRA s.27.

- <sup>67</sup> ALRA s.34(1).
- <sup>68</sup> ALRA s.33.
- <sup>69</sup> ALRA s.32.
- <sup>70</sup> ALRA s.37.
- <sup>71</sup> ALRA s.37A(1).
- <sup>72</sup> *Commonwealth Authorities and Companies Act 1997* (Cth) ss.7, 8. In addition, Land Councils must prepare budget estimates: ALRA s.34(3A).
- <sup>73</sup> ALRA s.19(1).
- <sup>74</sup> ALRA ss.30(1), (4).
- <sup>75</sup> ALRA s.30(5).
- <sup>76</sup> CLC, *Annual report 1997-1998*, CLC Alice Springs, 1998, p 9; NLC, *Annual report 1997-1998*, NLC Darwin, 1998, p 8.
- <sup>77</sup> The CLC has 7 regional offices. Several of these service two Council regions. For example, the Alice Springs office services the Central and Eastern Plenty Regions: CLC *Annual Report 1997-1998*, CLC Alice Springs, 1998, p 10. The NLC has 8 regional offices: NLC *Annual Report 1997-1998*, NLC Darwin, 1998, p 8. The NLC also has Regional Councils which meet four times a year and consist of the representatives on the NLC for the seven regions through which it operates: NLC, *Annual report 1998-1999*, NLC Darwin, 1999, pp 11-16.
- <sup>78</sup> ALRA s.31(5).
- <sup>79</sup> ALRA s.31(7).
- <sup>80</sup> ALRA ss.28(1), 29A(1).The Council cannot delegate core policy functions such as the power to consent to the grant of a mining interest in Aboriginal land: s.28(a)(ii).
- <sup>81</sup> B Rowland, *An examination of the Aboriginal Land Rights (Northern Territory) Act 1976-1980*, Department of Aboriginal Affairs, 1980.
- <sup>82</sup> Id, appendix 1.
- <sup>83</sup> J Toohey, *Seven years on*, AGPS, 1994, p 53.
- <sup>84</sup> Ibid.
- <sup>85</sup> Reeves, above note 23.
- <sup>86</sup> Id, pp 600, 616. It is proposed that Northern Territory Aboriginal Council members would be appointed jointly by the federal Minister for Aboriginal and Torres Strait Islander Affairs and the Chief Minister of the Northern Territory from a list of nominations made by Indigenous Territorians: p 607.
- <sup>87</sup> Id, p 601.
- <sup>88</sup> Id, Ch 28. Substantive recommendations on the Aboriginal Benefits Reserve are included in Ch 16.
- <sup>89</sup> I Viner, 'Whither land rights in the Northern Territory? Whither self-determination? A review of the Reeves Report' (1999) 4 *Australian Indigenous Law Reporter* 1, p 2.
- <sup>90</sup> See, for example, *ibid*; ATSIC, *Aboriginal and Torres Strait Islander peoples and Australia's obligations under the UN Convention on the Elimination of all Forms of Racial Discrimination: A report to the UN Committee on the Elimination of Racial Discrimination*, ATSIC, 1999, pp 56-67; J Crawshaw, ATSIC Commissioner, *Media Release*, 11 March 1999; JC Altman, F Morphy and T Rowse (eds), *Land rights at risk? Evaluations of the Reeves Report*, Centre for Aboriginal Economic Policy Research CAEPR Research Monograph No 14, 1999.
- <sup>91</sup> M Mowbray, 'Redefining land rights: The review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)' (1999) 4(18) *Indigenous Law Bulletin* 9. Concern has also been raised about Reeves' use of anthropological sources: see, for example, H Morphy, 'The use of anthropology in the Reeves Report'



(1999) 4(18) *Indigenous Law Bulletin* 13; P Sutton, *Anthropological submission on the Reeves Review*, prepared for the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, 10 February 1999.

<sup>92</sup> *Unlocking the future: The report of the inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of the Commonwealth of Australia, August 1999.

<sup>93</sup> *Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989* (NT).

<sup>94</sup> The Minister cannot consent to the disposal of the fee simple in part of the excision unless the land has been abandoned (see footnote 173): *Associations Incorporation Act 1963* (NT) s.26A(3A). Excised land can only be compulsorily acquired to provide essential services such as power, water or sewerage: *Lands Acquisition Act 1978* (NT) s.28A. *Mining Act 1980* (NT) s.174AA(1) prohibits mining on excised land.

<sup>95</sup> Sixteen excision claims (out of 42 applications) have been granted in the CLC region and 11 in the NLC region: CLC, *Annual report 1997-1998*, CLC Alice Springs, 1998, 21; NLC, *Annual report 1997-1998*, NLC Darwin, 1998, p 20.

The Northern Territory government has frozen excision grants due to concerns about liability for compensation under the future acts provisions of the NTA: CLC, *Annual report 1997-1998*, CLC Alice Springs, 1998, p 21. The NLC reported that no CLAs had been granted in its region for 3 years and said that the NT government is now demanding Indigenous Land Use Agreements as a precondition for handing over title: *Annual Report 1998-1999*, NLC Darwin, 1999, pp 24-25.

<sup>96</sup> The Memorandum of Understanding is a Schedule to the *Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989* (NT) but has not been reproduced in the *Pastoral Land Act 1992* (NT).

<sup>97</sup> The *Aboriginal Land Rights (Northern Territory) Amendment Act 1987* (Cth) inserted s.50(2D) to implement this element of the Memorandum but the provision has yet to be commenced.

<sup>98</sup> *Pastoral Land Act 1992* (NT) s.92. The CLC has pointed out that 'need' is based on the western concept of 'adequate housing circumstances or land upon which this might be provided': CLC, *Annual report 1997-1998*, CLC Alice Springs, 1998, p 20.

<sup>99</sup> *Pastoral Land Act 1992* (NT) s.104(1).

<sup>100</sup> *Pastoral Land Act 1992* (NT) s.109(1)(b).

<sup>101</sup> This distinction between traditional Aboriginal owners and those with rights arising from historical association with land is also made under Queensland legislation.

<sup>102</sup> These Acts provide a form of incorporation generally used to set up associations for religious, sporting, cultural and recreational activities.

<sup>103</sup> CLC, *Annual report 1997-1998*, CLC Alice Springs, 1998, p 19.

<sup>104</sup> *Id.*, p 20.

<sup>105</sup> This management structure may change if the federal government continues with its plan to transfer responsibility for environmental management to the states and territories: *id.*, p 67; *Aboriginal and Torres Strait Islander Heritage Protection Bill 1998* (Cth).

<sup>106</sup> Co-management can also arise outside national parks. For example, the settlement agreement for the Kartangurruru, Warlpiri and Walmajeri (Repeat) land claim provides for a joint committee of traditional owners and the Northern Territory Parks and Wildlife Commission to oversee flora and fauna surveys, feral animal control and bushfire management in the region: *id.*, p 17.

<sup>107</sup> Section 7(2)(a).

<sup>108</sup> *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1987* (NT) s.5(1). The deed of grant excludes all public roads and all minerals on the land are reserved to the Crown: s.13(2), (3). The

Trust is under a statutory obligation to grant a lease to enable the Paspaley Pearling Company to continue its business until at least 2012: s.39(1).

<sup>109</sup> Id, s.5(2).

<sup>110</sup> Id, s.11. Cobourg Marine Park was established under *Territory Park and Wildlife Conservation Act 1978* (NT) s.12.

<sup>111</sup> *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1987* (NT) s.16.

<sup>112</sup> Id, ss.8(2), (3).

<sup>113</sup> Id, s.12.

<sup>114</sup> Id, s.15(1). The original fee was \$20,000. The amount is adjusted annually according to percentage rises in the average weekly wage: s.15(4).

<sup>115</sup> Id, s.15(2).

<sup>116</sup> Id, s.18(1).

<sup>117</sup> Id, s.19(1).

<sup>118</sup> Id, ss.22(3), (5).

<sup>119</sup> Id, s.24. 'Aboriginal tradition' is defined in s.3 as the body of traditions, observances, customs and beliefs of Aboriginals or a community or group of Aboriginals and includes 'traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships'.

<sup>120</sup> Id, s.25(1).

<sup>121</sup> Id, s.25(2).

<sup>122</sup> Id, s.27(2).

<sup>123</sup> Id, ss.27 (4)(a), (b), (f), (h).

<sup>124</sup> Id, s.27(6).

<sup>125</sup> Id, s.28(2). If a plan of management is disallowed twice by the parliament, the matter is referred to the Chief Justice of the Northern Territory for advice: s.28(6).

<sup>126</sup> *Nitmiluk (Katherine Gorge) National Park Act 1989* (NT) ss.5(1), 6(1). The Corporation was established under the *Parks and Wildlife Commission Act 1995* (NT) s.39(1) to acquire, hold and dispose of real property. The Parks and Wildlife Commission has the care, control and management of all land held by the Corporation: s.39(6).

<sup>127</sup> *Nitmiluk (Katherine Gorge) National Park Act 1989* (NT) s.8. Traditional owners are defined in the same terms as under the ALRA.

<sup>128</sup> *Nitmiluk (Katherine Gorge) National Park Act 1989* (NT) s.10(1)(a). The Chairperson and Deputy Chairperson of the Board must be elected from the members who are traditional owners. The Jawoyn Association can authorise the NLC to perform any of its functions under the Act: s.3(2).

<sup>129</sup> Id, ss.16(a), (c), (d).

<sup>130</sup> Id, s.17.

<sup>131</sup> Memorandum of Lease cl 6: id, Schedule 1. The rent is reviewed every 3 years: cl 7.

<sup>132</sup> Memorandum of Lease cl 11(q): id, Schedule 1. There are a number of other relevant covenants, including encouraging Aboriginal business and commercial initiatives within the Park (cl 11(p)) and engaging as many Aboriginals as practicable to provide services in the Park (cl 11(n)).

<sup>133</sup> Id, s.20(7). A plan can be in force for up to 10 years: s.20(4). The *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1987* (NT) does not impose a time limit.

<sup>134</sup> *Nitmiluk (Katherine Gorge) National Park Act 1989* (NT) s.20(9).

- <sup>135</sup> Id, s.20(2).
- <sup>136</sup> Id, s.21(6). A panel appointed under s.21(7) must include one person nominated by the Board and one person nominated by the Minister. These people nominate the other panellist.
- <sup>137</sup> Id, s.27.
- <sup>138</sup> Id, s.19(1).
- <sup>139</sup> ALRA s.71(2).
- <sup>140</sup> ALRA s.70(1).
- <sup>141</sup> *Aboriginal Land Act 1978* (NT) ss.4, 5.
- <sup>142</sup> Id, ss.12, 13.
- <sup>143</sup> Id, ss.15, 16.
- <sup>144</sup> Reeves, above note 23, pp 308-09.
- <sup>145</sup> Id, p 383.
- <sup>146</sup> Aboriginal Land Rights Commission, *Second report*, Government Printer of Australia, 1975, p 108.
- <sup>147</sup> ALRA s.40(a).
- <sup>148</sup> Id, s.40(b).
- <sup>149</sup> Id, s.41(6).
- <sup>150</sup> Id, s.42(6).
- <sup>151</sup> Id, s.46(1).
- <sup>152</sup> Id, s.45. Under this system, traditional owners may have to decide on the merits of a project early when relatively limited information is available: NLC, *Annual report 1997-1998*, NLC Darwin, 1998, p 7.
- <sup>153</sup> ALRA s.44A(1).
- <sup>154</sup> Reeves, above note 23, pp 540-41. cf CLC, *Mines and myths: The truth about mining on Aboriginal land*, CLC Alice Springs, 1998.
- <sup>155</sup> ATASIC, *1998-99 Annual report*, p 149.
- <sup>156</sup> ALRA s.63(2).
- <sup>157</sup> Id, s.64. 40 per cent of the money goes to Land Councils for their administrative costs. The NLC receives 22 per cent of this, the CLC 15 per cent, the Tiwi Land Council 2 per cent and Anindilyakwa Land Council 1 per cent: NLC, *Annual report 1997-1998*, NLC Darwin, 1998, p 50.
- <sup>158</sup> ALRA s.25(3).
- <sup>159</sup> *Lands Acquisition Act 1978* (NT) s.46(1B)(a)(ii).
- <sup>160</sup> *Mining Act 1980* (NT) s.174AA(1).
- <sup>161</sup> The definition of 'association' indicates the breadth of organisations covered by s.4(1) of the *Associations Incorporation Act 1978* (NT): 'an association, society, institution or body formed or carried on for a religious, educational, benevolent or charitable purpose, for the purpose of providing medical treatment or attention or promoting or encouraging literature, science or art or for the purpose of recreation or amusement or of beautifying or improving a community centre, being an association, society, institution or body the activities of which are carried on in whole or in part in the Territory...'. The Act regulates trading associations more comprehensively than other associations.
- <sup>162</sup> Id, ss.20, 25.
- <sup>163</sup> Id, s.9(1).
- <sup>164</sup> Id, s.7(2)(d). The Registrar must be notified of the committee members or persons who have management of the association at the time of incorporation but there is no continuing requirement to notify

him or her as those persons change. However, the public officer of the association must notify the Registrar of his or her current identity and address: s.14.

<sup>165</sup> Id, s.25(3).

<sup>166</sup> Id, s.25AU.

<sup>167</sup> Id, s.25AX.

<sup>168</sup> Id, s.23A.

<sup>169</sup> Id, ss.4, 22A.

<sup>170</sup> The town camps in Alice Springs that are represented by Tangentyere Council are on special purpose leases granted by the Northern Territory government pursuant to the *Special Purposes Leases Act 1979* (NT). Under this Act, lessees pay rent and the land can be resumed for certain purposes, for example, water conservation: s.28(a)(iv).

<sup>171</sup> *Associations Incorporation Act 1978* (NT) s.26A(3A).

<sup>172</sup> Land is defined as abandoned if no association member has occupied it as a principal place of residence in the last five years: *Pastoral Land Act 1992* (NT) s.114(1). An adjacent lessee can apply to have abandoned land incorporated in his or her lease: s.114(2). The application is determined by the Community Living Areas Tribunal: ss.114(3), (4).

<sup>173</sup> *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1987* (NT) s.4.

<sup>174</sup> Claim No 193 Lodged 29 May 1997: Aboriginal Land Commissioner, *Report for the year ended 30 June 1998*, ATSIC, 1998, p 18.

<sup>175</sup> *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1987* (NT) s.33.

<sup>176</sup> Id, s.34(1).

<sup>177</sup> Id, s.34(2).

<sup>178</sup> Id, ss.35(1)(a), (b), (g), (k), (u).

<sup>179</sup> Claim No 240 Lodged 4 June 1997: Aboriginal Land Commissioner, *Report for the year ended 30 June 1998*, ATSIC, 1998, p 19.

<sup>180</sup> See p 21.

<sup>181</sup> *Nitmiluk (Katherine Gorge) National Park Act 1989* (NT) s.25(1).

<sup>182</sup> Id, s.25(2)(zh).

<sup>183</sup> The *Local Government Act 1993* (NT) applies to incorporated associations performing local government functions: *Associations Incorporation Act 1978* (NT) s.25AZF.

<sup>184</sup> *Local Government Act 1993* (NT) Pt 5.

<sup>185</sup> Id, Pt 6.

<sup>186</sup> Id, Pts 10-13.

<sup>187</sup> Id, s.97.

<sup>188</sup> Id, ss.100, 101.

<sup>189</sup> Id, s.105(2).

<sup>190</sup> Id, s.97(1).

<sup>191</sup> Id, s.97(2).

<sup>192</sup> Id, s.122(2).

<sup>193</sup> M Mowbray, 'Subverting the *Aboriginal Land Rights (NT) Act 1976*: the NT *Local Government Act 1993*' (1998) 4(10) *Indigenous Law Bulletin* 12, p 13.

<sup>194</sup> *Ibid.*

- <sup>195</sup> NLC, *Annual report 1998-1999*, NLC Darwin, 1999, pp 47-48.
- <sup>196</sup> *Aboriginal Lands Trust Act 1966* (SA) s.5.
- <sup>197</sup> *Id.*, s.16(1).
- <sup>198</sup> *Id.*, s.5(2).
- <sup>199</sup> *Id.*, s.6(1), as amended.
- <sup>199</sup> Aboriginal Lands Trust, *Annual report for the year ended 1997*, Aboriginal Lands Trust, 1997, pp 4, 11.
- <sup>200</sup> For a history of this land rights movement see P Toyne and D Vachon, *Growing up the country: The Pitjantjatjara struggle for their land*, Penguin Books, 1984.
- <sup>201</sup> Pitjantjatjara Land Rights Working Party, *Report of the Pitjantjatjara Land Rights Working Party of South Australia*, Pitjantjatjara Land Rights Working Party, 1978, p 2.
- <sup>202</sup> *Id.*, rec 1.
- <sup>203</sup> *Id.*, pp 6-10.
- <sup>204</sup> *Id.*, rec 11.
- <sup>205</sup> Toyne and Vachon, above note 201, pp 66-69.
- <sup>206</sup> Select Committee of the House of Assembly, *Report of the Select Committee of the House of Assembly on the Pitjantjatjara Land Rights Bill, 1979*, Government Printer, 1979.
- <sup>207</sup> This included publishing an open letter to the Premier in the *Adelaide Advertiser*: Toyne and Vachon, above note 201, p 89.
- <sup>208</sup> *Id.*, p 121.
- <sup>209</sup> *Pitjantjatjara Land Rights Act 1981* (SA) s.15.
- <sup>210</sup> *Id.*, s.4.
- <sup>211</sup> N Peterson, 'South Australia' in N Peterson (ed), *Aboriginal land rights: A handbook*, AIATSIS, 1981, p 121.
- <sup>212</sup> *Pitjantjatjara Land Rights Act 1981* (SA) ss.6(1)(b), 7.
- <sup>213</sup> *Id.*, ss.9(1), 11.
- <sup>214</sup> *Id.*, s.17.
- <sup>215</sup> *Maralinga Tjarutja Land Rights Act 1984* (SA) ss.6, 7. 'Leader' is defined as a person who has been accepted, in accordance with the customs of the traditional owners, as one of their leaders: s.3. Traditional owners is defined in the same terms as under the *Pitjantjatjara Land Rights Act 1981* (SA): s.3.
- <sup>216</sup> *Maralinga Tjarutja Land Rights Act 1984* (SA) s.8.
- <sup>217</sup> Relative to other jurisdictions this represents progress on purely statistical grounds. At the 1996 ABS Census, 1.4 per cent of the SA population reported being Indigenous: <www.abs.gov.au>.
- <sup>218</sup> *Pitjantjatjara Land Rights Act 1981* (SA) s.42c; *Maralinga Tjarutja Land Rights Act 1984* (SA) s.43.
- <sup>219</sup> *Aboriginal Lands Trust Act 1966* (SA) s.16(5)(a). Section 16(6) prohibits the alienation of land in the North-West Reserve.
- <sup>220</sup> Aboriginal Lands Trust, *Annual report for the year ended 1997*, Aboriginal Lands Trust, 1998, pp 10, 32. Leases are generally granted for 25 years, 99 years or the lifetime of an individual.
- <sup>221</sup> *Aboriginal Lands Trust Act 1966* (SA) s.16(2). This includes gold, silver, copper, tin and other metals, ore, minerals and other substances containing metal, gems and precious stones, coal and mineral oil in and on the land.
- <sup>222</sup> *Id.*, ss.16(8), (9).

- <sup>223</sup> Id, s.16(9).
- <sup>224</sup> Id, s.16(4).
- <sup>225</sup> Id, s.16a(2).
- <sup>226</sup> Id, s.16(3).
- <sup>227</sup> Id, ss.16(1)(b), (c).
- <sup>228</sup> Id, s.21. In 1990, the Aboriginal Lands Trust (Control of Alcoholic Liquor and Regulated Substances on Yalata Reserve) Regulations 1990 (SA) were promulgated to prohibit the transportation of alcohol to the Yalata Aboriginal Community and to prohibit its possession or consumption.
- <sup>229</sup> Id, s.20a.
- <sup>230</sup> Id, ss.20a(3)(b), (4). The Committee is established by s.20b of the Act. For a list of current Panel members see Aboriginal Lands Trust Annual Reports from time to time.
- <sup>231</sup> *Pitjantjatjara Land Rights Act 1981* (SA) s.19. This section was the subject of challenge under the *Racial Discrimination Act 1975* (Cth) in *Gerhardy v Brown* (1985) 159 CLR 70. A 'Pitjantjatjara' is defined as a member of the Pitjantjatjara, Yungkutatjara or Ngaanatjara people: s.4. See also *Maralinga Tjarutja Land Rights Act 1984* (SA) s.18(1).
- <sup>232</sup> *Pitjantjatjara Land Rights Act 1981* (SA) s.19(5)(b); *Maralinga Tjarutja Land Rights Act 1984* (SA) s.18(3).
- <sup>233</sup> *Pitjantjatjara Land Rights Act 1981* (SA) s.19(3); *Maralinga Tjarutja Land Rights Act 1984* (SA) s.18(5)(b).
- <sup>234</sup> *Maralinga Tjarutja Land Rights Act 1984* (SA) s.18(11)(e).
- <sup>235</sup> Id, s.20. Special provisions also apply to the residents of Cook for recreational and sporting purposes and to certain rabbit trappers: ss.19, 18(11)(f), 18(15). This lesser control over access is criticised in Toyne and Vachon, above note 201, p 131.
- <sup>236</sup> Property in all minerals and petroleum in SA is vested in the Crown: *Mining Act 1971* (SA) s.16(1); *Petroleum Act 1940* (SA) s.4(1).
- <sup>237</sup> Anangu Pitjantjatjara's powers do not extend to the Mintabie Precious Stones Field: *Pitjantjatjara Land Rights Act 1981* (SA) Pt III Div IV. See Toyne and Vachon, above note 201, pp 104-07.
- <sup>238</sup> *Pitjantjatjara Land Rights Act 1981* (SA) ss.20, 21; *Maralinga Tjarutja Land Rights Act 1984* (SA) ss.21, 23.
- <sup>239</sup> *Pitjantjatjara Land Rights Act 1981* (SA) s.20(8); *Maralinga Tjarutja Land Rights Act 1984* (SA) s.21(10).
- <sup>240</sup> *Maralinga Tjarutja Land Rights Act 1984* (SA) s.21(11). Conciliation involves the Minister of Mines and Energy, the Minister of Aboriginal Affairs, Maralinga Tjarutja and the applicant. Any references to the SA Minister of Aboriginal Affairs should currently be read as references to the Minister for Environment, Heritage and Aboriginal Affairs.
- <sup>241</sup> *Pitjantjatjara Land Rights Act 1981* (SA) ss.20(15)(a), (c); *Maralinga Tjarutja Land Rights Act 1984* (SA) ss.21(19)(a), (c). The factors listed in these sections resemble those to be taken into account in similar circumstances under the NTA s.39(1).
- <sup>242</sup> *Pitjantjatjara Land Rights Act 1981* (SA) s.20(11); *Maralinga Tjarutja Land Rights Act 1984* (SA) s.21(13).
- <sup>243</sup> *Maralinga Tjarutja Land Rights Act 1984* (SA) s.16(1).
- <sup>244</sup> Id, s.22(1).
- <sup>245</sup> Id, s.22(2)(b)(i).
- <sup>246</sup> Id, s.22(5).

- <sup>247</sup> *Pitjantjatjara Land Rights Act 1981* (SA) s.22(2); *Maralinga Tjarutja Land Rights Act 1984* (SA) s.24(2).
- <sup>248</sup> *Pitjantjatjara Land Rights Act 1981* (SA) s.24; *Maralinga Tjarutja Land Rights Act 1984* (SA) s.26. The miner must notify the Minister for Mines of the amount of or terms of agreement for any such payment although the Minister's consent is not required.
- <sup>249</sup> *Maralinga Tjarutja Land Rights Act 1984* (SA) s.26(3).
- <sup>250</sup> *Pitjantjatjara Land Rights Act 1981* (SA) ss.35, 36. *Maralinga Tjarutja Land Rights Act 1984* (SA) ss.33, 34.
- <sup>251</sup> *Pitjantjatjara Land Rights Act 1981* (SA) ss.36(2), (3); *Maralinga Tjarutja Land Rights Act 1984* (SA) ss.34(2), (3).
- <sup>252</sup> *Pitjantjatjara Land Rights Act 1981* (SA) s.37; *Maralinga Tjarutja Land Rights Act 1984* (SA) s.35.
- <sup>253</sup> *Pitjantjatjara Land Rights Act 1981* (SA) s.43(3).
- <sup>254</sup> *Id.*, s.43(6)(b).
- <sup>255</sup> *Maralinga Tjarutja Land Rights Act 1984* (SA) ss.44(1)(d), (4).
- <sup>256</sup> A Pitjantjatjara, *Mayatja Manta Nyangaku Kutju: Local government for Aboriginal communities*, Pitjantjatjara Council Inc, 1994, p 9.
- <sup>257</sup> *Id.*, p 10.
- <sup>258</sup> The Aboriginal Claims Bill 1983 (Vic) was defeated in the Legislative Council. It would have established an Aboriginal Land Claims Tribunal: McRae, Nettheim and Beacroft, above note 10, p 196.
- <sup>259</sup> *Aboriginal Lands Act 1970* (Vic) s.9. Lake Tyers was established as a Mission in 1861 under the auspices of the Church of England. Framlingham was first reserved for Aboriginal purposes in the same year. For a brief history of these communities see B Moore 'Victoria' in N Peterson (ed), above note 212, p 148-55.
- <sup>260</sup> *Aboriginal Lands Act 1970* (Vic) s.8(a).
- <sup>261</sup> *Id.*, ss.11(1)(a), (b).
- <sup>262</sup> *Id.*, s.11(3).
- <sup>263</sup> *Id.*, ss.12-14.
- <sup>264</sup> *Id.*, s.15.
- <sup>265</sup> The Ebenezer Mission near Dimboola, the Ramahyuck Mission near Stratford in Gippsland and the Coranderrk Mission near Healesville.
- <sup>266</sup> *Aboriginal Lands Act 1991* (Vic) ss.3, 6.
- <sup>267</sup> *Id.*, ss.6(1), (2), (3), (5), 7.
- <sup>268</sup> Aboriginal Land (Lake Condah) Bill 1986 (Vic); Aboriginal Land (Framlingham Forest) Bill 1985 (Vic); Aboriginal Land (Framlingham Forest) Bill (No 2) 1986 (Vic); Aboriginal Cultural Heritage Bill 1986 (Vic).
- <sup>269</sup> The Commonwealth passed the legislation pursuant to the race power in s.51(xxvi) of the Constitution: Parliamentary Debates, House of Representatives, 25 March 1987, p 1514. It could also have used the acquisitions power in s.51(xxxi).
- <sup>270</sup> *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) ss.6, 7. Both Corporations are incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth).
- <sup>271</sup> Given that at the 1996 ABS Census 0.5 per cent of the Victorian population identified as Indigenous (21,474 people), this is a minuscule amount of land: <www.abs.gov.au>.
- <sup>272</sup> *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) ss.13(1)(b), 21(1)(b).
- <sup>273</sup> Under the *Crown Land (Reserves) Act 1978* (Vic).

- <sup>274</sup> *Aboriginal Lands (Aborigines' Advancement League) (Watt Street Northcote) Act 1982* (Vic) s.3(2). The League is a benevolent society registered under the *Hospitals and Charities Act 1958* (Vic).
- <sup>275</sup> *Aboriginal Lands (Aborigines' Advancement League) (Watt Street Northcote) Act 1982* (Vic) s.3(3).
- <sup>276</sup> *Aboriginal Land (Northcote Land) Act 1989* (Vic) s.5(2).
- <sup>277</sup> *Id.*, s.5(3)(a).
- <sup>278</sup> At the 1996 ABS Census, Robinvale was the urban centre locality with the highest proportion (17.8 per cent) of Victorians identifying as Indigenous: <www.abs.gov.au>.
- <sup>279</sup> Victorian co-operatives are governed by the *Co-operatives Act 1996* (Vic).
- <sup>280</sup> *Aboriginal Lands Act 1970* (Vic) s.11(1)(a).
- <sup>281</sup> *Laus of Australia* Title 1.3 Land Law (at 1 April 1997) Ch 8, Legislative Regulation in Victoria, para 453.
- <sup>282</sup> *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) ss.15(1)(j); 23(1)(j).
- <sup>283</sup> *Id.*, ss.14(1), 22(1). The rights of access provided by the roads in Sch 1 Pt A are not maintained.
- <sup>284</sup> *Id.*, ss.14(2), 22(2).
- <sup>285</sup> *Id.*, ss.6(1), 7(1). Mineral is defined as any substance, except water, that occurs naturally as part of the earth's crust: s.3(1).
- <sup>286</sup> *Id.*, Pt V.
- <sup>287</sup> *Id.*, ss.31(1), (2).
- <sup>288</sup> *Id.*, s.31(5)(c).
- <sup>289</sup> *Id.*, s.33(1). The applicant can also apply for conciliation if permission is refused.
- <sup>290</sup> *Id.*, s.33(2). If the applicant and Corporation cannot agree on an arbitrator, the applicant can ask the Minister to appoint a suitably impartial person under s.33(3).
- <sup>291</sup> *Id.*, ss.33(4)(a)(i), (b).
- <sup>292</sup> *Id.*, ss.16, 24.
- <sup>293</sup> *Id.*, s.34(1).
- <sup>294</sup> *Id.*, s.34(2). In this regard, the legislation is similar to that governing Maralinga lands in South Australia.
- <sup>295</sup> *Id.*, s.34(2)(b). Section 21E(3) of the *Aboriginal and Torres Strait Islanders Heritage Protection Act 1984* (Cth) provides that after a 14 day notice and consultation period, the Minister can make a declaration of preservation specifying the manner of preservation, including any prohibitions on access. If the Minister refuses to make such a declaration the relevant Aboriginal community can request that he or she appoints an arbitrator to review the decision: s.21E(6). Protection applications are governed by Pt 4 of the *Aboriginal and Torres Strait Islander Heritage Protection Bill 1998* (Cth) introduced into the House of Representatives on 1 December 1998.
- <sup>296</sup> *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) s.32(1).
- <sup>297</sup> *Id.*, s.32(2)(a).
- <sup>298</sup> *Id.*, s.32(2)(b).
- <sup>299</sup> *Id.*, ss.17, 26(1).
- <sup>300</sup> *Id.*, s.26(2).
- <sup>301</sup> *Id.*, ss.18(1)(a), (b)(ii), 27(1)(a), (b)(ii).
- <sup>302</sup> *Id.*, ss.18(1)(c), 27(1)(c).
- <sup>303</sup> *Id.*, ss.18(2), 27(2).
- <sup>304</sup> *Id.*, ss.38(1), (3).



- <sup>305</sup> Id, ss.38(2), (4).
- <sup>306</sup> Id, s.38(6).
- <sup>307</sup> Id, ss.15, 23.
- <sup>308</sup> Id, ss.15(2), 23(2).
- <sup>309</sup> Id, ss.15(3), (4), 23(3), (4). Regulations can be made by the Governor pursuant to s.41.
- <sup>310</sup> Id, ss.15(9), 23(9).
- <sup>311</sup> *Aboriginal Lands (Aborigines' Advancement League) (Watt Street Northcote) Act 1982* (Vic) s.3(4); *Aboriginal Land (Northcote Land) Act 1989* (Vic) s.5(4).
- <sup>312</sup> Under s.3(1)(b) no grant can affect the operation of the *Mineral Resources Development Act 1990* (Vic), *Petroleum Act 1958* (Vic) or the *Extractive Industries Development Act 1995* (Vic).
- <sup>313</sup> *Aboriginal Land (Manatunga Land) Act 1992* (Vic) ss.3(2)(a), (b).
- <sup>314</sup> *Aboriginal Land Rights Act 1983* (NSW) s.35. For an overview of land rights in NSW prior to this time see M Wilkie, *Aboriginal land rights in NSW*, Alternative Publishing Co-operative, 1985, Chs 1-3.
- <sup>315</sup> *Aboriginal Land Rights Act 1983* (NSW) s.36. In exceptional circumstances the Minister may acquire land, by agreement or compulsorily, to satisfy the objectives of the Act: s.39.
- <sup>316</sup> However, when making a claim for land that is part of a travelling stock reserve, as defined in the *Pastures Protection Act 1934* (NSW) s.4, the applicant Land Council must satisfy the Minister that 'Aborigines have traditional rights to the land or that Aborigines have had a long association with the land': *Aboriginal Land Rights Act 1983* (NSW) s.37(4).
- <sup>317</sup> See, for example, Reynolds, above note 13, pp 31-32, 53-54.
- <sup>318</sup> Indigenous people make up 1.7 per cent of the NSW population. This represents more than 100,000 people: 1996 ABS Census: <www.abs.gov.au>.
- <sup>319</sup> *Aboriginal Land Rights Act 1983* (NSW) ss.36(9), (9A). Generally, leases under the *Western Lands Act 1901* (NSW) can be perpetual or for up to 40 years: ss.28A, 45. The Western Division comprises about 40 per cent of land in NSW.
- <sup>320</sup> *Aboriginal Land Rights Act 1983* (NSW) ss.36(9), (9A).
- <sup>321</sup> Id, s.6(1). Section 5(1) empowers the Minister to constitute LALCs in the manner prescribed. An application for the constitution of an area as a LALC may be made by 10 or more adult Aborigines living in, or having an association with, the area: *Aboriginal Land Rights Regulations 1996* (NSW) reg 6(1).
- <sup>322</sup> *Aboriginal Land Rights Act 1983* (NSW) s.6(3). Members include Aborigines who live in the Land Council area and have requested that they be enrolled and those with a close association with the area who have been accepted as members by Council: s.7(2).
- <sup>323</sup> Id, ss.12(1)(a), (e), (f).
- <sup>324</sup> Id, ss.12(1)(g), (j).
- <sup>325</sup> Id, s.38.
- <sup>326</sup> *Aboriginal Land Rights Regulations 1996* (NSW) reg 24.
- <sup>327</sup> *Aboriginal Land Rights Act 1983* (NSW) s.9.
- <sup>328</sup> Id, s.11; *Aboriginal Land Rights Regulations 1996* (NSW) reg 26(2).
- <sup>329</sup> *Aboriginal Land Rights Act 1983* (NSW) s.15(1).
- <sup>330</sup> Id, ss.20(b), (e). Regional Councils are also responsible for conciliating disputes about entry on the electoral roll between a LALC and one of its members: *Aboriginal Land Rights Regulations 1996* (NSW) reg 19(4).

- <sup>331</sup> The NSW Aboriginal Land Council is currently the sole NTRB for NSW. The federal Minister for Aboriginal and Torres Strait Islander Affairs has announced proposed invitation areas for recognition of NTRBs under the amended NTA (see p 7). At this stage it is anticipated that there will be two NTRBs in NSW, one in the far north-east, encompassing Lord Howe Island, and one representing the rest of the state: Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, *Media Release*, 19 February 1999.
- <sup>332</sup> *Aboriginal Land Rights Act 1983* (NSW) s.22(1).
- <sup>333</sup> *Id.*, ss.22(2), (3).
- <sup>334</sup> *Id.*, s.23(c2). See discussion at p 44.
- <sup>335</sup> *Id.*, s.23(1). The NSW Aboriginal Land Council Account, required by s.29(1) of the Act, includes money allocated by the NSW parliament and annual payments of 7.5 per cent of NSW land tax for the years 1984-1998: s.28(1). In regard to the Mining Royalties Account see p 45. See NSW Aboriginal Land Council policy document *Beyond the Sunset*, which sets out the Council's 11 objectives, including maximising land acquisition. Acquiring land for LALCs that do not have a land base is a priority.
- <sup>336</sup> *National Parks and Wildlife Act 1974* (NSW) s.84.
- <sup>337</sup> *Id.*, s.62.
- <sup>338</sup> *Id.*, s.63(1). If a board of management is established for the area under Part 4A of the Act, care of the area is vested in the board: s.63(2). See p 47.
- <sup>339</sup> *Id.*, s.36A.
- <sup>340</sup> *Id.*, s.36A(2)(a).
- <sup>341</sup> *National Parks and Wildlife Act 1974* (NSW) s.71D(2). Land is defined as being of cultural significance to Aborigines if it is 'significant in terms of the traditions, observances, customs, beliefs or history of Aborigines': s.71D(1).
- <sup>342</sup> *Id.*, s.71AW(1). Any person can propose that land be added to Sch 14: s.71AS.
- <sup>343</sup> *Id.*, s.71O. Pt 4A Div 2 sets out the procedure for negotiating leases.
- <sup>344</sup> *Id.*, s.71AE(3).
- <sup>345</sup> *Id.*, s.71AN(1).
- <sup>346</sup> *Id.*, s.71AN(2), (3)(a). Aboriginal owner board members are nominated by themselves or another Aboriginal owner.
- <sup>347</sup> *Id.*, s.71AO(1)(a).
- <sup>348</sup> *Id.*, s.57(7).
- <sup>349</sup> *Aboriginal Land Rights Act 1983* (NSW) ss.47, 48.
- <sup>350</sup> *Id.*, s.45(11).
- <sup>351</sup> *Aborigines Act 1969* (NSW) s.17(1A)(a)(iii).
- <sup>352</sup> *Aboriginal Land Rights Act 1983* (NSW) s.45(2)(a). This is also the position for land transferred to a LALC after a successful claim to a travelling stock reserve: s.45(2)(b).
- <sup>353</sup> *Id.*, s.45(2)(c)(i).
- <sup>354</sup> *Id.*, s.45(2)(c)(ii).
- <sup>355</sup> *Id.*, s.45(4). Consent is not required in certain specific circumstances, for example, in regard to mining rights in force before the land was vested in the LALC: s.45(12)(b). See also ss.45(12)(a), (13)(b).
- <sup>356</sup> *Id.*, s.45(5).
- <sup>357</sup> *Id.*, s.45(6).

- <sup>358</sup> Id, s.45(9).
- <sup>359</sup> Id, ss.46(1), (2).
- <sup>360</sup> Id, s.41(a).
- <sup>361</sup> Id, Pt 6 Div 4, s.29A(1).
- <sup>362</sup> Id, s.56D(1). An investigator can only be appointed for a Regional Aboriginal Land Council or a LALC with the approval of the NSW Aboriginal Land Council.
- <sup>363</sup> Id, ss.57, 57A.
- <sup>364</sup> Id, s.58(1).
- <sup>365</sup> Id, s.58A(1).
- <sup>366</sup> Id, ss.58A(1)(a), (b).
- <sup>367</sup> Id, s.56A.
- <sup>368</sup> Id, s.65A provides that each Aboriginal Land Council is to be taken to be a public authority for the purposes of the *Ombudsman Act 1974* (NSW), the *Independent Commission Against Corruption Act 1988* (NSW) and the *Freedom of Information Act 1989* (NSW).
- <sup>369</sup> Independent Commission Against Corruption, *Report on investigation into Aboriginal Land Councils in New South Wales: Corruption prevention and research volume*, Independent Commission Against Corruption, 1998.
- <sup>370</sup> Id, recs 5-8.
- <sup>371</sup> Id, rec 2(1).
- <sup>372</sup> *Aboriginal Land Rights Act 1983* (NSW) s.34(3). The NSW Aboriginal Land Council can, in turn, direct another Aboriginal Land Council to submit quarterly financial statements: s.34B.
- <sup>373</sup> Id, s.34(1).
- <sup>374</sup> Pursuant to *Aboriginal Land Rights Act 1983* (NSW) s.34(4).
- <sup>375</sup> Section 49.
- <sup>376</sup> *Aboriginal Land Rights Act 1983* (NSW) ss.49B(1), 49C(1)(a). Priority must be given to registering the names of Aborigines who have cultural associations with lands listed in Sch 14 to the *National Parks and Wildlife Act 1974* (NSW): s.49C(3).
- <sup>377</sup> *Aboriginal Land Rights Act 1983* (NSW) s.59(1). Certain disputes must have first been referred to the relevant Regional Aboriginal Land Council for conciliation: s.59(1)(a). The Registrar cannot refer disputes if provision is made for their determination elsewhere in the Act: s.59(2).
- <sup>378</sup> *Aboriginal Land Rights Act 1983* (NSW) ss.13(1), 21(1), 24(1). These rules may include some determined by the Minister under s.56A.
- <sup>379</sup> *National Parks and Wildlife Act 1974* (NSW) s.71AO(2).
- <sup>380</sup> Mutawintji Lease: <[www.austlii.edu.au/au/special/rsjproject/rsjlibrary/](http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/)>.
- <sup>381</sup> Sch 3 of the Lease lists individuals and organisations who have scientific or general licences under the *National Parks and Wildlife Act 1974* (NSW) to enter the Mutawintji lands. For example, Mr W Bates is entitled to 'hunt rabbits, goats, kangaroos and emus...for domestic purposes and for ceremonial and cultural purposes in accordance with the tradition of the Aboriginal owners': <[www.austlii.edu.au/au/special/rsjproject/rsjlibrary/](http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/)>.
- <sup>382</sup> Mutawintji Lease cl 12.2(5): <[www.austlii.edu.au/au/special/rsjproject/rsjlibrary/](http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/)>.
- <sup>383</sup> *National Parks and Wildlife Act 1974* (NSW) s.41(1). This prohibition also applies to proclaimed Aboriginal areas: s.64.
- <sup>384</sup> Id, s.41(2).

- <sup>385</sup> Id, s.41(4). Notice of intention to approve mining must be laid before both houses of parliament without objection: s.41(5).
- <sup>386</sup> *Aboriginal Land Rights Act 1983* (NSW) s.36A(6).
- <sup>387</sup> *National Parks and Wildlife Act 1974* (NSW) ss.71AO(3), (4).
- <sup>388</sup> 2.8 per cent of the Queensland population identified as Indigenous at the 1996 ABS Census. This represents more than 95,000 people: <www.abs.gov.au>.
- <sup>389</sup> For example, citations are only given for the *Aboriginal Land Act 1991* (Qld) as the *Torres Strait Islander Land Act 1991* (Qld) is almost identical. For a brief overview of the latter Act see G Neate, 'Torres Strait Islander Land Act 1991' (1997) 4(7) *Indigenous Law Bulletin* 13.
- <sup>390</sup> For some general background material see B Hocking, 'Torres Strait Islanders and the law' (1987) 2 *Law and Anthropology* 359; E Mabo, 'Land rights in the Torres Strait' in E Olbrei (ed), *Black Australians: The prospects for change*, James Cook University Students' Union, 1982, pp 143-48.
- <sup>391</sup> *Laws of Australia* Title 1.3 Land Law (at 1 April 1997) Ch 9, Legislative Regulation in Queensland, paras 466-468.
- <sup>392</sup> Ibid.
- <sup>393</sup> Ibid.
- <sup>394</sup> *Torres Strait Islanders Act 1939* (Qld) s.18(1).
- <sup>395</sup> See G Nettheim, 'The Queensland Acts and human rights' in E Olbrei (ed), above note 391, pp 82-109.
- <sup>396</sup> See *Land Act 1994* (Qld) ss.31, 33 for the current formulation of these powers.
- <sup>397</sup> Since the 1994 amendments this power has rested with the Minister: *Land Act 1994* (Qld) s.31(2)(b).
- <sup>398</sup> See F Brennan, *Land rights Queensland style: The struggle for Aboriginal self-management*, UQP, 1992, pp 86-88 for a fuller account of this episode.
- <sup>399</sup> *Land Act 1962* (Qld) s.203(b).
- <sup>400</sup> *Laws of Australia* Title 1.3 Land Law, (as at 1 April 1997), Ch 9, Legislative Regulation in Queensland, para 475.
- <sup>401</sup> *Land Act 1994* (Qld) s.32.
- <sup>402</sup> *Aboriginal Land Act 1991* (Qld) s.33(2). Reserve land can be converted to Aboriginal inalienable freehold under this Act. See the outline of this process at pp 53-54. Leases granted by the Crown under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld) can also be continued under s.33.
- <sup>403</sup> For the purposes of this Chapter, Aboriginal Councils and Island Councils are referred to collectively as 'community councils'. See the discussion of the community council system at pp 56-57.
- <sup>404</sup> *Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982* (Qld), *Land Act (Aboriginal and Islander Land Grants) Amendment Act 1984* (Qld), *Land Act Amendment Act (No 2) 1986* (Qld), *Land Act Amendment Act 1987* (Qld) and *Land Act and Another Act Amendment Act 1988* (Qld).
- <sup>405</sup> Brennan, above note 399, pp 57-79.
- <sup>406</sup> *Land Act 1994* (Qld) s.44(2).
- <sup>407</sup> See discussion of *Community Services (Aborigines) Act 1984* (Qld) and *Community Services (Torres Strait) Act 1984* (Qld) at pp 60-61.
- <sup>408</sup> After the Mer (or Murray) Island community in the Torres Strait refused to accept a DOGIT, the Island's traditional owners successfully claimed native title rights over the land in *Mabo*.
- <sup>409</sup> Ch 3 Pt 1 Div 2. The *Land Act 1962* (Qld) was repealed by s.524 of the *Land Act 1994* (Qld).

- <sup>410</sup> *Land Act 1994* (Qld) s.43(1).
- <sup>411</sup> *Id.*, s.508(1).
- <sup>412</sup> Section 6(1).
- <sup>413</sup> Brennan, above note 399, p 96.
- <sup>414</sup> *Ibid.*
- <sup>415</sup> *Community Services (Aborigines) Act 1984* (Qld) ss.77B(1), (2).
- <sup>416</sup> *Id.*, s.77B(3).
- <sup>417</sup> *Land Act 1994* (Qld) s.23(1). Existing reservations are preserved by s.508(3).
- <sup>418</sup> *Id.*, s.23(2).
- <sup>419</sup> *Id.*, s.40(1).
- <sup>420</sup> *Aboriginal Land Act 1991* (Qld) s.35(1).
- <sup>421</sup> *Aboriginal Land Act 1991* (Qld) s.35(2).
- <sup>422</sup> Brennan, above note 399, p 11.
- <sup>423</sup> Section 12.
- <sup>424</sup> *Local Government (Aboriginal Lands Act) 1978* (Qld) s.6, Sch 1.
- <sup>425</sup> *Id.*, s.14.
- <sup>426</sup> For background material see K Jacobs, R Felton and D Mudunathi, 'Mornington Island Perspectives' in E Olbrei (ed), above note 391, pp 119-23.
- <sup>427</sup> Brennan, above note 399, pp 10-11.
- <sup>428</sup> This led to extended litigation: *Peinkinna v Corporation of the Director of Aboriginal and Islanders Advancement* (unreported) Federal Court, 5 October 1976; *Corporation of the Director of Aboriginal and Islanders Advancement v Peinkinna* (1978) 52 ALJR 286. See also G Nettheim, *Victims of the law: Black Queenslanders today*, Allen and Unwin, 1981, Ch 7.
- <sup>429</sup> Brennan, above note 399, p 153.
- <sup>430</sup> *Aboriginal Land Act 1991* (Qld) ss.30, 35, 39. Dealings in transferred land and granted land (land which has been successfully claimed) are limited to granting certain leases, licences, mining interests, easements etc: ss.39(2), 76(2).
- <sup>431</sup> *Id.*, s.27(3).
- <sup>432</sup> 'Aboriginal land' is defined in s.10 of the *Aboriginal Land Act 1991* (Qld). 'Torres Strait Islander land' is defined in s.9 of the *Torres Strait Islander Land Act 1991* (Qld).
- <sup>433</sup> *Aboriginal Land Act 1991* (Qld) s.30. The term 'transferable land' is defined in s.11(1).
- <sup>434</sup> *Id.*, ss.12(a), (c), (d).
- <sup>435</sup> *Id.*, ss.28 (1), (3), (4).
- <sup>436</sup> *Id.*, s.84(1). Any pre-existing interest in granted land, other than a government interest, continues when it becomes Aboriginal land: s.71.
- <sup>437</sup> The term 'transferred land' is defined in s.11(2) of the *Aboriginal Land Act 1991* (Qld).
- <sup>438</sup> *Id.*, s.18.
- <sup>439</sup> *Id.*, s.83. Similar arrangements apply in NSW: see pp 47-48.
- <sup>440</sup> See *id.*, s.17(2).
- <sup>441</sup> *Id.*, s.18(3).
- <sup>442</sup> *Id.*, s.18(4).
- <sup>443</sup> See the discussion of traditional affiliation and historical association below.

- <sup>444</sup> *Aboriginal Land Act 1991* (Qld) ss.19 (b), 22, 19(d), (e), (f), 3.
- <sup>445</sup> *Id.*, ss.31(1), 77.
- <sup>446</sup> *Id.*, ss.45, 46. Land that was DOGIT land, Aurukun Shire lease land or Mornington Island Shire lease land immediately before it become claimable, cannot be claimed on the ground of economic or cultural viability: s.46(3). National park land cannot be claimed on this ground either: s.46(2).
- <sup>447</sup> *Id.*, s.53(1). 'Aboriginal tradition' is defined in s.9 as 'the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships'.
- <sup>448</sup> *Id.*, s.53(2).
- <sup>449</sup> *Id.*, s.54(1).
- <sup>450</sup> *Id.*, s.54(3).
- <sup>451</sup> *Id.*, s.55(1). When determining the claim, the Tribunal must have regard to the proposed use of the land: s.55(2).
- <sup>452</sup> *Id.*, s.89(1).
- <sup>453</sup> *Id.*, s.60.
- <sup>454</sup> *Id.*, s.60(1).
- <sup>455</sup> *Id.*, ss.60(3), (4).
- <sup>456</sup> *Id.*, ss.63(1), 64(1).
- <sup>457</sup> *Id.*, s.65(1).
- <sup>458</sup> *Id.*, s.65(3).
- <sup>459</sup> *Community Services (Aborigines) Act 1984* (Qld) s.77(1).
- <sup>460</sup> *Id.*, s.77(2).
- <sup>461</sup> *Id.*, s.14; *Community Services (Torres Strait Islanders) Act 1991* (Qld) s.14. Aurukun and Mornington Island Shire Councils operate as community councils but are established under separate legislation.
- <sup>462</sup> *Community Services (Aborigines) Act 1991* (Qld) ss.15(2), (3). Councils existing at the commencement of the legislation are preserved by s.15(1).
- <sup>463</sup> *Id.*, s.16.
- <sup>464</sup> *Id.*, s.18. A person whose name appears on an Aboriginal Council roll cannot vote at local government elections for the area: s.19(1)(b)(i).
- <sup>465</sup> *Community Services (Aborigines) Regulations 1988* (Qld); *Community Services (Torres Strait Islanders) Regulations 1985* (Qld).
- <sup>466</sup> *Community Services (Aborigines) Act 1991* (Qld) ss.19(2), 25(1).
- <sup>467</sup> *Id.*, ss.25(3)(a), (b).
- <sup>468</sup> *Id.*, s.46(1); *Community Services (Torres Strait Islanders) Act 1991* (Qld) s.44(1).
- <sup>469</sup> *Community Services (Aborigines) Act 1991* (Qld) s.47(1).
- <sup>470</sup> *Id.*, ss.48(1)(a), (b). The Councils also have a number of responsibilities for official appointments, financial administration and business operations.
- <sup>471</sup> *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) Pt 3A.
- <sup>472</sup> Queensland Legislation Review Committee, *Final report: Inquiry into the legislation relating to the management of Aboriginal and Torres Strait Islander communities in Queensland*, Legislation Review Committee, 1991, recs 5, 6, 9.

- <sup>473</sup> Id, rec 21.
- <sup>474</sup> *Community Services Legislation Amendment Act 1999* (Qld) s.13D.
- <sup>475</sup> See program description and funding guidelines reproduced in (1996) 1 *AILR* 675.
- <sup>476</sup> See Department of Aboriginal and Torres Strait Islander Policy and Development, *Community development program - Funding guidelines*, Internal Publication, 1998. And see more detailed discussion in Chapter 12.
- <sup>477</sup> *Land Act 1962* (Qld) s.335(1) now included in *Land Act 1994* (Qld) s.44.
- <sup>478</sup> *Land Act 1994* (Qld) s.44.
- <sup>479</sup> *Community Services (Aborigines) Act 1984* (Qld) s.8.
- <sup>480</sup> *Aboriginal Land Act 1991* (Qld) s.26(1).
- <sup>481</sup> *Laws of Australia* Title 1.3 Land Law, Ch 9, Legislative Regulation in Queensland, para 493.
- <sup>482</sup> *Community Services (Aborigines) Act 1984* (Qld) s.65(1).
- <sup>483</sup> Id, s.65(2).
- <sup>484</sup> Id, s.66(1)(b).
- <sup>485</sup> Id, s.68. See discussion at p 60.
- <sup>486</sup> *Land Act 1994* (Qld) s.22(1); *Mineral Resources Act 1989* (Qld) s.8; *Petroleum Act 1923* (Qld) s.10. Quarry material is defined as under s.5 of the *Forestry Act 1959* (Qld) and includes guano, gravel and clay.
- <sup>487</sup> *Land Act 1994* (Qld) s.452A. Although the protection existed at least from 1982 under the *Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982* (Qld).
- <sup>488</sup> *Land Act 1994* (Qld) s.56(1).
- <sup>489</sup> Id, s.56(2).
- <sup>490</sup> Id, s.56(3)(a).
- <sup>491</sup> Id, s.56(4).
- <sup>492</sup> See p 62.
- <sup>493</sup> *Local Government (Aboriginal Lands) Act 1978* (Qld) ss.23(a), (b), (c), (d), (f).
- <sup>494</sup> Id, ss.23(g), 24(1).
- <sup>495</sup> Brennan, above note 399, p 12.
- <sup>496</sup> *Local Government (Aboriginal Lands) Act 1978* (Qld) s.25(1).
- <sup>497</sup> Id, s.25(2).
- <sup>498</sup> Id, Pt 6 (ss. 40-108).
- <sup>499</sup> Id, s.58(1).
- <sup>500</sup> *Aboriginal Land Act 1991* (Qld) s.19(1)(e).
- <sup>501</sup> See p 56+.
- <sup>502</sup> *Aboriginal Land Act 1991* (Qld) ss.84(1), 85.
- <sup>503</sup> Id, s.86(1).
- <sup>504</sup> *Community Services (Aborigines) Act 1984* (Qld) s.68(2)(a)(i). The grantees are those to whom the land grant was initially made, that is, the owners.
- <sup>505</sup> Id, ss.68(2)(a)(ii), (b).
- <sup>506</sup> *Aboriginal Land Act 1991* (Qld) ss.39(5). See s.76(6) in regard to granted land. Contravention of these provisions does not invalidate the interest or agreement: ss.39(6), 76(7).

<sup>507</sup> Id, ss.42, 80.

<sup>508</sup> Id, ss.43(1), (3), 81(1), (5).

<sup>509</sup> Id, s.87.

<sup>510</sup> *Mineral Resources Act 1989* (Qld) s.129(3).

<sup>511</sup> Id, s.54.

<sup>512</sup> Id, ss.252(2)(c), 254.

<sup>513</sup> Id, s.269(1).

<sup>514</sup> Id, s.271(1).

<sup>515</sup> *Aboriginal Land Act 1991* (Qld) s.88(1). The monies must be applied for the benefit of the people for whom the trustees hold the land, particularly those most affected by the mining: s.88(2). See *Aboriginal Land Regulations 1991* (Qld) reg 55 for the current prescribed percentages. For example 50 per cent of every dollar of royalties up to \$100,000 and 25 per cent of every dollar between \$100,000 and \$200,000.

<sup>516</sup> *Community Services (Aborigines) Act 1984* (Qld) s.77A.

<sup>517</sup> *Community Services (Aborigines) Act 1991* (Qld) ss.25(2)(a), (b), (2A).

<sup>518</sup> Id, s.25(1A).

<sup>519</sup> Id, ss.26(3), (3A).

<sup>520</sup> Id, s.26(2).

<sup>521</sup> Id, s.26(4A)(b).

<sup>522</sup> Id, s.20(a). This can also occur at the petition of at least a fifth of the electors on the roll: s.20(b).

<sup>523</sup> Id, s.21.

<sup>524</sup> Id, ss.32(2), 8(1), 8(2), 32F(1).

<sup>525</sup> Id, s.36(3).

<sup>526</sup> Id, ss.39(2), (1).

<sup>527</sup> Id, s.36(1).

<sup>528</sup> Id, ss.42(1), (2).

<sup>529</sup> Id, s.43(2)(a).

<sup>530</sup> Id, s.43(2)(b).

<sup>531</sup> Id, s.45.

<sup>532</sup> In February 1990 the Tasmanian Minister Assisting the Premier on Aboriginal Affairs circulated a five page discussion paper setting out options for reform but legislation was not introduced for another five years: *Land rights for Tasmanian Aborigines*, Government of Tasmania, 1990.

<sup>533</sup> McRae, Nettheim and Beacroft, above note 10, p 198. Ironically, at the 1996 ABS Census Tasmania had the second highest per centage of population identifying as Indigenous of all Australian jurisdictions. The number of people identifying as Indigenous rose by 56.1 per cent from the 1991 ABS Census to 3 per cent of the population (13,873 people): <www.abs.gov.au>. For a detailed overview of land rights in Tasmania see L Ryan, *The Aboriginal Tasmanians*, second edition, Allen and Unwin, 1996.

<sup>534</sup> *Aboriginal Lands Act 1995* (Tas) ss.5, 6. It should be noted that the Aboriginal Land Council of Tasmania is not the same as the separately incorporated Tasmanian Aboriginal Land Council.

<sup>535</sup> Id, s.18(1)(a).

<sup>536</sup> The land is vested in perpetuity: id, s.27(1). Any alienation would have to be in accordance with trust principles, that is, in the interest of beneficiaries.



- <sup>537</sup> Id, Sch 3; McRae, Nettheim and Beacroft, above note 10, p 199.
- <sup>538</sup> *Aboriginal Lands Act 1995* (Tas) s.18(1)(d). In addition, lands could be added to Sch 3 by legislative amendment.
- <sup>539</sup> Id, s.18(1)(b).
- <sup>540</sup> Id, ss.30, 28.
- <sup>541</sup> Id, s.27(3). The Act commenced on 6 December 1995.
- <sup>542</sup> *Land Acquisition Act 1993* (Tas) s.5A.
- <sup>543</sup> *Aboriginal Lands Act 1995* (Tas) s.21.
- <sup>544</sup> Id, s.22. The Council may temporarily invest money for which it has no immediate use in a trust fund: s.24.
- <sup>545</sup> Id, s.9(3).
- <sup>546</sup> Chief Electoral Officer, *The Aboriginal Land Council of Tasmania: 1996 election procedures and guidelines*, Tasmanian Electoral Office, 1996, p 6.
- <sup>547</sup> Ibid.
- <sup>548</sup> Id, p 7.
- <sup>549</sup> (1995) 54 FCR 503; Chief Electoral Officer, above note 547, p 6.
- <sup>550</sup> *Shaw v Wolf* (unreported) Federal Court, 20 April 1998. See R Connell, 'Casenote: *Shaw v Wolf*' (1998) 4(12) *Indigenous Law Bulletin* 20; (1998) 3 *AILR* 357.
- <sup>551</sup> (1992) 175 CLR 1 at 70.
- <sup>552</sup> *Shaw v Wolf* at 80. See (1998) 3 *AILR* 357.
- <sup>553</sup> *Aboriginal Lands Act 1995* (Tas) ss.10(3)(a), (b).
- <sup>554</sup> Id, s.10(3)(c).
- <sup>555</sup> Id, s.10(6).
- <sup>556</sup> Id, s.27(8). There is limited access to Oyster Bay and Mount Cameron as specified in the Central Plan Register. Section 27(8) states that the right of access is equivalent to that which would exist if the land was a coastal reserve under the *Crown Lands Act 1976* (Tas) s.57.
- <sup>557</sup> *Aboriginal Lands Act 1995* (Tas) s.27(5).
- <sup>558</sup> Section 49A(1).
- <sup>559</sup> *National Parks and Wildlife Act 1970* (Tas) s.49A(2).
- <sup>560</sup> *Aboriginal Lands Act 1995* (Tas) s.27(2).
- <sup>561</sup> *Mineral Resources Development Act 1995* (Tas) Pt 7.
- <sup>562</sup> Id, s.131(2)(a).
- <sup>563</sup> Id, s.133(4).
- <sup>564</sup> *Aboriginal Lands Act 1995* (Tas) s.18(3).
- <sup>565</sup> Id, s.31.
- <sup>566</sup> Id, s.18(1)(c).
- <sup>567</sup> Id, s.32.
- <sup>568</sup> Id, ss.3, 18(5).
- <sup>569</sup> Id, s.31(2).
- <sup>570</sup> Id, s.27(4).
- <sup>571</sup> Id, s.19(1).

- <sup>572</sup> Id, s.19(2). Separate review and appeal rights exist in regard to decisions about the renewal of certain leases and licences: ss.28(3), 29.
- <sup>573</sup> *Land and Income Taxation Act 1910* (Tas) s.10(1)(r).
- <sup>574</sup> *Local Government Act 1993* (Tas) s.87(1)(da); *Fire Service Act 1979* (Tas) s.78(ba).
- <sup>575</sup> *Local Government Act 1993* (Tas) ss.93, 94.
- <sup>576</sup> A Darby, 'Reconciled to a savage land', *Sydney Morning Herald*, 1 March 1999, p 4. See Ryan, above note 534, Chs 12, 13.
- <sup>577</sup> At the 1996 ABS Census, 2.9 per cent of the WA population reported being Indigenous. This represents more than 50,000 people: <www.abs.gov.au>. For a brief history of the land rights movement in WA see C Pierluigi, 'Aboriginal land rights history: Western Australia' (1991) 2(52) *Aboriginal Law Bulletin* 24.
- <sup>578</sup> See p 11.
- <sup>579</sup> Royal Commission into Aboriginal Affairs, *Report*, Western Australian Government, 1974, pp 446-56.
- <sup>580</sup> Id, p 456.
- <sup>581</sup> See terms of reference in P Seaman, *Aboriginal land inquiry: Discussion paper*, Aboriginal Land Inquiry, 1984, p 3.
- <sup>582</sup> P Seaman, *Aboriginal land inquiry: Report Vol 1*, Aboriginal Land Inquiry, 1984, Ch 1.
- <sup>583</sup> Id, pp 38, 126. Under the proposals, Aboriginal people who claimed land successfully would gain inalienable freehold title: p 93.
- <sup>584</sup> Id, p 111.
- <sup>585</sup> *Land Act 1933* (WA) s.9.
- <sup>586</sup> Id, s.29(1). In addition to reserves there are numerous outstation communities established on an *ad hoc* basis by Aboriginal people returning to their traditional lands. See K Muir, 'Back home to stoke the fires: The outstations movement in Western Australia' (1999) 4(19) *Indigenous Law Bulletin* 11.
- <sup>587</sup> *Land Act 1933* (WA) s.31(1)(a).
- <sup>588</sup> Id, s.31(2). Before such a proclamation is made, the Minister must table a report in both houses of parliament setting out the reasons for it and the intended use of the land.
- <sup>589</sup> Id, s.31(3).
- <sup>590</sup> Id, s.33. None of the reservation provisions in the *Land Act 1933* (WA) relate specifically to Aboriginal land.
- <sup>591</sup> *Land Administration Act 1997* (WA) s.83.
- <sup>592</sup> Id, s.41.
- <sup>593</sup> Id, s.42, and Schedule 2 s.14(5) and (7).
- <sup>594</sup> Id, s.104.
- <sup>595</sup> *Aboriginal Affairs Planning Authority Act 1972* (WA) ss.25, 26.
- <sup>596</sup> Id, ss.8, 26, 27. In 1995 the land management functions of the Authority were transferred to the newly created Aboriginal Affairs Department. The legislation was not amended so in the interests of clarity all references in this Chapter will be to the Aboriginal Affairs Planning Authority.
- <sup>597</sup> Id, s.25(2)(a).
- <sup>598</sup> Id, s.25(2)(c)(iii).
- <sup>599</sup> Id, s.12. The Authority is staffed by public servants: s.15. There is no specific provision for Aboriginal staff.
- <sup>600</sup> Id, ss.13(1)(d), (f), (g).

- <sup>601</sup> Id, ss.23, 24.
- <sup>602</sup> Id, s.21. The Minister appoints one of the members to act as chairperson: s.21(3).
- <sup>603</sup> Id, s.23(c). 'Person of Aboriginal descent' is defined as any person living in Western Australia wholly or partly descended from the original inhabitants of Australia who claims to be an Aboriginal and who is accepted as such in the community in which he or she lives: s.4.
- <sup>604</sup> Id, s.20.
- <sup>605</sup> Id, s.7(2). The Aboriginal Affairs Planning Authority is also subject to such Ministerial direction.
- <sup>606</sup> Id, ss.7(1)(a), (d).
- <sup>607</sup> Aboriginal Lands Trust Review Team, *Report of the review of the Aboriginal Lands Trust*, Aboriginal Affairs Department, 1996, recs 1, 5. Cited in (1997) 2 *AILR* 110, p 115.
- <sup>608</sup> Id, rec 6.
- <sup>609</sup> *Aboriginal Communities Act 1979* (WA) s.4(1). The communities identified in the legislation are the Bidyadanga Aboriginal Community La Grange Incorporated and the Bardi Aborigines Association Inc. By 1997, 26 communities had been proclaimed under the Act: Aboriginal Affairs Department, *Annual report 1996-97*, Government Printer, 1997, p 11.
- <sup>610</sup> *Aboriginal Communities Act 1979* (WA) s.6(1).
- <sup>611</sup> *Aboriginal Affairs Planning Authority Act 1972* (WA) s.31. The regulations authorise police, public health authorities and officers of public authorities to enter reserves in the exercise of their official duties: Aboriginal Affairs Planning Authority Regulations 1972 (WA) reg 7.
- <sup>612</sup> Aboriginal Affairs Planning Authority Regulations 1972 (WA) reg 8(3).
- <sup>613</sup> Id, reg 8(3).
- <sup>614</sup> *Aboriginal Affairs Planning Authority Act 1972* (WA) s.28(b).
- <sup>615</sup> Section 32(1). 'Aboriginal inhabitants' are defined within the section as Aboriginal persons who are or have normally been resident within the area, and their descendants.
- <sup>616</sup> *Aboriginal Affairs Planning Authority Act 1972* (WA) s.32(2).
- <sup>617</sup> Aboriginal Lands Trust Review Team, above note 608, rec 8. Cited in (1997) 2 *AILR* 110, p 115.
- <sup>618</sup> *Land Act 1933* (WA) s.15. Resources include gold, silver, copper, tin or other metals, ore, minerals or other substances containing metals, gems or precious stones, coal or mineral oil and phosphatic substances in or upon the land.
- <sup>619</sup> *Mining Act 1978* (WA) s.24(7)(a).
- <sup>620</sup> Id, s.24(7)(b).
- <sup>621</sup> Id, s.24(7)(c); Aboriginal Affairs Planning Authority Regulations 1972 (WA) reg 8.
- <sup>622</sup> Aboriginal Affairs Planning Authority Regulations 1972 (WA) reg 8(3).
- <sup>623</sup> *Laws of Australia* Title 1.3 Land Law Ch 6, Legislative Regulations in Western Australia, para 342.
- <sup>624</sup> *Mining Act 1978* (WA) ss.108, 109; *Petroleum Act 1967* (WA) ss.137-149.
- <sup>625</sup> The delegation was pursuant to *Aboriginal Affairs Planning Authority Act 1972* (WA) s.24(2).
- <sup>626</sup> Aboriginal Lands Trust Review Team, above note 608, recs 9 and 10. Cited in (1997) 2 *AILR* 110, p 115.
- <sup>627</sup> *Aboriginal Affairs Planning Authority Act 1972* (WA) s.14(1).
- <sup>628</sup> The Act also provides for an Aboriginal Affairs Co-ordinating Committee: s.19. The Committee is made up of the heads of WA government departments that deliver services to Indigenous peoples. It was established to co-ordinate service delivery.
- <sup>629</sup> *Aboriginal Affairs Planning Authority Act 1972* (WA) s.18(2).

- <sup>630</sup> Id, s.18(1).
- <sup>631</sup> Id, s.7(1)(b).
- <sup>632</sup> *Aboriginal Communities Act 1979* (WA) ss.7(1)(a), (b), (d), (g).
- <sup>633</sup> Id, s.9(1).
- <sup>634</sup> Id, s.13(2).
- <sup>635</sup> Id, s.8.
- <sup>636</sup> Id, s.11. It was originally intended that breach of by-laws matters would be heard by courts staffed by Aboriginal Justices of the Peace and Aboriginal Magistrates: ALRC Report 31, *The recognition of Aboriginal customary laws*, Vol 2, AGPS, 1986, para 750. This aspect of the scheme has been controversial among certain commentators. See, for example, A Hodinott, *That's 'Gardia' business: An evaluation of the Aboriginal justices of the peace scheme in Western Australia*, Government Printer, 1986.
- <sup>637</sup> At the 1996 ABS Census, 1 per cent of the ACT population (2900 people) identified as Indigenous: <www.abs.gov.au>.
- <sup>638</sup> *Aboriginal Land (Jervis Bay Territory) Act 1986* (Cth) s.8, Sch. The Jervis Bay Territory on the south coast of NSW is part of the ACT. The territories power in s.122 of the Constitution enables the Commonwealth to pass legislation for the ACT.
- <sup>639</sup> Id, ss.2(1), 9.
- <sup>640</sup> Id, s.9(1)(a).
- <sup>641</sup> Id, s.9(3).
- <sup>642</sup> Id, s.9A. In 1998, Jervis Bay National Park and Jervis Bay Botanic Gardens were re-named Booderee National Park and Booderee Botanic Gardens.
- <sup>643</sup> Id, ss.38B, 38C.
- <sup>644</sup> Id, s.10.
- <sup>645</sup> Id, s.4A. Pt IV Div 4 of the Act concerns the executive committee. See p 81. The *Commonwealth Authorities and Companies Act 1997* (Cth) regulates certain elements of the financial affairs of federal authorities such as reporting and accountability. The Act imposes certain duties on the directors of an authority, for example, preparation of an annual report: s.9.
- <sup>646</sup> *Aboriginal Land (Jervis Bay Territory) Act 1986* (Cth) s.13(1).
- <sup>647</sup> Id, s.6(c).
- <sup>648</sup> For example, decisions of an administrative nature made under certain enactments are reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
- <sup>649</sup> *Aboriginal Land (Jervis Bay Territory) Act 1986* (Cth) s.6.
- <sup>650</sup> Id, s.17(2).
- <sup>651</sup> Id, ss.18(1), (2). Such a motion must be supported by two-thirds of registered members voting: s.26(2).
- <sup>652</sup> Id, ss.28(3), 29(1), (2).
- <sup>653</sup> Id, s.38. The Council can acquire real property under s.7(2)(a) but it does not fall within the definition of Aboriginal land.
- <sup>654</sup> Id, ss.38(2)(a), (b). 'Domestic purposes' is defined in s.37(2). 'Business purposes' is defined in s.37(3). Leases of up to 15 years can be granted to non-members, with Ministerial permission, or to the Commonwealth: ss.38(2)(e), (f), 38(3)(c).
- <sup>655</sup> Id, s.42. 'Relative' is defined in s.37(1) to include immediate family, lineal descendants and *de facto* spouses.
- <sup>656</sup> Id, s.38(4).

<sup>657</sup> Id, ss.48(1), (2).

<sup>658</sup> Id, s.48(3).

<sup>659</sup> Id, s.49.

<sup>660</sup> Id, s.14. Minerals is defined broadly to include precious metals, petroleum, gems and precious stones, and ores: s.2.

<sup>661</sup> Id, s.44.

<sup>662</sup> Id, s.43.

<sup>663</sup> Id, ss.52A(1), (2).

<sup>664</sup> Id, s.52A(3).

<sup>665</sup> Id, s.52A(14).

<sup>666</sup> Id, s.15.

<sup>667</sup> Id, s.50.

<sup>668</sup> Id, s.52A(2)(c).

<sup>669</sup> Id, s.45.

<sup>670</sup> Id, s.7(3).



## Chapter 12 ■

### Legislative Provision for Corporations and Councils

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#### Introduction

This Chapter is largely, though not exclusively, concerned with structures devised for Aborigines and Torres Strait Islanders apart from structures devised for land-holding and land-management purposes. Land-holding and land-management structures under legislation for statutory land rights, and for native title, are surveyed in Chapters 11 and 13, respectively.

- The first matter considered is land-holding structures for land acquired under the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (Cth).
- A second topic is experience under the *Aboriginal Councils and Associations Act 1976* (Cth), and proposals for its amendment.
- A third topic considers recent developments in one state—New South Wales—concerning the internal and external accountability of Aboriginal Land Councils and Aboriginal Legal Services.
- A final topic looks at the design of Aboriginal and Torres Strait Islander bodies established for the purposes of exercising broad governmental powers, particularly in Queensland.

#### Historical overview

Australian experience with governance bodies for Indigenous peoples has produced several interesting innovations.

Since colonisation, governance has been seen as a matter for non-Indigenous governments. Little attempt was made to understand Aboriginal authority structures and processes; indeed, attempts were made to eradicate such structures and processes.

The end of assimilationist tendencies began in the 1960s in response, in particular, to strong political moves from Indigenous Australians. Of course, demands for recognition and respect ran through post-colonisation Australian history<sup>1</sup> and gained some momentum in terms of organised political activity in the 1930s.

But the 1960s saw the beginnings of change. The 1967 referendum was successful in amending the Commonwealth Constitution so as to establish the legislative power of the Commonwealth parliament to make laws with respect to Aboriginal people.

The 1960s also saw the beginnings of the modern land rights movement with the Gurindji walk off from the Wave Hill pastoral station, and the Yirrkala clans campaign against a Commonwealth government grant of bauxite mining leases on the

Gove Peninsula. Both of these dramas played out in the Northern Territory where the Commonwealth parliament had plenary authority. Both reflected what has been the primary concern of Indigenous Australians—the recognition of land rights.

At that time, the only land where Aboriginal peoples and Torres Strait Islanders had any residential rights as such were the reserves. Notionally, reserves were areas of Crown land reserved for the use of Aboriginal people or Torres Strait Islanders, but owned by the Crown and managed by government officials or religious missions. The right to be on such reserves was, in most cases, not really a right for the Indigenous peoples concerned. There were, typically, powers to compel people to be on the reserves and to refuse permission for them to depart. There were also powers to exclude people from the reserves or to transfer them from one reserve to another.

The pattern varied from jurisdiction to jurisdiction and from one period to another.<sup>2</sup> In some jurisdictions there were Aboriginal Protection Boards or the like with overall powers to govern Aboriginal people and the reserves.

The first legislative breakthrough occurred in South Australia when, under the Dunstan government, the *Aboriginal Lands Trust Act 1966* (SA) established the Trust to hold reserves on behalf of Aboriginal people across the state.<sup>3</sup> The pattern was followed, with variations, in some other states.

### **Woodward and after**

The major innovation came from the Commonwealth parliament in relation to the Northern Territory with the reports of the Aboriginal Land Rights Commission<sup>4</sup> (Woodward Reports) and the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).<sup>5</sup> The Woodward Reports took very careful account of anthropological evidence and the views of Aboriginal peoples in the Northern Territory. The Act provided for the establishment of Land Trusts to hold title, and Land Councils to manage land and claims to land on behalf of those with traditional rights in respect of the land. This scheme is generally accepted as representing a high water mark in the design of culturally appropriate governance structures with respect to the land rights of Aboriginal Australians.<sup>6</sup>

The statutory land rights regimes for Indigenous Australians considered in Chapter 11 vary significantly across the several jurisdictions. For the purpose of land-holding and land-management, these statutes make considerable use of statutory corporations.

By contrast, native title at common law is covered by Commonwealth legislation, though with some provision for variations at state and territory level. The *Native Title Act 1993* (Cth) (the NTA) requires the establishment of ‘prescribed bodies corporate’, either to hold title or to act as agents for native title holders. The legislation also provides for a system of Representative Aboriginal/Torres Strait Islander Bodies. See Chapter 13.



By the mid-1970s there had been a proliferation of Aboriginal and Torres Strait Islander bodies formed for purposes other than holding title and managing land. Their purposes included the delivery of services to Indigenous Australians—legal, health, housing and the like. When such bodies began to receive public funding, it was necessary that they be established as entities under Australian law. The same applied to bodies formed for other purposes such as culture, sport and heritage protection.

Even before the 1970s, some Australian governments had established councils for Aboriginal and Torres Strait Islander communities with limited local government-type powers. Some councils, as in Queensland, also came to hold title to community land.

The Woodward Reports were not confined solely to land rights in the Northern Territory.

For one thing, the Commissioner saw a need for the restoration to Aboriginal people of land which could not be claimed under the claim process, which was confined mainly to unalienated Crown land. He proposed that funds be made available for the open market purchase of land for Aboriginal people and Torres Strait Islanders anywhere in Australia. A fund was first established for this purpose in 1974. The principal current program is administered by the Indigenous Land Corporation (the ILC).<sup>7</sup> Under the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (Cth) (the Land Fund Act), the ILC may vest land purchased only in corporations; it has needed to deal with those for whose benefit land is purchased with the aim of devising appropriate corporate entities for the purpose.<sup>8</sup>

In addition, Woodward foresaw that Aboriginal people would need to establish additional structures for such purposes as receiving and administering royalty-equivalent monies from mining and other developments on Aboriginal land. Again, he did not confine his recommendations to the Northern Territory but recommended the enactment of Commonwealth legislation of nation-wide scope. Indigenous Australians, of course, were (and remain) able to establish corporations and associations under generally applicable Commonwealth and state or territory legislation. But Woodward perceived a need for a more user-friendly system which could produce culturally appropriate corporate entities. The outcome was the *Aboriginal Councils and Associations Act 1976* (Cth) (the ACA Act). This was intended to provide for culturally appropriate corporations for a variety of purposes, and for culturally appropriate councils to exercise powers of community government.

This Chapter discusses these matters. It also refers to recent developments in one state—New South Wales—concerning Aboriginal Land Councils and Aboriginal Legal Services. And it considers recent experience in another state—Queensland—in the development of alternative governing structures for Indigenous communities.

## The Land Fund Act

The Woodward recommendations to fund open-market purchase of land for Indigenous Australians<sup>9</sup> first took the form of the Aboriginal Land Fund Commission established in 1974.<sup>10</sup> In 1980 the program was incorporated in the broader functions of the body established by the *Aboriginal Development Commission Act 1980* (Cth). In turn, this and other functions of the ADC were vested in the Aboriginal and Torres Strait Islander Commission (ATSIC) when it was established by the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (the ATSIC Act).

In the meantime, at state level, the *Aboriginal Land Rights Act 1983* (NSW) had also adopted a land purchase strategy supported by an innovative approach to funding. For fifteen years the equivalent of 7.5 percent of Land Tax revenues was put into a fund. Half of the money was to be available, year by year, for administration of the Aboriginal Land Council system and for land purchases; the other half was to be invested so as to accumulate a capital fund. After 1998 the income from the capital fund would be available for further land purchases.

This strategy—of budgetary allocations for a finite period and the build-up of a capital fund to generate income beyond that period—was adopted in the Land Fund Act.

The establishment of a land fund was the second of three elements in the Keating government's proposed response to the High Court's decision recognising the possible survival of native title in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. (The first element of response to the decision was the NTA. The third was to be the social justice package initiative.)

The preamble to the NTA included the following statement:

It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.

The fund was initially established by Part 10, section 201 of the NTA, but more developed legislation was introduced in 1994 and enacted in 1995. The Land Fund Act came into operation on 1 June 1995. ATSIC ceased to receive land purchase funding after 30 June 1997.<sup>11</sup> But it still has funds in a Regional Land Fund, under section 68 of the ATSIC Act, which allows Regional Councils to make allocations from their annual discretionary budgets for land purchases within their region.<sup>12</sup>

From 1 July 1997, at the national level, the land purchase function became primarily that of the ILC. It describes its approach as follows:

The main tenets of the ILC policy in land acquisition and land management are founded on the recognition of prior indigenous ownership of land. The ILC purchases land on the basis of its cultural importance to indigenous peoples, and recognises cultural and social priorities as well as environmental and economic issues in its approach to land management.<sup>13</sup>

The ILC is established as a statutory corporation (section 191A). In its land acquisition function, its clients are required to organise as corporations (section 191D(1)). (In contrast, its land management functions under section 191E relate to ‘Indigenous-held land’, a phrase which is defined in section 4B as not being confined to land held by corporations.) Section 191D(1) reads as follows:

The land acquisition functions of the Indigenous Land Corporation are as follows:

- (a) to grant interests in land to Aboriginal or Torres Strait Islander corporations;
- (b) to acquire by agreement interests in land for the purpose of making grants under paragraph (a);
- (c) to make grants of money to Aboriginal or Torres Strait Islander corporations for the acquisition of interests in land;
- (d) to guarantee loans made to Aboriginal or Torres Strait Islander corporations for the purpose of the acquisition of interests in land.

Section 5 of the Land Fund Act amends the ATSIC Act by inserting in section 4(1) the following definition:

**Aboriginal or Torres Strait Islander corporation** means:

- (i) an Aboriginal association incorporated under Part IV of the Aboriginal Councils and Associations Act 1976; or
- (ii) a body corporate where either of the following conditions is satisfied:
  - (i) all the members of the body corporate are Aboriginal persons or Torres Strait Islanders, or both;
  - (ii) a controlling interest in the body corporate is held by Aboriginal persons or Torres Strait Islanders, or both.

This leaves a considerable degree of flexibility, in contrast to the Native Title (Prescribed Bodies Corporate) Regulations under the NTA. Indigenous Australians are required to incorporate, but have a choice whether to do so under the ACA Act or under other legislation.<sup>14</sup> Possible advantages of an incorporation requirement might include: perpetual succession, limits on the liability of members and consistent requirements as to reporting and accountability.

However the requirement to incorporate may still present tensions between the requirements of Australian law and the traditional laws and authority structures of the particular Indigenous group for whom a purchase is proposed. The ILC is not confined in its land acquisition functions to acting for those people who would, but for some act of extinguishment, be native title holders, but the ILC has placed very strong emphasis on such people, as it reported in its 1997–98 *Annual report*.<sup>15</sup>

The main tenet of the ILC's policy is to divest title to land it has purchased to an indigenous corporation that, wherever practicable, represents the traditional owners of the land. This policy, outlined in the National Strategy, reflects the origins of the ILC as part of the Commonwealth's response to the High Court's recognition of native title. It is based on recognition of the prior ownership of Australia by indigenous peoples and on restoring an association to the land wherever possible. It is also aimed at ensuring that, in granting land to indigenous people, the ILC does not itself become an agent of dispossession, or create conflict by purchasing land for one group in the traditional land of another without proper consultation. Implementing the policy has, however, given rise to some practical difficulties and policy challenges.

In land acquisition, it is ILC policy to purchase land which is of cultural importance to indigenous peoples, including traditional, historical or contemporary attachment. In practical terms, there may be a range of interests (and types of attachment) associated with a particular purchase of land. Where land has been purchased on the grounds of historical or contemporary cultural significance, the ILC seeks to ensure that traditional interests are recognised in the structure of the title-holding body. The ILC has endeavoured to develop appropriate structures to assist indigenous groups to include those with historical and contemporary interests in the land as well as those with traditional attachment. The ILC also works with indigenous groups to ensure that the range of interests within a community can be accommodated in some way— if not by membership of the title-holding body, then by access, management or other agreements with the title-holding body.<sup>16</sup>

As noted earlier in this chapter, the structures of many indigenous corporations do not equip them to hold title to property. For example, where an indigenous corporation has been established to provide a service or to run an enterprise, the corporate structure may not provide enough protection for the land should the service discontinue or the enterprise fail. In order to ensure that land purchased by the ILC stays in the indigenous estate and is not lost because of debts incurred by the title-holding body, the most effective approach in most cases is to incorporate a new body for the purpose of holding title to land. In the majority of cases this means that the 'proponent group' or corporation which first sought the purchase by the ILC is not ultimately the landholding body. It has been the ILC's experience, however, that the membership of the new corporation is often broadly the same as that of the proponent organisation.

The ILC is sometimes faced with the problem that the proponents of a land purchase are not traditional owners of the land and thus, as a matter of policy, the ILC will be unable to divest title to that particular group. In these circumstances, the ILC seeks to divest title to a corporation which represents the traditional landowners, and, as noted above, is structured to ensure that other interests are also represented or accommodated...

In a number of cases the ILC has facilitated negotiations between groups about the final structure of the landholding body to ensure that the landholding corporation is representative of and acceptable to the broad range of interests in the land. Where appropriate, or where there is disagreement that cannot be resolved through negotiation, professional advice from anthropologists, historians or other sources may be sought.

In some cases where agreement could not be reached between parties who assert an interest in the land, the ILC has determined not to proceed to divestment for the time being...

Particular issues have arisen in Tasmania and in Queensland.

In Tasmania, the ILC has addressed a variation on the issue of the most appropriate title-holding body. The consensus in the Aboriginal community of Tasmania is that all land purchased by the ILC should be divested to the Aboriginal Land Council of Tasmania (ALCT). The legal aspects of this arrangement have been investigated and the ILC Chairman personally consulted widely in the Aboriginal community in Tasmania to ensure that the proposal is broadly supported. After due consideration, the ILC Board agreed at its June 1998 meeting to divest title to the ALCT. Whilst in the short-term, land granted by the ILC can be added to a schedule appended to the appropriate legislation, legislative amendments would give best effect to this policy decision.<sup>17</sup>

In its *Annual report 1998-99* the ILC reported that it had, by then, purchased three properties in Tasmania and had approved a further four, but was unable to divest the purchased land because the *Aboriginal Lands Act 1995* (Tas) had not yet been amended.

In the meantime, the ILC is seeking to negotiate a management agreement with the ALCT, which includes sub-leases to allow for use and access by local Indigenous groups.<sup>18</sup>

The necessary amendments to the Tasmanian legislation had still not been enacted a year later.<sup>19</sup>

Reference was also made in the ILC's 1997-98 Annual report to a particular problem which the requirement that land be vested in corporations creates in Queensland:

**Obstacles to purchase Grazing Homestead Freeholding and Grazing Homestead Perpetual Leases in Queensland**

In its 1996-97 Annual Report, the ILC reported that it had encountered a substantial legislative obstacle to certain land acquisitions in Queensland. The Land Act 1994 (Qld) requires that Grazing Homestead Freehold Leases (GHFLs) and Grazing Homestead Perpetual Leases (GHPLs) be held by individuals, essentially operated as family farms and cannot be transferred to corporate ownership, including the ILC. The ILC is also unable to acquire land on behalf of individuals. These particular forms of tenure together represent a substantial proportion of land in Queensland. There is a significant indigenous population in the area in which these forms of leasehold are the predominant form of tenure. The ILC has before it twelve proposals for the purchase of land presently held under these forms of title and, as a result of its inability to purchase, is unable to meet the land needs of some thousands of Aboriginal people in those regions.

Representations were made at State and Commonwealth level during the previous reporting period in an effort to find a solution to this impasse. During the current reporting period, representations were made, with no effect. The ILC hopes to discuss this matter with the new State government early in 1998-99.

Subsequently, the Queensland government announced that it proposed to remove the restrictions on GHPLs and GHFLs. This had not been achieved during the next reporting period.

In 1998-99, however, the ILC was able to purchase one such lease with the consent of the Governor-in-Council. The Queensland Minister for Natural Resources and Environment and Heritage has further indicated that, where appropriate, he will consider the transfer of such leases to the ILC on a case-by-case basis. The Queensland Government has reviewed the social, economic and competitive impacts of the restrictions, but the results of that review have not yet been released.<sup>20</sup>

A similar dispensation from the legislative restriction was reported as having permitted an additional such purchase in the following year, but there was still no announcement of the Queensland government's intentions in relation to the relaxation or retention of the restriction.<sup>21</sup>

At the same time, however, the Commonwealth government has proposed a number of amendments to the Land Fund Act. One of the amendments would authorise the ILC to grant land to individuals, partnerships and trusts as well as to corporations. (Similar provisions had been proposed during the debates on the Land Fund Act and, again, in 1996).<sup>22</sup>

Another area of continuing difficulty for the ILC arises from its strong policy of fully accommodating the interests of traditional owners/native title holders when divesting title to an Indigenous corporation. Generally, it seeks to divest title to an Indigenous corporation within twelve months of purchase. However, in a number of situations there are conflicting claims as to who are the traditional owners.<sup>23</sup>

Title-holding body issues – during the year some difficulties arose in divesting acquired properties to appropriate Aboriginal corporations primarily due to disputes among individuals or groups about the membership structure of the title-holding body. These disputes, which generally were not apparent when the property was acquired, have often led to protracted delays in investment. Properties that are large in size (ie pastoral leases) often encompass the traditional country of more than one indigenous group, a situation that sometimes leads to difficulties in intended land uses and future title holding arrangements.

Where this occurs, it is the ILC's preference to retain ownership of the property until the dispute is resolved and indigenous ownership is clarified. In some cases anthropological and/or National Native Title Tribunal (NNTT) assistance has been employed to assist in the determination of appropriate, representative title-holding organisations.<sup>24</sup>

This policy was tested in the Federal Court in the case *Bidjara Aboriginal Housing and Land Company Ltd v Indigenous Land Corporation*.<sup>25</sup> The applicant had, in 1996, proposed to the ILC that it purchase the pastoral lease for Mount Tabor Station. The ILC commissioned a report by a land use and planning consultant who recommended the purchase. The property was described as a 'pastoral lease with uncertain Native Title opportunities'; it was described as being of cultural significance to the Bidjara people and as including sacred, cultural and historical sites. The ILC agreed to acquire the property, conditional upon it resolving 'which body, other than the Bidjara Land and Housing Aboriginal Corporation, should be the new owner'. Justice Kiefel stated:

4 The applicant company, of which Mr R Robinson is the chair, has amongst its members a number of Bidjara people. Persons other than the Bidjara, including non-indigenous persons, and comprising up to forty per cent of the membership of the company, are also entitled to join it. The requirement of the applicant is that its members must reside in the Warrego area. Some persons claiming to be Bidjara do not live in the area. Another company, the Bidjara Traditional Owners Aboriginal Corporation for Land Culture and Heritage Pty Ltd, of which Mr Robinson's brother is the chair, supports the grant of the property acquired by the ILC to the applicant. The second respondent [Yunthala Bidjara Limited] contends that the applicant does not represent the Bidjara people or the country. It seeks to represent Bidjara peoples only, although how this is to be achieved has not yet been resolved. In particular there is a dispute as to whether one family, referred to in the native title claims...is Bidjara...

5 Shortly prior to the ILC acquiring the Mt Tabor property, and on 11 July 1997, the first of the native title claims, which included the subject property, was made by members of the Lawton and Fraser families who claim to be members of the Bidjara Council of Elders. The application was said to be made on behalf of themselves, and for and on behalf of the Bidjara Peoples. The second native title claim, by three persons, again said to be on behalf of the Bidjara peoples and their clan groups, was filed on 28 October 1997. On 19 December 1997 Mr R Robinson filed an application on behalf of the Bidjara People, with respect to the lease area and that claim has been registered.

6 No grant of the pastoral lease has been made by the ILC. It explains its delay, or inability to do so, by reference to the dispute which has arisen as to the representation of the Bidjara People and, as a result, the lack of any corporation to whom it might make a grant under its own guidelines. It believes that a resolution of these matters might be achieved at some point in the native title proceedings. The applicant contends that the ILC is obliged, under the Act, to proceed to make a grant to an aboriginal corporation.

Justice Kiefel considered the relevant provisions of the Act, particularly section 191D(3)(b), on which the applicant placed primary reliance, which requires that, when the ILC acquires an interest in land for the purpose of making a grant to an Indigenous corporation, that that grant should be made 'within a reasonable time after that acquisition'. Her Honour also considered the ILC's national and regional Strategies and its Guidelines.

24 The ILC argues that a reasonable time has not elapsed and that it is reasonable to await the establishment of an Aboriginal or Torres Strait Islander corporation which represents Aboriginal persons with traditional links to the land the subject of the lease more fully than any existing corporation, and further that such a corporation be one which did not engage in any trading or business activity that might render it liable to be wound up.

...

26 In one sense it may be said that the ILC has made a decision, although not specific to a grantee. It awaits the outcome of the native title proceedings and the identification of those persons and families having traditional links to the land the subject of the lease. If there is no Aboriginal or Torres Strait Islander corporation in existence of which they, or a number of them, are members, there would need to be one formed before a grant could be made. There is no time estimate given as to when an outcome is likely.

...

38... Given the preference afforded, by the policy documents, to those having a traditional connexion to the land, and to the use of the statutory powers of acquisition and grant as an adjunct to native title claims it could not, in my view, be said it was unreasonable in delaying its decision so those aims might best be realised. It seems to me that it was in the circumstances justified in doing so.

The application was dismissed.

### **The Aboriginal Councils And Associations Act 1976 (Cth)**

The Bill for this Act (as with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)) was introduced in 1975 under the Whitlam government but enacted in 1976 under the Fraser government. In introducing the Bill in 1975, the Minister for Aboriginal Affairs, Mr Les Johnson, referred to 'the need to provide a vehicle by which Aboriginal communities and organisations, whether they hold land or not, may more effectively achieve their aims and objectives within the general Australian community'. He went on to say:

They need a flexibility in such matters as establishment of the geographical base and membership of a corporation, the election of the governing executive for a community, the making of rules appropriate for that community and the control of that community's funds and property.<sup>26</sup>

In introducing basically the same bill in 1976, the new Minister, Mr Ian Viner, referred to the point made in the first of the Woodward Reports 'that existing legal provisions in respect of incorporation were not adequate to meet the needs of the communities with which he had come into contact'. The Minister said:

What is so important about this measure is that it will recognise cultural differences between the Aboriginal and non-Aboriginal societies and enable Aboriginal communities to develop legally recognisable bodies which reflect their own culture and do not require them to subjugate this culture to overriding Western European legal concepts.<sup>27</sup>



The evidence is that this vision has not been achieved. Amendments to the ACA Act and the way in which the ACA Act has been administered have led to calls for it to be amended in order to return to the original concept.

Writing in 1999, Mantziaris notes that approximately 3,000 corporations have been incorporated under the ACA Act:

These corporations have become major actors in the social, economic and political life of Aboriginal Australia. But the incorporation statute is in crisis, as its own form of the legal category 'corporation' struggles to accommodate the social-political functions with which these corporations have been entrusted.<sup>28</sup>

The functions fulfilled by ACA Act corporations range from land-holding, service-delivery (for example, the provision of health, medical, legal and housing services and the administration of employment and training programs), the promotion of arts, sport and culture, to the pursuit of business, political representation and native title litigation.<sup>29</sup>

Mantziaris notes that the ACA Act establishes a general regime for the incorporation and management of Councils (never used) and Aboriginal Associations and creates the Office of the Registrar of Aboriginal Corporations, vesting it with wide regulatory powers. Membership is restricted to Aboriginal persons or their spouses. He writes:

Throughout the late 1970s and the 1980s, ACA Act corporations were subject to a very basic accountability regime. The public officer of the corporation was under an obligation to provide a current register of the name and address of every member; the Governing Committee had to ensure that proper accounts and records were kept and that adequate control was maintained over corporate assets. Audit reports and financial statements were to be submitted to the Registrar. This simple governance structure was meant to reflect the circumstances of indigenous economic and political organisation. By 1984, it was apparent that some corporations could not meet these minimal requirements and the Act was amended to grant the Registrar a discretionary power to exempt corporations from full compliance.<sup>30</sup>

However, 'from the early 1990s, there has been a steady legislative push to assimilate the novelty of the ACA Act corporation within the dominant legal category of the Corporations Law corporation'. Mantziaris continues:

The result is that even though most ACA Act corporations would fall within the Corporations Law definition of a 'small proprietary company'...their reporting and audit requirements go well beyond those of small proprietary companies. The audit requirements are now more onerous than those imposed on incorporated associations under State and territory legislation and are additional to whatever financial accountability measures might be imposed by public funding bodies such as ATSIC.

...The effect of this process of analogical legal reasoning has been to impose on the indigenous corporation a set of consequences stemming from a legal category which has

evolved on the basis of a very different corporate substratum—that of the nineteenth century commercial enterprise.

The practical consequences of this fictive tendency are quite grave. The ACA Act corporation now embodies governance rules which are, generally speaking, undermined by their bias towards European cultural norms.<sup>31</sup>

Mantziaris goes on to illustrate this proposition by reference to the cultural assumptions which underscore the General Meeting and the fiduciary duties owed by members of the Governing Committee to the corporation.

In 1995 ATSIC commissioned a Review of the ACA Act by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). The Review was led by Dr Jim Fingleton and involved a research team of consultants. The Review was completed in August 1996.<sup>32</sup> Volume 1 contains the final report and recommendations. Volume 2 contains six Special Issues Papers and a series of thirty-two Case Studies of the experience of Indigenous people with a variety of corporations in various parts of Australia.

The Review has not been published or even tabled in Parliament. No public decisions have been made as to whether any of the recommendations are to be adopted or on whether the amendments proposed to the ACA Act in 1995, which had been sidelined pending the Review, are to be resurrected. Indeed, in late 2000, expressions of interest were invited from appropriate bodies to undertake a fresh review of the Act.

In the meantime, the adequacy of the ACA Act has acquired some urgency in light of the NTA—regulations under the NTA require that Prescribed Bodies Corporate (established under the Act to hold title or to act as agents for native title holders) must be incorporated under the ACA Act. This issue was addressed in one of the Special Issues Papers for the Review, reproduced in Volume 2 of Fingleton's review.<sup>33</sup>

The topic of Prescribed Bodies Corporate under the NTA is the subject of a separate report prepared on behalf of the National Native Title Tribunal by Christos Mantziaris and David Martin entitled *Native title corporations: A legal and anthropological analysis of institutional design* (the NTC Report), the principal elements of which are summarised in Chapter 13.

This Chapter focuses on the ACA Act itself. It does not attempt to replicate the detailed work by Dr Fingleton and his team, and instead draws directly from the Review. Because the Review is unpublished, substantial extracts are set out in Discussion Paper 7.<sup>34</sup> What follows summarises the principal elements and sets out shorter excerpts.

Chapter 2—'Overview', reported 'widespread dissatisfaction with the ACA Act in its present form, and the way it is being administered' felt by all those with an interest in the Act's operation. The complaints covered many matters, but their underlying theme was that the Act's regime for the incorporation of Indigenous groups and communities had

become unsuitable, either for meeting the circumstances, needs and wishes of the community members or as a vehicle for the delivery of government-funded community services.

The main reason why people used the ACA Act was because they were seeking funds from ATSIC for some purpose—to acquire land, or to carry out some government-type service. Under ATSIC’s procedures, bodies have to be incorporated in order to apply for funds, and the ACA Act was the legal apparatus usually made available for that purpose. The Review pointed out that about half of all the Indigenous organisations in Australia had used other laws to meet their incorporation needs; and more than half of the Indigenous organisations funded by ATSIC were not incorporated under the ACA Act.

2.10 It is a key conclusion of this review that, in trying to meet the need for greater accountability, the direction of reforms brought in by the 1992 amendments was misguided. By imposing strict requirements on the structure of corporations and their decision-making processes, very little flexibility remained in the Act. Bodies wishing to incorporate were now faced with a set of Model Rules, drafted to ensure compliance with the Act’s requirements, which ran to twenty-four clauses (some of which had a dozen sub-clauses) and set out rules for all aspects of the body’s operations in precise detail. In the first three years after the amendments, the Registrar sought and received a total of seventy-three legal opinions on aspects of the Act’s operation—not good, for a law intended to be simple and easily understood. But the worst consequence was the loss of flexibility in the Act’s regime. From a law intended to suit the enormously diverse needs of indigenous groups and communities across Australia, the approach was now ‘one size fits all’. Only one model ‘suit’ was made available, and that was a legal strait-jacket, which gave no room for local cultural variation in corporate structures and decision-making processes. The consequence of that loss of flexibility will now be examined.

2.11 In the following illustration, each symbol represents a legal ‘instrument’, as follows:

A: The ACA Act itself

B: Rules made by corporations under the Act

C: Service agreements entered into by corporations with funding agencies to provide community services

D: Other legislation on particular subjects (eg, *Native Title Act*)

Present situation:

A	→	B	C	D
ACA Act		Rules	Service agreement	Other legislation

The way the ACA Act works at present, the Act itself (A) sets out in very detailed terms how a body can be incorporated, and how it can then operate. The rules adopted by that body at its incorporation (B) are also very specific—in fact, they repeat much of what is in the Act itself. The result is that B is basically an extension of A. Meanwhile, bodies incorporated under the Act who wish to be funded to provide a community

service are required to enter into a service agreement of some kind (C). Under ATSIK's present system for program funding, no attempt is made to articulate the funding regime (C) with the incorporation regime (A and B).

2.12 From a legal point of view, these two factors:

1. the basic sameness of A and B, and
2. their separateness from C

have the effect of limiting the scope for adaptation of the legal instruments to different situations. A is almost the same as B, and they have no relationship to C. How the instruments can be interrelated, and the benefits that become available, will be looked at shortly. The fourth legal instrument above is 'other legislation' (D), and the example given is the *Native Title Act 1993* (Cth). A legal device commonly adopted is for one piece of legislation to pick up a 'regime' created by another law, and use it for its purposes. Just such a situation arose under the Native Title Act, when it was necessary to provide for 'prescribed bodies corporate'. These bodies are responsible for holding and managing native title under the Act and, rather than introduce a whole new regime for them, the existing regime of the ACA Act has been 'picked up'. In doing so, the Native Title Act (Prescribed Bodies Corporate) Regulations 1994 spell out certain matters which must be addressed in the rules of such bodies, in particular with respect to consultation. The result is that, to qualify as a prescribed body corporate for native title-holding purposes, a body must incorporate under the ACA Act, and cover those particular matters in its rules. There are obvious advantages in being able to combine Acts in this way.

2.13 Or, at least, there *should* be advantages. The problem in this case is that, when it came to 'picking up' the ACA Act for the purposes of native title-holding, many aspects of it were found to be unsuitable. A paper in Volume 2 of this report contains a long list of the difficulties in using the Act for this purpose, basically because so many of its provisions would conflict with custom. Native title, while recognised by the common law, is a customary title. The ACA Act was designed to enable indigenous groups to operate in accordance with custom. If the Act is so unsuitable for the purposes of groups holding native title in their own traditional lands under custom—the ultimate indigenous group activity—then the ACA Act has strayed very far indeed from its original purpose.

The Review described the ACA Act as having 'become a classic piece of over-regulation'. The main performance indicator for the Office of the Registrar of Aboriginal Corporations is 'full compliance by Aboriginal Corporations with the reporting requirements of the Act'. The Office consistently falls short of this target.

2.15 And all this regulation comes at a high cost. ...Despite all this expense and administrative effort, the accountability of corporations set up under the ACA Act, in ATSIK's view, is no better than that of the indigenous bodies it funds which have incorporated under the general law. The present Registrar's view is that more accountability requirements should be added to the Act, and more resources be made available to enforce those requirements. All the evidence suggests this would only be putting good money after bad.

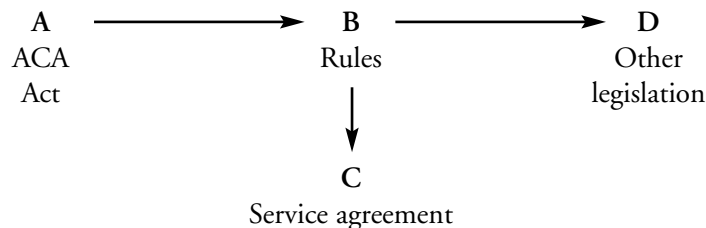
The Review saw that the clear alternative was for accountability to be perceived, not in terms of whether the ACA Act's requirements had been met, but whether the particular outcome—usually, the delivery of a community service – had been performed. It recommended that the ACA Act be rewritten, returning it to its original purposes of a simple law, flexible enough to allow Indigenous bodies around Australia to incorporate in ways which are appropriate to them; and that ATSIC's funding system be reviewed, so that the weight of accountability is picked up where performance of outcomes is the main concern.

2.17 ...If the Act is reduced to a simple form, then it is available to be built on as required. Where a body only requires basic recognition, then it need not be saddled with additional requirements. But where, as in many cases, a body is being incorporated in order to be funded for the provision of community services, then a more elaborate legal regime can be constructed, using the various legal instruments available. But this time, it is possible to combine the 'cultural appropriateness' of the incorporation with the 'accountability' for performance in delivery of the funded service.

2.18 To return to the illustration, using the same four symbols as above, ie:

- A: The ACA Act
- B: A corporation's rules
- C: The service agreement
- D: Other legislation

**Recommended situation:**



Having scaled the Act back, the four legal instruments can be used and articulated with each other as the occasion demands. In the case of a group seeking to incorporate simply to gain legal recognition of their indigenous corporate nature only a basic set of rules would be required, covering such matters as the group's name, its membership criteria, how the group acts, any custom applying to it, and so on. Only two instruments, the Act (A) and the rules (B), are involved.

2.19 Where, however, a group is incorporating in order to provide community services using public funds, then it has a wider responsibility. It has to be accountable not only to its membership, but to the wider community for whom the services are intended, and ultimately to the taxpayers for expenditure of public funds. Accountability in this context is multi-dimensional, and conflict is possible between the different obligations and expectations. To deal with this complex situation, the incorporation regime and the funding regime need to be co-ordinated. The Act (A)

having set out the basic requirements for incorporation, the group's rules (B) then need to be developed so that they meet two types of accountability:

- (i) internal accountability: to the group's membership; and
- (ii) external accountability: to the wider constituency intended to benefit from the service, and to the funding agency.

Internal accountability is best addressed by letting the group incorporate in a culturally appropriate way. That is, basing the group's rules on its own concepts of membership, leadership and decision-making. External accountability is mainly the concern of the service agreement (C), but it may specify that the group must include certain matters in its rules (B), if it wants to be funded to provide that particular service.

2.20 Matters which might be specified in this way could be aimed at ensuring representativeness of the constituency—that is, that the group's governing body is not just drawn from its own membership, but includes representatives of the wider constituency for whom the service is intended. And the service agreement may require the rules to spell out the way the constituency will be consulted, in planning for and providing the service. In this way, the complementary requirements of internal and external accountability can be addressed in a way likely to enhance a group's performance. Rather than forcing all groups to accept the structures and decision-making processes laid down in fine detail in the present Act and Model Rules, groups can adopt structures and processes which are meaningful to them, but their wider responsibilities in using public funds to provide government-type services to their communities can also be met. Indigenous groups and communities across Australia are typically small and local, and a flexible incorporation law is the only way to cater for their enormous variety. This flexibility does not, however, have to come at the expense of effective accountability, if the approach advocated above is adopted.

2.21 Another benefit of scaling the incorporation law back to the basic requirements for legal recognition is that it becomes available for being 'picked up' by other special-purpose legislation (D). Taking the native title example again, the problems of using the present Act as the vehicle for incorporation of 'prescribed bodies corporate' for holding and managing native titles can be overcome by the approach advocated above. The native title legislation can specify the matter which bodies must address in their rules (B), in order to qualify for the powers and functions of prescribed bodies corporate. But each body is able to adopt its own structure and applicable customs, without the Act (A) dictating how these vital matters are handled.

2.22 These reforms to the ACA Act will mean that much more attention will have to be given to the incorporation of groups being set up to be funded for provision of community services, and the service agreement will also have to be carefully negotiated to work in tandem with the group's rules. To be fully effective, it would mean a major reform of ATSIC's funding regime, and correspondingly of the services it provides to indigenous groups and communities. A more pro-active style of service would be involved, tapping into skills necessary for effectively advising indigenous groups on their incorporation options. The Office of the Registrar of Aboriginal Corporations would be reduced, in keeping with the reduction in the Act's prescriptive requirements and in the

Registrar's current extensive powers to intervene in a group's affairs. Far more attention in future should be given to information, education and advice – but the Act should be rewritten first.

In Chapter 3 the Review comments:

3.10 A large number of corporations have been established to obtain funds to provide services. Estimates based on figures provided by the Registrar for Aboriginal Corporations indicate that approximately 67% of corporations formed under the ACA Act are for the purpose of service provision (see table in Chapter 4). There are two major reasons for the proliferation of indigenous corporations for the purpose of service delivery. First, mainstream service-providers have failed indigenous communities in two fundamental ways. In a large number of instances they have failed to provide indigenous communities with any service at all, and where services have been provided, they have often been so culturally inappropriate as to hinder rather than to give effect to service delivery to indigenous communities.

...

3.13 The second main reason for proliferation of indigenous corporations is that the recognition of a right to self-determination presumes recognition of cultural distinctness. Indigenous communities tend to be very localised and desire local solutions to the problems which they encounter. Time and time again, programs—even well-intentioned programs—which are imported into communities fail. Corporations have served an extremely important role as structures through which enormous achievements have been made by Aboriginal and Torres Strait Islander communities.

3.14 Corporations are therefore playing a very different role in indigenous communities to the role which they play in the mainstream community. They have a much greater bearing on indigenous people's lives than they do in the general community. This is particularly so in small communities where people's only access to basic amenities such as housing, sewerage and water might be through a service corporation. The central role which corporations play in many indigenous communities is directly related to the fact that they are indigenous communities. The relationship between corporations, community development and funding is integral within indigenous communities...

In Chapter 5—'Cultural Appropriateness', the Review draws a series of Findings from the Case Studies. The Findings themselves (without the amplifying comments) are summarised as follows:

- There is widespread dissatisfaction with the Act in its present form, and its administration.
- Most Indigenous bodies seek incorporation under mainstream laws, rather than the ACA Act.
- The Act's 'popularity', based on the level of incorporations under its provisions, is an illusion. By far the most common reason for groups incorporating under the ACA Act was to gain access to ATSIC funding; that was the real motivating factor, rather than some attraction to the Act itself.

- A very large proportion of the bodies incorporated under the ACA Act are based at the local community level, and their main purpose for incorporating is to provide a community service—and be funded for that purpose.
- There is practically no opportunity for groups to adopt rules on the matters of most significance to them based on custom.
- The apparent freedom for groups to adopt rules based on custom is in fact seriously qualified, in particular with respect to:
  - (a) group membership; and
  - (b) decision-making by the group.
- Opinions vary over whether non-Indigenous persons should be eligible for membership, some people feeling that non-Indigenous membership should not be possible while others favour an approach which leaves it open to each group to decide for itself, under its rules.
- The imposition of limits on membership numbers is artificial, it presents difficulties for small communities and leads to incorporations which are not culturally appropriate.
- There is a major demand for the incorporation of ‘umbrella’ organisations, which is not possible under the present Act as it is interpreted.
- It is not culturally appropriate to base membership in all cases on formalities like applications and membership lists.
- General meetings of the corporation’s membership are generally not good forums for making informed decisions and setting policies.
- Governing Committees do not generally reflect the decision-making structure within communities.
- The Registrar’s wide discretionary powers under the Act, instead of allowing necessary flexibility as was intended, have actually worked against culturally appropriate incorporations.
- The strong impression gained from the case studies and submissions made under the review is that the Registrar is most reluctant to agree to any deviation from the Model Rules.
- There is an ever-increasing gap between people’s attempts to incorporate in a culturally appropriate way and the Registrar’s pre-occupation with matters of statutory compliance.

The Review, in Chapter 6, tracks the increasing complexity of the ACA Act over the years on matters of accountability. It offers the following findings drawn from the Case Studies:

- Accountability as a concept is not well-defined, and the process of accountability is poorly understood.
- Accountability, in the context of Indigenous organisations, is a multi-dimensional concept, which will involve one or more of the following elements—



- (i) responsibilities, of a political, social and economic nature, to a local group membership;
- (ii) responsibilities to a wider constituency, often to provide a particular public service or range of public services fairly and efficiently; and
- (iii) the responsibility to account to the general public for the expenditure of public funds, in accordance with the conditions on which they were provided to the organisation.

Not every Indigenous organisation is faced with the full range of accountability requirements, but for those that are, conflict is always possible between the goals and expectations of members, of the wider constituency, and of the funding agency.

- The current approach to measuring whether indigenous corporations are accountable places far too much reliance on:
  - (i) the filing of audited financial reports; and
  - (ii) compliance with the ACA Act.
- Audited financial reports are not reliable indicators of accountability.
- Compliance with the requirements of the ACA Act is not a reliable indicator of accountability.
- Neither the ACA Act, nor the Registrar in enforcing the Act, is concerned with many of the main factors upon which an organisation's real accountability depends.
- The ACA Act's regime brings together wide legal powers and significant administrative resources, but they are concentrated on enforcing compliance with the Act—which as the previous findings show, is not the same thing as accountability.
- True accountability, in the sense of ensuring that a body achieves the objectives it is being funded for, is the responsibility of the funding agency. Present arrangements suggest that the Registrar has a central part to play in ensuring that funding objectives are achieved, but this is mistaken and leads to a major confusion of roles.
- Because accountability is misunderstood, and enforcement of compliance with the Act is confused with achievement of funding objectives, current attempts to improve outcomes in service delivery not only have failed to produce the intended improvements but also have produced unintended problems and difficulties, including—
  - inconsistent regulation of indigenous corporations;
  - over-regulation of most corporations under the ACA Act;
  - unnecessary interference with the rights and powers of indigenous self-management and self-determination;
  - chronic illegality (as a strict matter of law) in the operations of corporations, with consequent breach of funding agreements;
  - lack of attention to the real causes of poor outcomes in service delivery;
  - a consequent proliferation of bodies incorporating to seek funding for services; and
  - ever-increasing difficulties for ATSIC and other agencies in attempting to provide funds for community services in a rational way.

In Chapter 8 the Review considers Reforms, including legislative reforms:

8.3 The basic options are:

- (a) leave things as they are;
- (b) repeal the Act;
- (c) make minor adjustments to the Act, to strengthen it and address particular problems; or
- (d) carry out a major rewrite of the Act, to get to the root of the problems.

The Review discusses each of these options in sequence, and opts for (d) which it analyses:

8.11 ...this option involves changing the basic thrust of the Act, back to the directions proposed for it in 1976. This approach is based on the view that there is a continuing role for a Commonwealth Act providing legal recognition to indigenous groups in a culturally appropriate way. Such bodies will be accountable to their membership in accordance with the rules they adopt, including any custom which they nominate as applying to them. To the extent that accountability beyond their membership is required, those additional requirements can be spelt out in different ways—

- in service agreements, in the case of bodies funded to provide community services;
- in the rules adopted by the body concerned (either at incorporation, or under a change of rules at the time of entering into the service agreement); or
- possibly, in a special part of the Act itself.

8.12 In addition, where a body has functions vested in it under legislation, those special functions, the powers that go with them and how they are exercised will be spelt out in the other legislation. A case in point is a group incorporated for the purposes of being a 'prescribed body corporate' under the Native Title Act 1993. Under the ACA Act in its present form, the powers and functions of such native title-holding bodies are largely incompatible with the prescriptions, limitations and administrative discretions contained in the ACA Act (see Vol 2, Sullivan). Under option (d), the Act would be reformed so that the native title-holding body could readily gain recognition as a 'natural' group with an 'automatic' membership, holding native title under and in accordance with custom and the Native Title Act.

8.13 This is the option the review team clearly favours, and within it there are further choices, which relate to how 'radical' the Act's reform should be. They are—

- (i) to reduce the Act to its bare minimum requirements;
- (ii) to make the Act a Federal version of the State and Territory Associations Incorporations Acts; or

- (iii) to provide in the Act for different categories of incorporations, enabling accountability requirements to be matched to a body's actual activities.

The Review discussed these sub-options and concluded:

8.20 Opinions varied between team members as to which option was to be preferred, but the **weight of opinion came down in favour of recommending option (ii)—a Federal version of an Associations Incorporation Act.**

The Review discussed other legislative recommendations on such matters as controls on incorporation, re-incorporations, membership lists, dispute resolution, Councils, drafting and tax exemption. It also recommended a number of financial and administrative reforms.

Because the Review has not been tabled or published, there has been little opportunity for any public discussion of its criticisms or recommendations. One such opportunity did, however, take the form of a debate in the pages of the *Indigenous Law Bulletin*. Mantziaris was particularly critical of what he termed the absence of a corporate law perspective in the Review, and expressed concern that the Review, in trying to restore a suitable degree of cultural appropriateness, had moved too far away from essential elements of the corporation. (Whether the corporation is the most suitable vehicle for particular purposes is a separate question.) He also indicated his own preference, among the options considered by the Review team, for the 'different categories' model. Dr Fingleton provided a spirited response.<sup>35</sup>

It seems not unfair to say that the ACA Act has, on occasion, become a battleground. One recent and dramatic example appears from the judgment of the Federal Court in *Leslie, in the matter of the Aboriginal Councils and Associations Act 1975 v Hennessy*<sup>36</sup> which Drummond J described as arising from a 'tripartite dispute between the Registrar, ATSIC and those previously controlling NAILSS [National Aboriginal and Islanders Legal Services Secretariat Aboriginal Corporation] and QAILSS [Queensland Aboriginal and Islanders Legal Services Secretariat Aboriginal Corporation]' (para 19). Those previously controlling the corporations included Mr R Robinson, then also ATSIC Deputy Chairman; he was also an officer of the Goolburri Aboriginal Corporation Land Council which had been in dispute with the Registrar in *Kazar v Duus*.<sup>37</sup>

The reported deficiencies of the ACA Act would be less significant if Indigenous Australians and their advisers had access to the various critiques, provided that they also had the option of seeking incorporation under other legislation at Commonwealth or state/territory level. However, as noted, in some situations they will have no option but to incorporate under the ACA Act. This is currently the position for Indigenous people needing to establish a Prescribed Body Corporate in respect of a Federal Court determination of native title. The NTC Report sets out to provide guidance on how to steer a careful path between the requirements of the ACA Act, on the one hand, and, on the

other hand, the cultural and economic needs of native title holders and others with traditional rights and interests in the territory concerned.

As noted, the ACA Act was conceived to serve the needs of a large number and variety of Indigenous bodies. The Review demonstrates that, as it has evolved, it demonstrably fails to do so. It is discouraging that amendment of the ACA Act has been treated as a matter of such little urgency.

## **Internal and external accountability in NSW**

New South Wales is one state in which recent inquiries throw some light on ways to improve accountability (internal and external) in Indigenous organisations.

### **Aboriginal Land Councils**

The *Aboriginal Land Rights Act 1983* (NSW)<sup>38</sup> adopted a three-tiered system of Aboriginal Land Councils—119 Local Aboriginal Land Councils (LALCs), 13 Regional Aboriginal Land Councils (RALCs) and the state-wide New South Wales Aboriginal Land Council (NSWALC). All are bodies corporate. The membership of LALCs is based primarily on residence within the area and only secondarily on having an association with the area. This has the potential to create some tension between the statutory land rights regime and native title rights and interests.

As noted above in Chapter 11,<sup>39</sup> the Act imposes on the Land Councils significant provisions for accountability. These were recently re-examined in the context of an inquiry by the NSW Independent Commission Against Corruption (ICAC).<sup>40</sup>

In its Executive Summary, the ICAC said:

Corruption prevention is an important role for the ICAC, and this is particularly relevant to Aboriginal land councils. The ICAC's enquiry showed that many of the issues identified relate to lack of training and capacity in the difficult task of running multi-functional organisations which control quite substantial sums of money.<sup>41</sup>

The Report went on to summarise four groups of outcomes which the ICAC considered necessary to prevent and counter corrupt conduct in Aboriginal land councils:

**Increased accountability through:**

- appropriate community decision-making processes

**Improved decision-making through:**

- meaningful political participation
- transparent decision-making by LALCs
- proper corporate governance by the NSWALC
- effective responses to misconduct and disputes

**Proper management of resources through:**

- best practice management of LALCs
- increased support for LALCs
- clearer accountability relationships between LALCs and the NSWALC

**Ongoing strengthening of the Aboriginal land council system through:**

- training for members, office-bearers and staff in their roles, responsibilities, rights and relationships
- ongoing ICAC support for the reform process.<sup>42</sup>

The Report treated accountability as a central issue in the enquiry because ‘most corrupt conduct can be linked to a lack of accountability in some way’.<sup>43</sup> The ICAC made the distinction (referred to previously in this Chapter) between internal accountability and external accountability, and continued:

Aboriginal land councils are unique statutory organisations. They are formed under legislation, and are subject to external accountability in the same way as other public sector organisations. However, their representative nature also gives them a political character, which means that internal accountability is especially important if they are to function properly.

It has been suggested in a number of recent reports on Aboriginal organisations that mechanisms which ensure optimal internal accountability are likely to result in increased external accountability. Optimal internal accountability is also likely to generate a greater degree of self-determination, because the organisation will be more capable of achieving the aspirations and wishes of its members.<sup>44</sup>

In considering decision-making processes, the ICAC considered the question of cultural appropriateness:

Non-Aboriginal models for organisational structure, on which the LALC Model Rules are based, may not be suitable for small Aboriginal organisations. In particular, the importance of family relationships and loyalties should not be underestimated. It would be appropriate to look beyond the existing models of appointing office-bearers to structures which maintain the balance of family representation. The tremendous diversity in the Aboriginal community across New South Wales creates the need for greater flexibility in designing decision-making models to suit individual communities.<sup>45</sup>

The ICAC report also stressed the importance of ensuring that ‘all Aboriginal people with a right to be represented by a LALC can have their voices heard in the decision-making process’.<sup>46</sup> The report referred to difficulties experienced in the application of the membership rules. Also worth reference is what the Executive Summary had to say about best practice management for LALCs:

Good management practices rest on a foundation of effective corporate governance. Five principles for effective corporate governance, adapted to the situation of local Aboriginal land councils are:

1. governance should be clearly defined and understood;
2. the governance model should be simple, clear and consistent;
3. the roles of elected and appointed officials should be clear and separate;
4. the roles, powers, responsibilities and accountabilities of elected officials should be spelt out in the legislation;
5. appointment of officers should be made according to objective selection criteria which are clearly stated beforehand.
6. The separation of the roles and functions of elected officials and appointed staff is of particular relevance in Aboriginal land councils. The small size and close knit nature of many Aboriginal communities makes them vulnerable to overlapping responsibilities and conflicting priorities.<sup>47</sup>

The Report made 26 specific recommendations directed to the State Department of Aboriginal Affairs (DAA), the Registrar's Office and NSWALC.

NSWALC, in its 1996-97 Annual report, stated that:

The NSWALC is committed to the implementation of corruption prevention and improved accountability strategies as suggested by ICAC in future reports and consultations. Some management and training strategies have already been implemented and are enjoying early success.<sup>48</sup>

ICAC published an Implementation Progress report in October 1999<sup>49</sup> in which it extracted the following statement from the 1997-98 Annual report of NSWALC:

The NSWALC continues to strive to work in co-operation with the ICAC staff to ensure that any recommended changes are implemented to help achieve the objectives of the investigation: to eradicate and resist corruption in land councils and to strengthen the process of self-determination.

ICAC commented:

While the ICAC appreciates this public statement of commitment, it appears to be at odds with the reality of the situation. It has been approximately 18 months since the release of the ICAC's First Report and related recommendations, but to date the NSWALC appears to have produced no public document that indicates any steps have been taken by it to address the ICAC's recommendations.<sup>50</sup>

Accordingly, ICAC put forward a further ten recommendations.

In a related move, the NSW DAA, in 1998, had commenced a review of the *Aboriginal Land Rights Act 1983* (NSW).<sup>51</sup> The purpose of the review has been described as not to fundamentally change the Aboriginal Land Council system, but to update the Act to ensure that it is relevant and workable. The review is designed to:

- respond to community concerns about the operation of the Act,
- bring about improvements in the operations of the Aboriginal Land Council system, and
- provide a response to the issues raised by ICAC.

The Discussion Paper documents stated that the Act had been substantially amended four times since its enactment in 1983 and that major amendments had been designed to strengthen internal accountability of land councils. Key mechanisms for this purpose include the Minister, the Registrar of the *Aboriginal Land Rights Act* and the Land and Environment Court. NSWALC has important supervisory functions in relation to RALCs and LALCs.

In regard to NSWALC's responsibilities under the NTA, as a 'representative Aboriginal/Torres Strait Islander body', it is also answerable to ATSIC and to the Commonwealth Minister (and, indeed, it was initially denied 're-recognition' under the processes established by the *Native Title Amendment Act 1998* (Cth)).

As to internal accountability, the successive amendments to the Act had led to some ambiguity about the role of elected LALC officials in relation to LALC members. Much the same could be said about NSWALC Councillors and staff.

LALCs perform a number of roles in addition to their roles in acquiring and managing land. They provide services to their members, particularly housing. They provide employment opportunities for Aboriginal people and can conduct formal training programs. Some conduct enterprises in their areas. More generally, LALCs frequently provide a forum and a meeting place for their communities.

But, as ICAC had noted, the method of election, coupled with the intense localism of Aboriginal politics, can lead to a LALC being captured by a particular family group or faction, to the exclusion of others. Different processes for selecting LALC officers might be necessary to improve internal accountability.

The Department published a further Consultation Report based on a series of seven Workshops held in June-July 2000 in Wagga Wagga, Gosford, Tamworth, Bateman's Bay, Broken Hill, Coffs Harbour and Coonamble. The purpose of the Workshops was to elicit the opinions and comments of Aboriginal people on the various issues and options raised in the Discussion Paper.

Little consensus emerged among the seven Workshops, or even within them, over the suggested options for changes to the legislation on the various matters considered, namely: the objectives of the Act; the structure of the ALC system; the functions of the three levels of the system; boundaries and numbers of LALCs; membership; decision-making; elections of Office Bearers, RALC Representatives and NSWALC Councillors; funding; financial accountability; administrators; investigators; employment and

training; resolution of disputes and complaints; functions and status of the registrar; land acquisition; dealings in land; cultural heritage; and natural resource management and environmental planning.

It is understood that amending legislation is being prepared in the light of the various inputs into the process, including the ICAC reports, and reports prepared by NSWALC itself.

### **Aboriginal Legal Services**

ATSIC's 1998-99 Annual report described ATSILs (Aboriginal and Torres Strait Islander Legal Services) as 'community-based organisations that provide legal services in a culturally appropriate way for priority issues such as where personal safety or liberty is at risk', primarily in criminal cases. Policy Guidelines from the ATSIC Board also require ATSILs to provide a range of services to women including family violence services. 'ATSIC currently funds a network of 96 service sites (ie offices that are staffed five days a week)' and 10 Family Violence Prevention Units, mostly in areas not covered by other service providers.<sup>52</sup>

ATSIC developed a reform agenda for the renewal of ATSILs which, in late 1996, was given a pilot run in New South Wales, the state in which the first ATSIL was established in 1970. A review conducted by ATSIC found that a renewal was needed in the face of client issues with services. Also ATSILs needed to be more accountable to the regions and communities they were serving. In addition there were some key internal governance, management, communication and skills issues facing ATSILs, like most community based organizations, which had been neglected and needed attention.

The renewal process involved calling for tenders for the delivery of legal services to Indigenous people in the state—the tender criteria emphasized the importance of an ATSIL being committed to work towards high quality services, willing to change when needed and to provide better solutions to justice issues than casework. ATSIC and the ATSILs worked in partnership in NSW through what was then known as the ALS Workshop, now the Coalition of Aboriginal Legal Services (COALS).

From its beginning in November 1996, the workshop has identified quality client service as its main purpose. Although the Workshop does not use the term 'continuous improvement', the philosophy of the Workshop is in line with it: work in partnership, maintain a client focus, work as a team (which does not always mean consensus decision making), use data not politics or emotions to make decisions, and employ a facilitating style of leadership, not the top down sort. The Workshop has allowed ALSs in NSW to develop an approach to management which can suit their regional organisations and the culture of their regional communities.<sup>53</sup>

It seems that this process in NSW persuaded the Commonwealth government to adopt similar processes elsewhere in Australia and, indeed, to retain a separate system of legal



service organisations for Indigenous Australians funded through ATSIC. In a media release on 19 April 1998, Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, acknowledged that ‘maintaining separate Aboriginal and Torres Strait Islander legal services was necessary to ensure services were sensitive to the special needs of Indigenous people’.<sup>54</sup>

ATSIC engaged the Allen Consulting Group to evaluate the pilot tendering exercise in NSW.<sup>55</sup> The report spelt out the core elements of the pilot reforms:

- the division of NSW into eight distinct regions that were to be serviced by their own ATSILS (where previously there were three organisations that covered the whole of NSW). Funding was determined on the basis of needs of Aboriginal and Torres Strait Islander people within each of the regions;
- issuing grants to provide indigenous legal services on the basis of a two-stage competitive tender. Expressions of interest were called by parties interested in providing legal services to Aboriginal and Torres Strait Islander peoples. Evaluation panels, chaired by a retired NSW Judge (Hal Wootten), were convened to short-list and evaluate the tenders. The panels made recommendations to the relevant Regional Councils [of ATSIC]. These recommendations were endorsed, and providers commenced operations in most regions on 1 July 1998. Where no party was considered to have met with the tender requirements ATSIC worked with the most suitable applicant to develop a service in the region; and
- the development of service standards setting best practice and performance indicators. A working party broadly comprised of ATSIC, Regional Councillors, the legal services and other stakeholders developed a comprehensive set of best practice service standards. The standards cover all aspects of an ATSILS’ work – from the size of the board to services needed by target groups such as women. All organisations tendering for the provision of legal services in NSW were required to agree to adopt the standards and to work with each other and ATSIC to implement them over the next few years.

...

- Throughout the consultation undertaken for this review it was clear that there were a number of broad benefits associated with the pilot reforms:
- a greater focus on delivering services in regional areas—prior to the pilot tendering exercise the majority of resources appear to have been concentrated in metropolitan Sydney. The introduction of the funding model and regional service delivery has provided more equitable delivery of legal services for indigenous people throughout NSW;
- a greater emphasis on performance of ATSILS—there has been a concerted effort by ATSIC to focus the attention of ATSILS on the quality of the legal services provided. The ATSILS appear to have embraced the challenge of improving outcomes, but change has been incremental rather than overnight; and

- increased acceptance by indigenous communities—a number of parties have commented that since the reforms there has been less community/family politics involved in the provision of indigenous legal services, and that people have been generally more willing to use ATSILS in preference to other legal service providers (principally Legal Aid).<sup>56</sup>

This generally positive evaluation tends to reinforce much of the thinking in the Review of the ACA Act. In particular, there are wider opportunities for Indigenous people to be actively associated with the processes whereby ATSILS are established and funded, and there is enhanced emphasis on outcomes. The Allen Consulting Group recommended further extension of this latter element:

It is the Group's view that ATSIC should...view its role as a more hands-off regulator who focuses on the output and outcomes for the community, rather than the traditional focus of government on inputs (such as budget and staff numbers) and processes (such as legal, regulatory and administrative processes). This is best done by monitoring compliance with agreed performance indicators and achievement of specified benchmarks.

This approach requires a change in the mind-set of the Government, ATSIC and its officers. To formalise this more hands-off approach the Group suggests that grants should...be abandoned and legally enforceable (ie, arm's length) contracts should instead be used.<sup>57</sup>

ATSIC is promoting the renewal of ATSILS in other states and territories. ATSILS in the Northern Territory have engaged in the renewal process. The process is ongoing, for example ATSILS in NSW are continuing with their attention to developing and evaluating themselves against standard for quality services. As noted in the Fingleton Report, different approaches may be appropriate in regard to organisations established for other purposes.

The renewal of ATSILS in NSW and more recently the Northern Territory is part of a wider push for the primary focus to be on the outcomes for communities and regions, rather than organizations. For example, '[ATSIC's Murdi Paaki Regional] Council's policy is to fund communities rather than organisations'<sup>58</sup> and to work towards direct community involvement in regional agreements and regional autonomy arrangements. While effective Indigenous organisations are important to the recognition of rights in that they can offer governance structures and methods for asserting rights, they are not the primary outcome. 'Organisations are the serve providers engaged by Council and other agencies to deliver services and programs to the community. Community Working parties are seen as a better way to ensure a wide cross section of the community is heard and represented [in decision making]'.<sup>59</sup> As regional agreement and autonomy arrangements emerge, Indigenous organisations such as ATSILS will change and develop in significant ways to support them.<sup>60</sup>

These developments throw into further question the appropriateness and inflexibility of the ACA Act as currently drafted and administered.

## Councils and self-government

The genesis of the proposal for culturally appropriate forms of community government pre-dates the Woodward recommendations. The Gibb Review recommended:

That legislation be drawn up to enable an Aboriginal Community Society to be loosely incorporated; community representatives to be chosen by the Aborigines themselves as far as possible by their own methods, and the legislation to operate in a way designed to minimise interference with the internal workings of the traditional social structure, sources of authority and mutual economic obligations.<sup>61</sup>

The Woodward recommendations were enacted as Part III of the ACA Act. But, as noted in the Review:

3.18 ...it has never been operative. No council has ever been formed under this legislation...this does not reflect a lack of need or interest in a federal council structure, but rather policy factors which have prevented exercise of this option. In its absence, while some councils have been set up for indigenous communities in those jurisdictions where some legislative provision has been made (mainly the Northern Territory and Queensland), indigenous corporations set up under Part IV of the Act have increasingly been used for provision of council-type services.

The Review deals with the matter at length in Chapter 7:

7.1 ...Part III was aimed at meeting the incorporation needs of indigenous communities carrying out local government-type essential services. After emphasising the intention to avoid the 'subjugation' of indigenous cultures to 'overriding Western European legal concepts', the then Minister for Aboriginal Affairs, Mr Ian Viner, explained in his Second Reading Speech:

'Councils are geographically-based bodies which may undertake a variety of functions on behalf of an Aboriginal community of the area, provided that these include the provision of at least one of the kinds of services listed in clause 11(3) such as housing, health, municipal and related services. By providing for the incorporation of councils, the legislation will allow Aboriginal communities to incorporate without requiring registration of community membership, as in the case of associations. A council is in the nature of a community corporation based on a local Aboriginal social structure serving the special interests of that community.'<sup>62</sup>

7.2 Concerns expressed by State and Territory Governments about the Council provisions of the Act caused a long delay in the proclamation of the legislation. State and Territory Governments were concerned that the establishment of Aboriginal Councils might intrude into State responsibilities for proposed or existing local government and that semi-autonomous Aboriginal entities would be created which would develop separately from the Federal or State institutions of government.

7.3 Part III of the ACA Act (sections 10-42) provides the process for establishing Aboriginal Council areas and then setting up Aboriginal Councils for them, for their functions and powers, their supervision by the Registrar and their reporting requirements.

This Chapter of the Review gives a lengthy consideration of the political manoeuvrings which have led Part III to become 'the forgotten option'.<sup>63</sup> It examines eleven applications for the establishment of Aboriginal Councils – seven in the Northern Territory, one in Western Australia, two in Queensland, and one in Victoria. In considering the Northern Territory Government's opposition to the use of the provisions in the NT, the Review notes:

7.47 ...The functions of the Community Government Councils [under the Local Government Act] are mirrored on mainstream local government. This is precisely the intention of the Northern Territory Government. The Government has always made it clear that Aboriginal people need to be incorporated into existing government structures even when these structures have some 'culturally appropriate' add-ons relating to boundaries, membership and voting. As far as the Northern Territory Government is concerned, local government will be the highest stage of political development of Aboriginal people within its jurisdiction. That may well also be the view of many Aboriginal people as well.

But opposition to the use of Part III is not confined to state and territory levels of government.

7.58 The failure of the people at Bulman to have an Aboriginal Council established in their area demonstrates once again that there is an almost total lack of commitment to its own legislation on the part of the Commonwealth. In some sections of the Government there has been, and continues to be, outright opposition to Aboriginal people using the Part III provisions...

7.59 There is very little evidence that the Commonwealth, particularly through its Aboriginal affairs agencies DAA (Department of Aboriginal Affairs) and ATSIC, has ever seriously attempted to explain to communities the types of incorporation options they may have. In fact in the Northern Territory this has been left to the Northern Territory Government which of course has its own legislation to promote. The only other organisations that have attempted to inform people of their options have been the Central and Northern Land Councils...<sup>64</sup>

Chapter 7 of the Review considers state and territory regimes for local or regional governance, notably the *Local Government Act 1993* (NT), the *Aboriginal Communities Act 1979* (WA) and the *Community Services (Aborigines) Act 1984* (Qld) and the *Community Services (Torres Strait Islanders) Act 1984* (Qld). The finding is that:

For many indigenous people the provisions in State legislation do not provide for forms of effective culturally appropriate regional or local governance.<sup>65</sup>

But there have been some positive developments at state and territory level. In Western Australia, the Review notes that ‘one of the most interesting developments in recent years ...has been the creation of the new Shire of Ngaanyatjarraku’.<sup>66</sup> There have also been interesting developments in Queensland.<sup>67</sup>

The point has been made<sup>68</sup> that it is too dismissive to write off standard local government models for self-government as being necessarily inappropriate for Indigenous Australians. Sanders states, ‘There are certainly issues here to be addressed, such as the one about traditional or historical association versus current residence as the basis for the right to participate’. He goes on:

Take for example the Torres Strait. The individual Island Councils established under the Queensland Parliament’s Community Services (Torres Strait) Act have forebears going back to 1899, while the regional Island Coordinating Council has antecedents dating to the 1930s. Both command considerable support from Islanders as governance structures for their islands and region. Hence in 1989 when the Commonwealth wanted to establish an ATSIC regional council in the Strait, Islanders wanted their Island Council chairs who are members of the ICC also to be members of that new Commonwealth regional body. When native title came along in the early 1990s, Islanders wanted the ATSIC regional council’s successor body, the TSRA, to be the native title representative body for the region. ...[T]he Island Councils and the ICC established under the Queensland legislation...have commanded considerable loyalty and support among Islanders, which suggests that they are accepted as of considerable cultural relevance and appropriateness.

This is not to say that there are not issues of contention...The resident/non-resident Islander issue has become a major one in Torres Strait Islander politics. ...But it is an issue which the new native title prescribed bodies corporate in the Strait are having to grapple with just as much as Island Councils. And neither can be said to be a ‘culturally appropriate’ governance structures just on the basis of its membership or constituency...

If there is anything which, at the present time, can command the epithet of ‘culturally appropriate governance structure’ in Torres Strait it is probably the combination of Island Councils and emerging prescribed bodies corporate. The two together...provide different locuses of power and authority for the two countervailing constituencies of native title holders and residents.

Sanders also comments on the rather different situation in the Northern Territory involving land trusts and land councils established under Commonwealth legislation, and community government councils set up under territory law. He concludes:

There is much to be said in favour of the ‘dispersed governance typical of many NT Aboriginal communities’.<sup>69</sup> Different organisations doing different things can represent different interests in the local polity. So in a sense we need to begin, politically, by identifying the major interests that can and should be recognised in the local polity and asking whether institutional structures allow adequately for that representation.

The critical element in this ongoing process of constituency and interest management has to be the choices made by the Indigenous people involved in the process. The recent choices referred to by Sanders in relation to the Torres Strait organisations were the choices made by Islanders themselves, rather than being imposed on them by either Commonwealth or state government (though the Islanders were working within parameters laid down by governments). A structure will be culturally appropriate, presumably, if the Indigenous people concerned deem it to be appropriate to their particular needs.

It is helpful to set forms of self-government in some sort of conceptual framework. This has been done in a valuable paper by Limerick for those involved in the former Alternative Governing Structures Program in Queensland.<sup>70</sup>

He contrasts a top-down approach, generally favoured by governments, with a bottom-up, community-based approach. The top-down approach has characterised past practice in Canada and the USA, but both countries have, in recent times, moved to community-based approaches. Similarly, Queensland set out to supplement its *Community Services (Aborigines) Act 1984* and *Community Services (Torres Strait Islanders) Act 1984* with a new bottom-up Alternative Governing Structures Program (AGSP).

Even where they wish to make provision for choices to be made by particular communities, governments tend to operate through broad framework or enabling legislation. New liberal legislation along these lines was proposed for Queensland in the Final Report of the Legislation Review Committee in 1991. But Limerick notes that Queensland has avoided such overall legislation and has left the design of alternative governing structures to particular communities. He writes:

The critical elements of the Program are as follows:

- The process of developing alternative governing structures works from the bottom-up. That is, the community takes the initiative in developing the new structures, rather than the government imposing its model.
- The AGSP thus relies on a methodology of community-based planning. The community examines its own needs and how it wants to run its affairs and plans governing structures to achieve those ends.
- Finally, legislation will follow the development of specific plans where it is necessary for their implementation.<sup>71</sup>

Limerick identifies several particular structures or modes for self-government. The most common is the local government model, as in Queensland and the Northern Territory, and in Canada's provisions for Band Councils.

The defining features of the local government model relate to the nature of the powers that such governments have:

- Firstly, in relation to the status of the powers of these governments, they are delegated from a higher government and are always subject to the overriding control of that higher government.

- Secondly, in relation to the type of powers of these governments, they concern mainly the provision of local services such as roads and sewerage, and not matters such as education and police which remain the province of the higher government.<sup>72</sup>

...Wolfe<sup>73</sup> observes that what Aboriginal people really want is control over human services such as education, social welfare, health and policing. She argues that although these are matters that are vital to cultural survival, they are the very matters that the NT Government keeps control over.<sup>74</sup>

Within the Australian experience, Limerick contrasts the question of powers and the question of structures, and notes that ‘many useful governing **structures** have been developed under local government type systems’. He refers in particular to means adopted in the Northern Territory, Canada and elsewhere to devise structures which reflect Indigenous authority and processes, including, in Australia and Canada, the idea of a Council of Elders.

All of these structures are attempts to allow more community participation in decision-making. Indians regard the elected council system set up by the government as a European way of doing things. In Indian society people do not merely elect a small group of people to run the affairs of the entire community. Decisions are traditionally made with the involvement of everybody. This is just another example of how European structures are usually inappropriate for indigenous self-government.<sup>75</sup>

A second mode of self-government is described as ‘Public/Regional Government’ and may come into play when an entire region with a substantial majority Indigenous population gains powers of self-government covering all people within the region. Examples elsewhere include the Home Rule Government of Greenland, with its Inuit majority within the overall sovereignty of Denmark, Alaska’s North Slope Borough and, in 1999, Canada’s territory of Nunavut with an Inuit majority. A potential Australian development in this sort of direction is the Torres Strait Regional Authority.

A third model identified by Limerick is Incorporation. Corporate forms of community self-government can be found in Alaska. Australian examples include the Ngaanyatjarra people in Western Australia, the Pitjantjatjara peoples in South Australia, and the residents of Lake Condah and Framlingham Forest in Victoria. Limerick comments:

There are two basic advantages of incorporation as a structure for government:

- Firstly, a corporation is not under the bureaucratic control of the state government in the way that a local government is. It can receive funding directly from ATSIC to carry out projects and thereby avoid being subjected to state’s strict accountability requirements.
- Secondly, a corporation can adopt whatever decision-making structure it wishes. A local government body, on the other hand, is constrained by the structure set out in the legislation.<sup>76</sup>

But he also notes potential disadvantages.

Limerick's fourth mode of Indigenous self-government is that of Sovereignty. US law has long recognised the Native American peoples as possessing a residual if subordinate sovereignty. Canadian discussion of the matter uses a different term—the inherent right of self-government.

Has Queensland's Alternative Governing Structures Program fulfilled the potential envisaged for it in 1994? Apparently, there has been only limited progress. Several reasons are suggested.<sup>77</sup>

One reason is that it has been difficult to get an AGSP planning process under way in communities where there is an entrenched community council. Greater progress has been experienced in communities with no existing council or governing structure, such as Thursday Island and Old Mapoon, and for Indigenous populations in rural towns.

A second factor appears to be that there is very limited knowledge about (or interest in) general purpose governing structures in Indigenous communities. There is much greater interest in establishing more focussed bodies to deal with such matters as health, education, CDEP programs or community justice issues. Accordingly, the AGSP was, in 1997, merged with other funding programs, in 'a new more holistic Community Development Program'. Experience with those communities with well-established Community Justice Groups,<sup>78</sup> such as Kowanyama and Palm Island, suggests that they have begun to take on broader roles as quasi-governing structures.

Support for these lessons can be drawn from research in South Australia.<sup>79</sup>

The research was motivated by a wish to attract funding under the *Local Government (Financial Assistance) Act 1995* (Cth). Such funding is available primarily for local governing bodies incorporated under state local government acts. But South Australia's Pitjantjatjara lands, Maralinga lands and some of the Aboriginal Land Trust lands are not included within any local governing body. But there is some flexibility in the Act as to what kind of an organisation can be a local governing body for these purposes.

Accordingly, the organisations operating on the Pitjantjatjara lands were surveyed to identify which existing organisation might be best selected for nomination – as an alternative to creating yet another organisation to be run by the limited pool of 2,500 Anangu men, women and children. Anangu Pitjantjatjara was identified as 'the key organisation because ultimately it has responsibility for the land which is a central responsibility in the context of the culture'.<sup>80</sup> It also represents Anangu as traditional land owners of the land, and has statutory authority over the land.<sup>81</sup>

...Aboriginal communities on Aboriginal freehold or reserve land have a right to retain and develop their pre-existing authority structures. Furthermore, the land on which these communities are situated is held by special tenure which was created precisely to enable those communities to continue their occupation of the land in accordance with their own culture.



If these communities are required to adopt the administrative practices of mainstream Australia in order to administer and develop their local areas, including participation as a level of government, then the basic principle of self-determination is abrogated.

The premise of this report is that these communities are fundamentally different. That difference derives not only from the cultural traditions of the local community, but is also closely and intricately linked with the system of authority over land usage. Authority has a distinctly geographical reference in a way which has no analogy in a society where land can be bought and sold.

Applying this criteria in practice is not difficult because Aboriginal communities which do continue to occupy their traditional lands are in fact more comfortable with discussing decision-making and responsibility in the context of traditional rights and usually apply this criteria as a sub-text to the process imposed by bureaucratic constraints.<sup>82</sup>

Such a decision seems to have been the logical one in the case of lands, such as the Pitjantjatjara lands, where the traditional owners have been largely left in occupation. It will be less easy to identify an existing appropriate organisation on lands where ‘traditional’ and ‘historical’ peoples have co-existed, possibly for generations. It will be more difficult still in settings such as towns and cities where there is no—or limited—tenure specifically for the Indigenous peoples.

Nonetheless, the lessons from Queensland suggest that it may be better to build from an existing and viable organisation, whether it be a body formed for purposes of land holding, or community justice, or some other purpose. Most importantly is the bottom up approach: proper consultation has to be an essential pre-requisite to the design of such structures.

Some of these themes—were raised in respect of the Cape York Peninsula region by Noel Pearson in an important booklet published in 2000 entitled *Our right to take responsibility*.<sup>83</sup> Pearson’s primary concern in the book is to challenge the welfare dependency which he perceives to be the cause of the disastrous social situation in many Cape York communities. In Chapter 7, ‘Reforming Indigenous governance and the role of the state’, he discusses the need for changes to the principles and structures of governance, and the need for reform in the role of the state and its bureaucracy.

Central to recovery will be the reform of our indigenous governance structures. The following conclusions are unavoidable when looking at the governance structures of Cape York Peninsula:

- there is a great deal of waste (of efforts, of people, of resources) because of the irrational and incoherent structures of governance in the Peninsula;
- many of these structures were imposed from above by government, with inappropriate functions, decision making and representative provisions;
- many of them were established at a time when the recognition of native title rights and self determination were not imagined;

- they, like the government above them, do not address the critical need for a holistic approach to governance;
- they, like the government above them, do not address the critical need for a de-welfarised approach to governance.

Cape York Peninsula vitally needs indigenous governance structures which put behind us the prevailing welfare model of governance. It is helpful to conceive of three general levels of governance in Aboriginal society in Cape York Peninsula:

- firstly there is the regional level;
- secondly there is the community level (now being approached as sub-regions which basically centre around the existing community centres);
- thirdly there is the local level which includes clan groups and other smaller levels of organisation, including families, as well as individuals.

Each of these three levels of governance need to be recognised as necessary for the development of our communities. Whilst State and Commonwealth governments have recognised and sponsored the community level of government, the development of regional organisations has largely been driven by Aboriginal people. The structures that have been developed at the regional level are therefore Aboriginal community controlled.

State governments have also consistently ignored the importance of the local level of governance, largely because it is more convenient to limit its financial responsibility to the sponsorship of governance at the community level.

The following matters need to be kept in mind when we rationalise the Aboriginal governance structures of Cape York Peninsula:

- we need to ensure that there is coordination and cooperation in the system of governance at the community or sub-regional level. For this to happen, community government will need to be substantially overhauled and re-designed;
- we need to ensure that there is coordination and cooperation in the structures at the regional level;
- we need to ensure that empowerment at the local level is what results from the regional and community levels of governance. The aim of regional and community governance is to promote local level responsibility and action;
- we therefore need to ensure that there are strong organisational, representative and communication links between the three levels of governance: between regional and community, between community and local—so that cooperation and coordination is maximised;
- we need simple structures that are founded on the principles of holistic action and the de-welfarising of approaches and that provide space for the operation of Aboriginal laws and customs—rather than legalistic and bureaucratic structures. In other words, we must place the highest value on the importance of the local levels of governance—at the village, clan, family and individual levels – because it is at these levels that empowerment for change must take place;
- we need governance structures that are representative and accountable.

...

The development of regional organisations which are owned and controlled by the Aboriginal people of Cape York Peninsula evidences the new direction that we have been charting. We now have energetic regional organisations dealing with land (Cape York Land Council), health (Apunipima Cape York Health Council), community development (Balkanu Cape York Development Corporation) and enterprise development (Cape York Corporation and Cape York Charitable Trust).

These organisations are competent, are representative of the people and involve community members in their work. They participate in the wider policy and political debate, they advocate strongly the rights of our people and they strive to work together. Indeed they have achieved a level of cooperation and unity of purpose which is quite unique and extremely valuable. It will take ongoing leadership to maintain this unity of purpose.

Our regional organisations need to continue to develop cooperation and coordination so that we break that great problem of governance—the lack of a holistic approach. After all, these organisations have the same constituency: the people of the Peninsula, and there is no excuse for our organisations to fail to cooperate. They should not exist if they fail to cooperate, because our people suffer when this happens.

...

The process of sorting out governance at the community level has also commenced. A number of communities have undertaken planning projects looking at alternative governing structures over the years. Whilst many communities are hamstrung by the existing mess of governing structures, there are some examples of success.<sup>84</sup>

Pearson goes on to talk about the need to create a new interface with three government entities: the Commonwealth government, the Queensland government and ATSIC. He proposed direct discussions among these bodies and representatives of Cape York Aboriginal peoples, to produce what he termed a ‘partnership interface’. He also discusses the need to reform community governance structures. In contrast to Limerick, he envisages a need for enabling legislation:

The establishment of Community Councils under Queensland legislation in 1984 was an important milestone in the movement towards self management—but we now need to take the next step.

Whilst local government functions were established by the State—there are functions in enterprise and community development, community justice, land title-holding and management, youth and recreation issues, education and health—that now need to be fitted into a coherent jigsaw of community governance. This will require new Queensland legislation. Again, whilst the details need to be worked out by the people of Cape York Peninsula (and indeed by each community) in conjunction with the State Government—the following points need to be considered:

- the legislation should build upon the local government apparatus that is already in place, rather than abolishing it—local government is an important piece of the governance jigsaw

- the legislation should allow communities to establish and fit other community governance organisations dealing with economic development, health, education, youth and recreation, community justice and land title holding and management into a coherent governance arrangement
- the legislation should allow different communities to establish their community governing structures to fit their needs, within a general approach
- the legislation should allow for the recognition of existing community owned and controlled structures
- the legislation would not allow for government interference with the independence of the community owned and controlled organisations
- there would be a clear connection between the community governance structures and the partnership interface structure.

The 'pieces of the community governance structure' are quite developed in many of the communities in the Peninsula. They now need to be pulled together and formally recognised in the governance structures and processes of communities. We need Queensland legislation to do this.<sup>85</sup>

After an important discussion of problems presented by the existing operations of bureaucracies, Pearson writes:

The state bureaucracy today hoards the great bulk of the resources that our community needs in order to develop. The state bureaucracy's upwards definition of accountability and its disjointed mode of operating mean that our community does not get the optimum benefit from the state's transfer of resources. Moreover the state bureaucracy's service delivery method of transferring resources has too often compounded the problem of passive welfarism in our community. And yet the resources held by the state—financial and expert – are valuable and potentially useful to our development.

In the light of this therefore, rather than completely rejecting the role of the state in our community, we have sought to properly define its role. In order to give effect to the new role we conceive for the state, we need to explore a new partnership with it.<sup>86</sup>

The Queensland government led by Premier Beattie has responded positively to this partnership concept in meetings with Cape York Aboriginal peoples and other stakeholders.

## Notes

- <sup>1</sup> H Reynolds, *This whispering in our hearts*, Allen and Unwin, 1998.
- <sup>2</sup> For an account of one jurisdiction at one time, see G Nettheim, *Victims of the law: Black Queenslanders today*, Allen and Unwin, 1981.
- <sup>3</sup> See Chapter 11.
- <sup>4</sup> *First report*, AGPS, 1973 and *Second report*, AGPS, 1974.
- <sup>5</sup> See Chapter 11.
- <sup>6</sup> At the time of writing, the Commonwealth government is considering its response to the Reeves Report which recommends substantial changes to the legislation. For comment, see I Viner, 'Whither land rights in the Northern Territory? Whither Aboriginal self-determination? A review of the Reeves Report' (1999) 4(1) *Australian Indigenous Law Reporter* 1; JC Altman, F Morphy and T Rowse (eds), *Land rights at risk? Evaluations of the Reeves Report*, CAEPR Research Monograph No 14, ANU, 1999. The Reeves recommendations failed to win whole-hearted support from an important parliamentary committee: House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, Commonwealth Parliament, August 1999.
- <sup>7</sup> For extracts from the ILC's *Annual report 1997-98*, see (1999) 4(2) *Australian Indigenous Law Reporter* 109, pp 109-21.
- <sup>8</sup> The requirement for land to be vested in a corporation has also caused problems. In Queensland, some forms of pastoral leases may be vested only in natural persons.
- <sup>9</sup> Aboriginal Land Rights Commission, *Second report*, AGPS, 1974, paras 240-72.
- <sup>10</sup> The Commission's attempt to purchase pastoral lease land in Queensland, opposed by the state government, led to a landmark High Court decision upholding the validity of the *Racial Discrimination Act 1975* (Cth): *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
- <sup>11</sup> For a Federal Court decision concerning ATSIC funding of land purchases during the transitional two year period, see *New South Wales Aboriginal Land Council v ATSIC* (1995) 131 ALR 559. See also H McRae, G Nettheim and L Beacroft, *Indigenous legal issues. Commentary and materials*, 2<sup>nd</sup> edn LBC Information Services, 1997, pp 298-99.
- <sup>12</sup> The 1997/98 ATSIC Annual report disclosed a balance of over \$8 million at 30 June 1998. The 1998/99 Annual report disclosed a balance of nearly \$10 million. ATSIC also has a substantial Housing Fund.
- <sup>13</sup> Indigenous Land Corporation, *Annual report 1997-98*, ILC, 1998, p 22. Extracts are reproduced in (1999) 4 *Australian Indigenous Law Reporter* 109, pp 109-24.
- <sup>14</sup> The ILC has prepared model rules for incorporating under such legislation.
- <sup>15</sup> Pages 46-47. The matter is also addressed in the 1998-99 *Annual report* with reference to two particular purchases.
- <sup>16</sup> A similar policy approach is stated in the ILC's *Annual report 1998-99*, pp 24-25, 36-37. See also *Annual report 1999-2000*, pp 50-51.
- <sup>17</sup> *Annual report 1997-98*, p 47.
- <sup>18</sup> *Annual report 1998-99*, pp 34, 70-72.
- <sup>19</sup> *Annual report 1999-2000*, p 24.
- <sup>20</sup> *Annual report 1998-99*, pp 33, 55-56, 75.
- <sup>21</sup> *Annual report 1999-2000*, p 30.
- <sup>22</sup> *Annual report 1998-99*, p 19; *Annual report 1999-2000*, p 12.

- <sup>23</sup> *Annual report 1998-99*, pp 33-34.
- <sup>24</sup> *Annual report 1999-2000*, p 38.
- <sup>25</sup> [2000] FCA 1501 (25 October 2000) per Kiefel J. See also *Annual report 1999-2000*, pp 65-66.
- <sup>26</sup> Parliamentary Debates, House of Representatives, 30 September 1975, pp 1410-11.
- <sup>27</sup> Parliamentary Debates, House of Representatives, 3 June 1976, pp 2946-47.
- <sup>28</sup> C Mantziaris, 'The dual view theory of the corporation and the Aboriginal corporation' (1999) 27 *Fed L Rev* 283, pp 284-85.
- <sup>29</sup> *Id*, p 317.
- <sup>30</sup> *Id*, p 307.
- <sup>31</sup> *Id*, pp 308-09.
- <sup>32</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Final report. Review of the Aboriginal Councils and Associations Act 1976*, August 1996 (the Review).
- <sup>33</sup> P Sullivan, 'The needs of prescribed bodies corporate under the Native Title Act 1993 and Regulations' in AIATSIS, above note 32. See also P Sullivan, *A sacred land, a sovereign people, an Aboriginal corporation: Prescribed bodies corporate and the Native Title Act*, NARU (ANU) Report No 3, 1997. For an account of difficulties encountered by the judiciary with the regulations, see C Mantziaris, 'Problems with prescribed bodies corporate: *Mualgal People v Queensland*' (1999) 4(22) *Indigenous Law Bulletin* 21, pp 21-22.
- <sup>34</sup> Discussion Papers are available on [www.austlii.edu.au/au/special/rsjproject/rsjlibrary/arccrp/index.html](http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/arccrp/index.html).
- <sup>35</sup> C Mantziaris, 'Beyond the *Aboriginal Councils and Associations Act*? Part 1' (1997) 4(5) *Indigenous Law Bulletin* 10, pp 10-14; 'Beyond the *Aboriginal Councils and Associations Act*? Part 2' (1997) 4(6) *Indigenous Law Bulletin* 7, pp 7-13; J Fingleton 'Back of beyond: the review of the *Aboriginal Councils and Associations Act 1976* in perspective' (1997) 4(6) *Indigenous Law Bulletin* 14, pp 14-15; C Mantziaris 'Reply to Jim Fingleton' (1997) 4(6) *Indigenous Law Bulletin* 16.
- <sup>36</sup> [2000] FCA 1532 (27 October 2000) per Drummond J.
- <sup>37</sup> (1998) 88 FCR 218.
- <sup>38</sup> See Chapter 11, pp 41-48.
- <sup>39</sup> *Id*, pp 45-47.
- <sup>40</sup> Independent Commission Against Corruption, *Report on Investigation into Aboriginal Land Councils in New South Wales: Corruption prevention and research volume*, Independent Commission Against Corruption, 1998. (Specific findings are covered in a later report, *Report on Investigation into Aboriginal Land Councils: Investigation report*, Independent Commission Against Corruption, 1999.) Further reports were promised, including a 'report card' on what NSWALC, DAA and the Registrar of the Aboriginal Land Rights Act have done in responding to ICAC's recommendations.
- <sup>41</sup> *Id*, p 4.
- <sup>42</sup> *Id*, pp 6-7.
- <sup>43</sup> *Id*, p 7.
- <sup>44</sup> *Ibid*.
- <sup>45</sup> *Id*, p 8.
- <sup>46</sup> *Id*, p 9.
- <sup>47</sup> *Id*, p 14.
- <sup>48</sup> New South Wales Aboriginal Land Council, *Annual report 1996-97*, New South Wales Aboriginal Land Council, 1998, p 38.

- 49 *Report on investigation into Aboriginal Land Councils in New South Wales: Implementation progress report*, October 1999.
- 50 Id, p 17. In May 2000 the NSW Auditor-General reported that NSWALC had mismanaged its finances: 'Land Council "failed on finances"', *Sydney Morning Herald*, 18 May 2000, p 8.
- 51 *Review of the Aboriginal Land Rights Act 1983 (NSW)*, Background Paper, Summary of Discussion Topics and Discussion Topics, NSW Department of Aboriginal Affairs, May 2000.
- 52 *1998-99 Annual report*, ATSIIC, p 89.
- 53 T Christian and L Beacroft, 'Changes to Aboriginal legal services' (1998) 4(13) *Indigenous Law Bulletin* 4, pp 4-5.
- 54 Id, p 5.
- 55 The Allen Consulting Group, *Tendering of Aboriginal and Torres Strait Islander legal services in New South Wales: Initial assessment and future options*, Final Report to the Office of Evaluation and Audit, December 1999.
- 56 Id, 'Part A: Summary and overview', pp 2-3.
- 57 Id, pp 6-7.
- 58 Chairman Sam Jeffries, *1999-2000 Murdi Paaki Annual Report*, ATSIIC, p 6.
- 59 Ibid.
- 60 Refer to *Report on greater autonomy*, National Policy Office, ATSIIC, 2000 for more details of regional autonomy discussions, models and directions.
- 61 Review, above note 32, para 7.9, citing C Gibb, *The situation of Aborigines on pastoral properties in the Northern Territory*, Report of the Committee of Review, Parliamentary Paper No 62, Commonwealth Government Printing Office, 1973, p 49.
- 62 Parliamentary Debates, House of Representatives, 3 June 1976, p 2947.
- 63 D Dalrymple, 'The forgotten option: Part III of the *Aboriginal Councils and Associations Act 1976*' (1988) 2(32) *Aboriginal Law Bulletin* 11, pp 11-13.
- 64 In Western Australia, an unofficial handbook to the state and Commonwealth legislation was produced under the auspices of two parliamentarians: *The Aboriginal organisations' survival kit*, 1995.
- 65 Page 117.
- 66 Page 108. See paras 7.63-7.69.
- 67 One of the Issues Papers in Volume 2 of the Review is S Brennan, 'Queensland models for Indigenous self-governance'.
- 68 By Will Sanders in response to Discussion Papers 4 and 7, at a Workshop for the Project, held on 31 March 2000.
- 69 Citing T Rowse, *Remote possibilities: The Aboriginal domain and the administrative imagination*, NARU, ANU, 1992, p 89.
- 70 M Limerick, *Discussion paper on alternative governing structures*, October 1994; also M Limerick, *Resource document on alternative governing structures*, Law, Justice and Culture Unit, Office of Aboriginal and Torres Strait Islander Affairs, September 1994.
- 71 Id, pp 2-3.
- 72 Id, p 8.
- 73 J Wolfe, *'That community government mob': Local government in small Northern Territory communities*, North Australia Research Unit, ANU, 1989.

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<sup>74</sup> Limerick, *Discussion paper on alternative governing structures*, above note 70, pp 8-9.

<sup>75</sup> *Id.*, p 11.

<sup>76</sup> *Id.*, p 15.

<sup>77</sup> Personal communication with Michael Limerick, 22 September 1999.

<sup>78</sup> For accounts of Queensland's community justice groups, see P Chantrill, 'Community justice in Indigenous communities in Queensland: Prospects for keeping young people out of detention' (1998) 3 *Australian Indigenous Law Reporter* 163; *Interim assessment of community justice groups: Local justice initiatives program*, Department of Aboriginal and Torres Strait Islander Policy and Development, May 1999.

<sup>79</sup> *Mayatja Manta Nyangaku Kutju: Local government for Aboriginal communities*, prepared for Anangu Pitjantjatjara by the Pitjantjatjara Council Inc, 1994.

<sup>80</sup> *Id.*, p 10.

<sup>81</sup> *Id.*, p 11.

<sup>82</sup> *Id.*, p 21.

<sup>83</sup> N Pearson, *Our right to take responsibility*, Noel Pearson and Associates Pty Ltd, 2000.

<sup>84</sup> *Id.*, pp 67-69.

<sup>85</sup> *Id.*, pp 72-73.

<sup>86</sup> *Id.*, p 81.



## Chapter 13 ■ Native Title Legislation

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### Introduction

In response to the uncertainty which many in the non-Indigenous community perceived to have been created by the decision in *Mabo v Queensland*<sup>1</sup> (*Mabo (No 2)*), the Keating Labor government decided to legislate on native title.<sup>2</sup> This process was of questionable benefit to Indigenous peoples—if native title exists at common law, it does not require confirmation by statute. Moreover, to those who live by its rules, the legitimacy of Indigenous law does not depend on recognition by the mainstream legal system:

The idea that Aboriginals actually have rights that are not given to them by the grace of the white community is very hard for many people to absorb.<sup>3</sup>

A question at the centre of this Project is how native title holders can best control what happens on their land. Jacqui Katona, Executive Officer of the Gundjehmi Aboriginal Corporation,<sup>4</sup> has suggested that to answer this question it is necessary for non-Indigenous governments and people to recognise Indigenous peoples' ability to manage themselves.<sup>5</sup>

It is essential that Indigenous peoples' organisations have infrastructures that reflect Indigenous aspirations and assist communities to exercise or enjoy their rights. Indigenous governance paradigms are required. While it may be reasonable to expect Indigenous organisations to comply with certain non-Indigenous bureaucratic requirements, such as external financial accountability, questions always need to be asked about the measures against which compliance is judged.

Effective co-existence must be more than constant compromises by Indigenous peoples. The non-Indigenous community could benefit from a more reciprocal flow of ideas. For example, the sharing that is a fundamental part of Indigenous culture represents a finely calibrated social contract that imbues both generosity and responsibility in society members.<sup>6</sup> It is vital that there is scope for such values to be incorporated into governance structures if an Indigenous community desires it. Non-Indigenous bureaucratic requirements should not impede this.<sup>7</sup>

In *Aboriginal Dispute Resolution*, Larissa Behrendt explores 'how the values of the Aboriginal community can be used imaginatively to develop real alternatives to the dispute resolution mechanisms used by the dominant legal system'.<sup>8</sup> Behrendt is concerned mainly with alternatives to courts, but the principles she develops are also useful in considering governance structures:

Aboriginal and Torres Strait Islander communities should be able to implement models in their own communities, which recognise traditional cultural values and traditional structures of decision making.<sup>9</sup>

A community must always decide for itself what is best for its members. Only the community knows what is best for the community.<sup>10</sup>

## Native Title Act

The *Native Title Act 1993* (Cth) (NTA), as originally enacted, was a highly complex scheme for determining which land is subject to native title according to non-Indigenous law, protecting native title, validating past acts which may have been invalid because of the hitherto unacknowledged existence of native title, and providing a regime for future acts which might affect native title. The legislation was made substantially more complex as a result of amendments enacted in 1998.<sup>11</sup>

‘Native title’ is defined in the NTA as the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters where:

- the rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or Torres Strait Islanders; and
- the Aboriginal peoples or Torres Strait Islanders by those laws and customs have a connection with the land or waters; and
- the rights and interests are recognised by the common law of Australia.<sup>12</sup>

### *Governance structures under the NTA*

There are two kinds of governance structures involved in the native title application and administration process: Native Title Representative Bodies (also referred to as Representative Aboriginal/Torres Strait Islander Bodies) (NTRBs) and Prescribed Bodies Corporate.

### *Native title representative bodies<sup>13</sup>*

NTRBs are key players in the process that Indigenous groups must follow to have their native title recognised by non-Indigenous law. Broadly speaking their functions have been assisting members to make native title claims and facilitating the resolution of intra-group disputes about native title. In the second reading speech for the original Native Title Bill 1993 (Cth), Prime Minister Keating described the role of NTRBs as follows:

Representative organisations will...assist in co-ordinating claims: it is important that claims come forward in a sensible, organised way. They will also be a channel for notification of proposed actions affecting native title as provided for in the Bill. The organisations will, of course, be fully accountable for any funds provided.<sup>14</sup>

In a sense, the role of NTRBs was to be not unlike the role of the Land Councils established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), discussed in Chapter 11. Indeed, the role was added to the existing roles of two major Land Councils in the Territory and to the existing roles of the NSW Aboriginal Land Council.

### *Prescribed bodies corporate*

Pursuing the above analogy with ALRA structures, the function of prescribed bodies corporate under the NTA could be likened to that of Land Trusts in the Northern Territory.

If the Federal Court proposes to make a determination that native title exists, it is also required to make a determination of a prescribed body corporate (PBC) either to hold title on trust for the common law holders of native title, or to act as their agents. Other specific functions are given to PBCs under the Act or regulations.<sup>15</sup> In the first place, it is for the native title holders to establish, and to nominate to the Federal Court, a body to serve as PBC for one or other of its primary functions; failing such nomination, the Federal Court needs to designate a prescribed body to act as their agent.

## **Representative Aboriginal/Torres Strait Islander Bodies**

In late 1994, ATSIC initiated a review of the NTA provisions in the light of experience to that time.<sup>16</sup> The Review Committee reported:

It has also become apparent that Native Title Representative Bodies have a pivotal role in the operation of the Act, which was perhaps not anticipated or fully appreciated during the debate on, and drafting of, the legislation.

Native Title Representative Bodies need to fulfil a number of indispensable functions on behalf of their constituents, including:

- the preparation and lodgment of claims for recognition of native title or for compensation with the National Native Title Tribunal;
- the carriage of native title litigation and appeals—at this stage, often in the nature of test cases—elsewhere within the court system;
- responding to non-claimant applications and future act notifications;...
- educating and informing their indigenous constituents about the potential and limitations of native title;
- participating in the development of regional agreements;
- undertaking heritage and site clearance work on behalf of native title parties; and
- eventually, assisting potential prescribed bodies corporate in the performance of their functions under the Act.

At this stage, [NTRBs] are clearly the workhorses of the native title regime.<sup>17</sup>

The Review Committee's general position was that:

...the interests of native title parties will be best served by larger, professional [NTRBs]. In our view, there are strong arguments based on maximising economies of scope and scale for [NTRBs] to be responsible for larger rather than smaller geographical regions and to have exclusive representative powers within those regions.

...We argue that the provision of adequate resources and support to [NTRBs] is crucial to the sustained development of a just and credible native title regime.<sup>18</sup>

Who, then, are the NTRBs? The NTA, as originally enacted, was not at all prescriptive. Section 202 simply provided that the Commonwealth Minister may determine that a body is a representative Aboriginal/Torres Strait Islander body for a specified area. The Minister simply needed to be satisfied:

- that the body was broadly representative of the Indigenous people in its area;
- that it satisfactorily performs its existing functions; and
- that it will satisfactorily perform its new functions (section 202(3)).

Shortly before the NTA commenced operation on 1 January 1994, the Minister published a determination that 12 bodies were regarded as NTRBs for the purpose of the Act. They included statutory bodies established by land rights legislation in the Northern Territory, NSW and South Australia; Aboriginal Legal Service bodies in Western Australia, South Australia and Victoria; and established land councils without specific statutory powers in Queensland and Western Australia. Other bodies were determined later, many being new and inexperienced.<sup>19</sup> The NTA made no express requirement that the bodies even be incorporated, but such a requirement would have been a consequence of section 203, which provided for grants of financial assistance by the Commonwealth Minister or by ATSIC.

The Review Committee, recommended, among other things:

that the primary focus for NTRB representative jurisdiction should be the land within their determined border and the indigenous constituency with native title interests and rights in that land (irrespective of current residence location).<sup>20</sup>

They recommended that there should be complete coverage of the continent by 24, and up to 27, NTRBs.<sup>21</sup>

For the purpose of this Chapter, the significant discussion appears in the Review Committee's Chapter 2, 'Roles and Responsibilities', which begins by considering the criterion in section 202(3)(a) that a body be broadly representative:

2.42 NTRBs are expected, somewhat unrealistically in the Committee's view, to be all representative things to all people. Increasingly, both government and indigenous people expect NTRBs not only to operate and structure themselves to ensure equitable, 'democratic' access to their services, but also to do so in a manner that is culturally authorised by indigenous society.

2.43 None of the NTRBs currently determined are ‘representative’ in the sense of employing the western democratic procedures used to elect the indigenous regional councillors and commissioners of ATSIC. The Review Committee believes that a requirement to develop ‘democratic’ structures based strictly on such election procedures for governing boards and/or committees is not appropriate for NTRBs. The Northern Territory land councils have operated successfully for 20 years with a structure based on community representation. NTRBs are, first and foremost, organisational advocates for their native title constituents. The Review Committee suggests that minimally they must be able to demonstrate that they can act for and serve the interests of a sufficiently broad cross-section of their indigenous constituency. The main issue then remaining is what organisational procedures and structures facilitate adequate representation and accountability to indigenous constituents who wish to utilise their services.

2.44 ...during consultations, it was apparent to the Review Committee that NTRBs which had established governing boards and/or committees reflecting the broad land ownership patterns in their areas, and with inclusive membership regimes, gained the support of their constituency necessary for effective representation.<sup>22</sup>

The question of accountability to the internal constituency of NTRBs was also considered:

Calls for greater accountability were directed towards two main areas. First, for NTRBs to have Aboriginal, gender-balanced governing committees reflecting the broad cultural constituencies within their regions. Second, for NTRBs to have widely publicised policies and guidelines outlining their decision-making processes; procedures for assessing the merits of claims; procedures for prioritising claims; and appeal mechanisms. Greater clarity in the statutory responsibilities of NTRBs will aid accountability to constituents.<sup>23</sup>

Because of the variability likely to arise in these matters among NTRBs through their guidelines and procedures, the Review Committee recommended that they:

...should operate under requirements similar to those specified in section 23 of the [Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)], namely, the necessity to ascertain and express the wishes and opinions of indigenous peoples living in their region as to the management of native title land in that area, to protect the interests of, and consult with, those people with respect to native title land; and in carrying out their functions with respect to any native title land in their areas, to seek the informed consent of native title holders and claimants.<sup>24</sup>

Among future roles and responsibilities, the Review Committee identified the need for NTRBs to be able to offer representation and support services to PBCs as native title determinations are made.<sup>25</sup>

Other chapters of the Review Committee report addressed workloads and resource needs (Chapter 4) and funding, management and administration (Chapter 5), with ATSIC to be the key body for providing funds and for external accountability.

The *Native Title Amendment Act 1998* (Cth) greatly extended the NTA's original two sections dealing with NTRBs. The new Part 11 deals separately with original NTRBs and a reconstituted system under which the NTRB areas are revised and a process set under way for recognition of NTRBs for those areas during a transition period.

The transition period commenced when the first stage of amendments came into effect on 30 October 1998. Section 201B spells out that eligible bodies for recognition must be bodies corporate—incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth) (ACA Act), a body corporate that is already an NTRB or a body corporate under a Commonwealth or state or territory law prescribed for the purpose. Original NTRBs would not necessarily have a monopoly for their areas. Under the revised section 202, the Commonwealth Minister may determine that a body is an NTRB for an area, may determine more than one body for an area and must be satisfied of the criteria in the original NTA, namely, that the body is broadly representative, that it satisfactorily performs its existing functions and that it will satisfactorily perform the functions listed under section 202(4). These include assisting with claims for determinations of native title or for compensation, assisting to resolve disagreements among individuals or groups, representation in various negotiations and new certification functions in relation to applications for determinations of native title and to Indigenous land use agreements (ILUAs). An NTRB may also be a party to an ILUA but must, beforehand, consult with and have regard to the interests of persons who hold or may hold native title in the area (section 202A).

Part 11, Division 2 set up a new process under which the Commonwealth Minister invited applications from eligible bodies for recognition as the NTRB for an area.<sup>26</sup> During the transition period, existing representative bodies were invited to re-apply for representative body status.<sup>27</sup> Section 203AD establishes criteria for the Minister's satisfaction. At first glance, they appear similar to those in section 202(3), but there are significant differences. When determining whether to recognise an Indigenous organisation as a representative body, the Minister must be satisfied that:

- the body will satisfactorily represent persons who hold or may hold native title in the area;
- it will be able to consult effectively with Aboriginal and Torres Strait peoples living in the area; and
- it satisfactorily performs or has the ability satisfactorily to perform the functions of an NTRB.<sup>28</sup>

The Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr William Jonas, has pointed out the significance of the rewording of the criteria from those in section 202(3) to the new section 203AD(1):

The amendments remove from the criteria for recognition the requirement that the applicant be representative. Instead, the Minister needs to be satisfied that the body will

satisfactorily represent actual or potential native title holders. This amendment heralds a fundamental change to the relationship between representative bodies and the Indigenous communities they represent.

As indicated previously in this chapter, there are three ways in which representative bodies give effect to the principles of participation as required by CERD: first, through the provision of services to native title holders; second, through representing native title holders in the formulation of legislation and policy; and third, through their role in delivering community structures to enable decision-making in the native title process. By shifting the emphasis away from 'representativeness' towards 'a capacity to represent', the amendments fail to appreciate the importance of representative bodies in the latter two roles of formulating legislation and policy and developing community structures. While the provision of services is a very important function of representative bodies, it is not sufficient to ensure full participation of native title holders and Indigenous people in the native title process.

...The amendments no longer require that the values of the local Indigenous people be present in the organisations which represent them. The question of how best to achieve the effective functioning of native title representative bodies is now being framed in terms of bureaucratic models of best administrative practice.<sup>29</sup>

The re-recognition processes placed considerable strains on the NTRBs and, indeed, on the entire system. The first stages of the process were summarised in ATSIC's *1998-1999 Annual report*.<sup>30</sup> ATSIC was directly engaged in the establishment and conduct of team reviews for each of the NTRBs for report to the Minister. (It also established an independent review of NTRB responsibilities and workloads, and the resources needed to support them, both before and after the 1998 amendments: this is referred to below.)

The National Native Title Tribunal reported that:

...the process of recognition of representative bodies by the relevant Commonwealth Minister will result in fewer bodies in some States and will give rise to various practical consequences as existing (or new) bodies perform an expanded range of functions and, in some areas, take responsibility for matters [for] which no body or another body previously had responsibility.<sup>31</sup>

At the end of the reporting period, the recognition of representative bodies is still in progress. The demand on the resources and attention of the representative bodies has, along with the registration test, significantly diminished their capacity to be involved in mediation.

Again, the impact of this has often been on parties other than the applicants. They have been left neglected and frustrated with a process that has, to date, offered them little resolution to matters that often affect their daily lives, and understandably reluctant to engage in further mediation. This situation may not change in some areas even after the Minister's decisions about re-recognition, especially if the decisions leave some regions without a representative body.<sup>32</sup>

The NNTT returned to the topic in its *Annual report 1999-2000*. It noted that the ‘total number of representative body areas nationally went from 24 to 20’; that, as at 30 June 2000, only 10 representative bodies had been recognised, leaving 10 areas for which there was no recognised body; that some of the bodies denied recognition were preparing fresh applications; and that the process was expected to be completed by 31 December 2000. The Tribunal repeated its concern that the process had diverted the attention and the resources of NTRBs from other matters to the detriment of the overall native title processes.<sup>33</sup>

The processes followed in the re-recognition process were recently considered by Merkel J in the Federal Court in *Pilbara Aboriginal Land Council Aboriginal Corporation Inc v Minister for Aboriginal and Torres Strait Islander Affairs*.<sup>34</sup>

The Pilbara Aboriginal Land Council (PALC) had originally been incorporated in 1982 under the ACA Act. In March 1996 it was recognized as a NTRB for the original Pilbara area, but it did not have a monopoly—indeed, four bodies were invited to apply for recognition for the Pilbara invitation area under the 1998 amendments to the NTA.

In all these areas the processes were conducted by ATSIC through assessment teams acting under a document entitled ‘Procedures Relating to Applications for Recognition as a Native Title Representative Body’. An ATSIC assessment team met with members of the PALC in October 1999. It eventually reported to the Minister. The report contained a number of adverse observations and opinions. The Minister, acting substantially if not entirely upon the report of the assessment team, decided in March 2000 not to recognize the PALC as the representative body for the area. The PALC sought judicial review for breach of the rules of natural justice. It argued that the adverse material in the report to the Minister should have been disclosed to them so that they might have an opportunity to respond.

Justice Merkel held, after extended consideration of the law, that the rules of natural justice were applicable to the re-recognition process under the NTA. He accepted that all the adverse matters had, in fact, been raised by the assessment team during its field visit and that the PALC had then had opportunity to respond. There was no further obligation on the assessment team or the Minister to bring those portions of the team’s written report to the attention of the PALC. The application was dismissed.

The Aboriginal and Torres Strait Islander Social Justice Commissioner devoted Chapter 5 of his *Native Title Report 1999* to NTRBs. Dr Jonas reported that there were 24 NTRBs throughout Australia at the time, most of them being Indigenous organisations which were well-established before the *Mabo (No 2)* decision, mostly with functions under statutory land rights regimes:



Representative bodies are at the forefront of Indigenous governance issues in Australia. The scope of their functions and their representative base have meant that they have been forced to develop and adopt organisational and administrative styles appropriate to an Indigenous organisation in a non-Indigenous framework. Representative bodies must be responsive and accountable both to their constituent communities and to Government. Not surprisingly, these demands place specific stresses upon them and require innovative methods of governance.

...The amendments...redraw the boundaries of the representative body areas, institute a procedure for re-recognition of representative bodies across the country, reform the structure of representative bodies and significantly alter their functions...

While the amendments were intended to improve the efficiency, effectiveness and accountability of representative bodies for the benefit of all stakeholders, it is significant that they were not initiated by, nor consented to, by Indigenous people.<sup>35</sup>

The report went on to criticise other aspects of the amendments, including the redrawing of NTRB boundary areas:

As a result of the amendments, which re-draw the boundaries and limit the number of bodies that can be recognised to one per area, representative bodies are effectively competing with each other for recognition in relation to the same area. Inevitably certain representative bodies will cease to exist as a result of the amendments.<sup>36</sup>

The Commissioner also discussed the additional functions and responsibilities given to NTRBs and the need for additional resources and funding.

ATSIC commissioned an independent review, conducted by a consortium of Corrs Chambers Westgarth, lawyers, and Salvatore Brennan Rashid, management consultants.<sup>37</sup> It reported the following key findings of the consultancy:

- workloads of NTRBs are significantly higher than allowed for by present funding;
- corporate governance within NTRBs is generally deficient; and
- the shortcomings of NTRBs impose considerable costs on the wider community.

It went on to report its key recommendations:

1. That NTRBs be funded so that they have the capacity to fulfil their core functions, prioritise between competing service demands of their constituents and maintain appropriate standards of corporate governance.
2. That NTRBs accept and aim to fulfil their role under the Native Title Act 1993 (as amended) as service delivery organisations.
3. That NTRBs be required to adopt the high standards of corporate governance mandated by the Act, devote resources to core functions ahead of non-core functions and prioritise between competing service demands of their constituents.
4. That ATSIC play a greater role in ensuring that NTRBs comply with the recommendations for their role which are adopted, in particular through stricter monitoring of grant conditions and enhanced training of ATSIC officers.

### *Accountability*

Accountability of NTRBs is relevant at two levels. First, there is public accountability which is usually manifested through accounting requirements. The second arm is accountability to the body's members and the community it represents. Internal accountability mechanisms must be able to reflect Indigenous political culture which emphasises the primacy of local groups and the obligations of individuals to their immediate kin.<sup>38</sup>

...a policy focus on mechanisms to better achieve internal accountability for Aboriginal organisations would assist in the realisation of both Aboriginal self-determination and public accountability.<sup>39</sup>

The 1995 ATSIC review recommended that NTRBs be accountable to their clients in a manner consistent with section 23 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Section 23 emphasises Land Councils' consultation and negotiation roles. In particular, the legislation provides that a Land Council cannot take any action unless it is satisfied that the traditional owners understand the nature of the proposed action and consent to it and unless it has consulted any Aboriginal community that will be affected.<sup>40</sup> On the face of it, this legislative approach gives Indigenous communities a direct say in governance decisions that affect their lands.

External accountability for the newly recognised, or re-recognised NTRBs is dealt with in considerable detail in Division 5. (Earlier drafts for amendments from 1996 and 1997 were even more demanding.)

In its *1998-99 Annual report* ATSIC reported that during the year it had:

responded to concerns about the accountability of some NTRBs by making adherence to a Native Title Policy Framework a condition of grant funding. The Framework clarified and expanded on various operational and accountability arrangements that had already been endorsed by the Board in previous years.<sup>41</sup>

It appears that ATSIC has adopted a strategy of working closely with NTRBs to assist them to ensure appropriate outcomes, as distinct from invigilating them from a distance.

The NTRBs are, inevitably, corporate bodies of one sort or another. Their functions are enlarged and given a firmer statutory basis under the 1998 amendments. There are more developed provisions for both internal and external accountability. The adequacy of the resources available to them to fulfil their functions remains a problem. Subject to these matters, there seems to be some latitude for NTRBs to constitute themselves in such manner as is acceptable to their communities.<sup>42</sup>

### **Prescribed Bodies Corporate**

The NTA requires that when the Federal Court determines that native title exists it must at the same time determine a PBC either to hold title as trustee for the native title

holders or to act as their agent or representative. Such a PBC then becomes registered as a registered native title body corporate.<sup>43</sup> The Act itself does not specify that PBCs should be incorporated under any particular legislation.<sup>44</sup> It is left to regulations to 'prescribe the kinds of bodies corporate that may be determined under section 56 or 57'.<sup>45</sup>

The Native Title (Prescribed Bodies Corporate) Regulations, as amended in June 1998,<sup>46</sup> Regulation 3, *seemed* to require that a PBC be incorporated under the ACA Act, though the language of the regulation was not entirely clear because it referred to section 59 of the original NTA, which was amended effective from 30 September 1998. This caused problems in *Mualgal People v Queensland*.<sup>47</sup>

ATSIC referred to such problems in its *1998-99 Annual report*:

The Native Title Act gives a broad outline of how applicants for native title will hold their rights and manage them once a formal determination of native title is made. They have to choose between a trust arrangement and an agency arrangement. But the details of the arrangement are left to be specified in regulations (commonly known as the 'prescribed body corporate regulations' or simply 'PBC regulations'). The original regulations, which commenced on 30 December 1994, provided that:

- the only kind of incorporated body that can be a PBC is an Aboriginal Corporation under the Aboriginal Councils and Associations Act 1976;
- consultation with native title holders is required in the decision-making processes of the PBC; and
- Aboriginal/Torres Strait Islander representative bodies have a limited consultative role.

On 24 December 1998, Justice Drummond of the Federal Court questioned the validity of the regulations in the case of *Mualgal People v Queensland*. He stated that the regulations had not taken account of the 1998 amendments to the Native Title Act and that they may have been rendered invalid by those amendments when they commenced on 30 September 1998. ATSIC received legal advice that the only way to solve the problem would be to repeal and remake the regulations. This was done and re-made regulations were gazetted on 14 July 1999 (Commonwealth of Australia Gazette No S 323).

The re-made regulations were not intended to resolve all the problems with the PBC regulations, only the Mualgal problem. The Minister for Aboriginal and Torres Strait Islander Affairs decided to undertake a comprehensive review of the regulations to address the other problems. However, the details of that review will not be finalised until the NNTT's Research report on PBC Regulations, to be released in August 1999, has been analysed.<sup>48</sup>

The new regulations seem clearly to require that PBCs be incorporated under the ACA Act. The difficulties presented by the ACA Act in its present form are discussed in some detail in Chapter 12 in the light of a 1996 review of the Act. That review has not been published and its recommendations have not been adopted.

Accordingly, it became a matter of considerable urgency to develop and disseminate guidance for NTRBs and others on how to design PBCs, within the constraints imposed by the ACA Act, which would accommodate the (varying) needs and interests of native title holders as fully as possible. Meeting this need became the major in kind contribution of the NNTT to the Collaborative Research project of which this book is a final product. The Tribunal commissioned an expert in corporations law and a distinguished anthropologist to undertake the task. The first product of their collaboration was published separately by the NNTT under the title *Guide to the design of native title corporations*.<sup>49</sup> This was intended to be of immediate use to those who needed to design such corporations. It was conceived as a plain English companion volume to a fuller study which was still to be completed. That volume was subsequently published under the title *Native title corporations*.<sup>50</sup>

No attempt is made here to summarise the work, and readers are referred to *Native title corporations*, in particular for a thorough legal and anthropological analysis of the issues.

It is worth noting that problems of incorporating PBCs for the purposes of the NTA could be alleviated by Commonwealth government action in either, or both, of two directions:

- amending the NTA regulations so as no longer to mandate that PBCs be incorporated under the ACA Act,
- amending the ACA Act and its regulations to address the problems that have become evident with the legislation.

The two studies by Mantziaris and Martin provide valuable insights and guidance to those setting out to design PBCs which remain as close as possible to the needs and interests of the Indigenous group concerned while also meeting the requirements of Australian law. It remains a matter of concern that the conjunction of Australian laws relating to the formation of PBCs is so lacking in coherence as to make the task unnecessarily difficult.

## Notes

<sup>1</sup> *Mabo v Queensland* (1992) 175 CLR 1.

<sup>2</sup> Specifically, the non-Indigenous community was concerned about the need to validate titles since 1975 that were probably invalid under the *Racial Discrimination Act 1975* (Cth), the need for a process to allow development to occur on native title land and the need for certainty about whether land was subject to native title: H McRae, G Nettheim and L Beacroft, *Indigenous legal issues*, second edition LBC, 1997, p 219.

<sup>3</sup> H Wootten, 'Mabo: Issues and challenges', in *Selected Conference Papers*, Judicial Commission of NSW, 1994, p 347.

<sup>4</sup> The Corporation represents the Mirrar peoples: Mirrar Gundjehmi, Mirrar Urningangk and Mirrar Mengerrdji. It was established to collect royalties after the Mirrar people agreed to the federal government building the Ranger uranium mine on their country.

- <sup>5</sup> S Perera and J Pugliese, '101If native title is us, its inside us': Jabiluka and the politics of intercultural negotiation—Interview with Jacqui Katona' (1998) 10 *Australian Feminist Law Journal* 1, pp 12, 17. She also suggests (p 16) that there needs to be greater emphasis on explaining the dominant society to Indigenous people so that they can properly take advantage of the aspects of western society that could benefit their culture.
- <sup>6</sup> See CAEPR, *Issue brief 17: Principles and implications of Aboriginal sharing*, March 1997: <online.anu.edu.au/caepr/brief17.htm>.
- <sup>7</sup> This means accommodating what anthropologists have referred to as the 'Aboriginal domain': T Rowse, *Remote possibilities: The Aboriginal domain and the administrative imagination*, North Australia Research Unit, Australian National University, 1992.
- <sup>8</sup> Federation Press, 1995, p 2.
- <sup>9</sup> Id, p 6.
- <sup>10</sup> Id, p 108.
- <sup>11</sup> *Native Title Amendment Act 1998* (Cth). The federal government stated that the amendments were a response to the decision in *Wik Peoples v Queensland* (1996) 134 ALR 637 in which the High Court held that pastoral leases and native title could co-exist. The government argued that the decision created further uncertainty and proposed a '10 point plan' to amend the NTA: Department of the Prime Minister and Cabinet, *Media release*, 4 June 1997. However, the plan itself had largely been developed by the Coalition in opposition well before *Wik* was handed down: F Brennan, *The Wik debate: Its impact on Aborigines, pastoralists and miners*, UNSW Press, 1998, p 35. See also 'Wik: The aftermath and implications' (1997) 3(2) *UNSW Law Journal Forum*; *The Wik summit papers: 22-24 January 1997*, Cape York Land Council, 1997.
- In March 1999, the UN Committee on the Elimination of Racial Discrimination decided that the amended NTA breaches the UN Convention on the Elimination of All Forms of Racial Discrimination: CERD/C/54/Misc.40/Rev.2. It adhered to that view in subsequent findings: CERD/C/55/Misc.31/Rev 3 (16 August 1999); CERD/C/56/Misc.42/Rev 3 (24 March 2000). The government has rejected these findings. See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native title report 1999*, HREOC, 2000, Ch 2.
- A Parliamentary Committee investigating the issue divided along party lines: *CERD and the Native Title Amendment Act 1998*, Sixteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, June 2000.
- <sup>12</sup> NTA s.223(1).
- <sup>13</sup> NTA Pt 11 ss.201A-203FH.
- <sup>14</sup> Parliamentary Debates, House of Representatives, 16 November 1993, p 2881.
- <sup>15</sup> NTA Pt 2 Div 6.
- <sup>16</sup> *Review of native title representative bodies*, ATSIC, 1995.
- <sup>17</sup> Id, pp vii-viii.
- <sup>18</sup> Id, p viii.
- <sup>19</sup> Id, Ch 3 'Operational Jurisdictions'.
- <sup>20</sup> Id, p xii.
- <sup>21</sup> Ibid.
- <sup>22</sup> Id, pp 16-17.
- <sup>23</sup> Id, p 20.
- <sup>24</sup> Id, pp 20-21.

- <sup>25</sup> Id, p 22.
- <sup>26</sup> NTA s.203A. ‘Eligible body’ is defined as a body corporate registered under the *Aboriginal Councils and Associations Act 1976* (Cth) with objects that enable it to perform the new functions of a representative body, a body corporate that is a pre-existing representative body or a body corporate established under a prescribed law. A ‘registered native title body corporate’ cannot be a representative body: NTA s.201B. Registered native title bodies corporate are prescribed bodies corporate that are registered on the National Native Title Register: s.253. The Minister announced proposed invitation areas; a final decision was to be made once interested parties had the opportunity to comment on the proposal: Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, *Media release*, 19 February 1999.
- <sup>27</sup> NTA ss.203AA. Under the new regime, only one NTRB is to represent each geographical area. This would have a significant effect in some areas. For example, in Western Australia there are regional NTRBs and, in addition, the Aboriginal Legal Service of WA is currently recognised as an NTRB for the state.
- <sup>28</sup> NTA s.203AD(1). In considering these first two criteria, the Minister must take into account whether the body’s organisational structures and administrative processes will operate in a fair manner: s.203AI(1). The criteria for assessing fairness include the opportunities for those the body represents to participate in its processes and be consulted, its decision making procedures, its rules of conduct, its management structures and its procedures for reporting back to Indigenous communities: s.203AI(2).
- <sup>29</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native title report 1999*, HREOC, 1999, Ch 5, pp 101-02.
- <sup>30</sup> Id, pp 131-41, 144-45.
- <sup>31</sup> National Native Title Tribunal, *Annual report 1998-99*, NNTT, 1999, p 19.
- <sup>32</sup> Id, p 47.
- <sup>33</sup> National Native Title Tribunal, *Annual report 1999-2000*, NNTT, 2000, pp 20-22.
- <sup>34</sup> (2000) 175 ALR 706; [2000] FCA 1113.
- <sup>35</sup> Page 94.
- <sup>36</sup> Id, p 96.
- <sup>37</sup> Aboriginal and Torres Strait Islander Commission – Native Title Branch, *Review of native title representative bodies*, March 1999.
- <sup>38</sup> CAEPR, *Issue brief 7: Linking accountability and self-determination in Aboriginal organisations*, November 1996: <online.anu.edu.au/caepr/brief7.htm>.
- <sup>39</sup> Ibid.
- <sup>40</sup> *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth) s.23(3). See Chapter 9 for further discussion of this provision.
- <sup>41</sup> ATSIC, *1998-99 Annual report*, ATSIC, 1999, pp 131-41, 144-45.
- <sup>42</sup> For comment on the process of reorganising the NTRB system, see ATSIC Information Paper, *Implementation of new legislative provisions relating to native title representative bodies*, November 1998; L Strelein, ‘Moving the boundaries: Native title representative bodies and the re-recognition process’ (1999) 4(22) *Indigenous Law Bulletin* 12, pp 12-13.
- <sup>43</sup> NTA Pt 2, Div 6, ss.55-60AA.
- <sup>44</sup> Section 60AA is the sole exception, and applies in relation to the Meriam people whom the High Court found to hold native title in *Mabo (No 2)*. It authorises the Federal Court to make a determination of a PBC under s.56 or s.57, and it requires that such a body be incorporated under the ACA Act.
- <sup>45</sup> NTA s.59.

- <sup>46</sup> SR 1994, No 440 as amended up to SR 1998, No 120.
- <sup>47</sup> (1998) 160 ALR 386. C Mantziaris, 'Problems with prescribed bodies corporate. *Mualgal People v Queensland*' (1999) 4(22) *Indigenous Law Bulletin* 21, pp 21-22.
- <sup>48</sup> ATSIIC, *Annual report 1998-99*, ATSIIC, p 141.
- <sup>49</sup> C Mantziaris and D Martin, *Guide to the design of native title corporations*, NNTT, September 1999.
- <sup>50</sup> C Mantziaris and D Martin, *Native title corporations: A legal and anthropological analysis*, NNTT and Federation Press, 2000. In the *Guide* it is referred to as 'the main volume'.





## Chapter 14 ■ Environmental and Resource Management and Indigenous Australians

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### Introduction

This Chapter gives an overview of selected institutions and strategies of governance, and particularly those concerned with Indigenous Australians' management of country. 'Country' is a term often used when referring to a physical or metaphysical place of origin for members of an Indigenous clan, kin-based group or looser community. It includes the values, places, resources, stories, myths and cultural obligations associated with a geographical area, including land and sea.<sup>1</sup> We argue in the first part of the Chapter that there is a trend towards the devolution and exercise of governance rights and responsibilities to regional and local Indigenous organisations in relation to country. However this trend is not uniform or consistent across jurisdictions. Legal and administrative governance structures and processes also remain fragmented, complex, and diverse.<sup>2</sup>

While many institutions discharge functions and exercise power generally within the domestic Australian legal and political jurisdiction, including federal, state and local governments, there are many other institutions that are appropriately focussed on the needs and rights of Indigenous Australians. We briefly explore the most important of these latter institutions in this Chapter, such as the Aboriginal and Torres Strait Islander Commission (ATSIC), Indigenous corporations (including the Indigenous Land Corporation), land councils, land trusts and native title bodies corporate, Indigenous local governments and councils and regional councils and land management agencies. Other institutions such as advisory committees and councils, and gender-specific organisations are also referred to.

Governance is defined for the purpose of this Chapter as the practices, mechanisms, techniques and social institutions that influence and regulate conduct. Governance embodies fluid, co-operative and collaborative relationships among a range of actors, including governments and their constituent parts (including corporate agencies within governments), multilateral inter-governmental institutions, corporations and business associations, universities, research institutes, individuals, social movements and transnational networks of non-government organisations (NGOs) and Indigenous peoples' organisations (IPOs),<sup>3</sup> the media and the global capital market. In addition to actors, other constituents of governance include formal and informal institutions and organisations, knowledge/power networks and discourses, norms, principles, rules and decision-making procedures and programs and practices. To be governable is also to be a site for the exercise of power by diverse actors.

The second part of the Chapter suggests that there is a clear trend toward the increasing use of agreements and contractual arrangements between legally constituted Indigenous organisations, public sector funding agencies and resource extraction corporations (with the latter least explored) in the governance of Indigenous country. In this part we briefly examine a range of agreements that are currently used for governance purposes. These include agreements relating to land and cultural heritage management; joint management agreements concerned with protected areas, agreements negotiated within Natural Heritage Trust programs and Indigenous Land Use Agreements under the *Native Title Act 1993* (Cth) (NTA). This is not an exhaustive list, but this part of the Chapter does demonstrate that agreements have increasing prominence and support as a governance mechanism. This trend partly reflects the enhanced negotiating power that Indigenous organisations have acquired through the belated recognition of native title and non-discrimination rights in Australian law. By 1999 for example, there were already more than 1,300 agreements of various kinds concluded as a result of native title negotiations.<sup>4</sup> Such agreements may involve miners, pastoralists, Indigenous and industry organisations, governments and other stakeholders. The use of agreements also reflects a broader transformation of public governance that has encouraged non-government organisations to assume corporate form so that they can legitimately contract to perform many tasks with government or private financial or other assistance. Some of these tasks were formerly considered government responsibilities.

Despite the proliferation of institutions and agreements associated with the recognition of native title, the debate that has been active in Queensland particularly, and within the ATSIC, about the interrelationship between legal entities that hold land title and governance bodies, such as community councils and councils of elders,<sup>5</sup> has not yet taken hold nationally. This may partly be because of the slow progress being made by the National Native Title Tribunal, and counterpart state and territory bodies (where established) in achieving final outcomes in relation to native title claims. It may also be because Indigenous leaders and their constituents are not keen to invite fundamental rearrangements of the governance structures that can be a source of power and income, however tied. Only some grants to Indigenous local government bodies are untied. An analysis of available funding sources for Indigenous governance bodies is beyond the scope of this Chapter.

An indication of the range of issues that need to be addressed in local and regional governance of country especially outside urban areas, is provided in the following list. Most of these issues are relevant to ecologically sustainable development:

- land use zoning and implementation; environmental assessment
- tourist accommodation
- animal control and fencing (especially livestock management, feral animal control)
- roadworks and earthmoving

- canteens, stores, markets and shopping complexes
- endangered species management
- transport (land, water and air), traffic control and cycle tracks
- service stations
- parks, gardens and reserves
- signage and mapping
- machinery and equipment
- zoos, arboreta and nurseries
- fire management
- social support groups and childcare services
- control of noxious plants and materials
- flora, fauna and other ecological surveys
- education and training
- land, river, coast, foreshore and reef management (including protected area management)
- campsite development and management
- sport and recreation
- cultural and heritage site management, arts and cultural development
- by-law enforcement and community policing
- contribution to or development of local, regional, and/or catchment-level plans, management policies and cooperation with other agencies
- housing and construction
- public conveniences, sanitation, stormwater drainage and garbage

The next Section gives a brief introduction to the range of predominantly Indigenous-focussed legal entities that have some governance responsibilities in relation to these matters. The following Section then gives an overview of the types of agreements particularly relevant to the management of country that these entities can enter into. Capacity building in natural and cultural resource management and environmental law enforcement is beyond the scope of the Chapter, although it is may be a growth policy area in future.<sup>6</sup>

## **Types of governance entities**

### **The Aboriginal and Torres Strait Islander Commission**

One of the most influential advocacy organisations in recent years in both domestic and international fora, particularly in respect of native title and land rights, human rights and the protection of culture and heritage has been the ATSIC. Other peak advocacy organisations such as land councils and Aboriginal legal services have been relatively less influential, except where they have successfully pursued test-case litigation. But these organisations all insist that Australia has to meet international standards relating to

Indigenous peoples' civil, political, economic, social and cultural rights. These rights are inherent in many current international laws and policies concerned with ecologically sustainable development (ESD) as well as human rights more generally. Such international standards are manifest in instruments such as the Rio Declaration on Environment and Development and Agenda 21,<sup>7</sup> and in conventions such as the International Labor Organisation (ILO) Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (not yet ratified by Australia), the United Nations Convention to Combat Desertification<sup>8</sup> and the Convention on Biological Diversity (CBD). The Ramsar Convention<sup>9</sup> and the World Heritage Convention<sup>10</sup> are also now being implemented in a way that better recognises the contemporary rights and interests of local and Indigenous communities. ATSIC has been an active supporter of the evolving draft United Nations Declaration on the Rights of Indigenous Peoples and contributed effectively to the more than decade-long development of its principles within the United Nations' Working Group on Indigenous Populations. The draft Declaration was examined in detail in Chapter 2.

ATSIC advises the Commonwealth to ensure that Indigenous perspectives are taken into account in government policies and programs, including in key areas of service provision. Such advice may or may not concur with that offered by other government agencies. ATSIC also contributes effectively to public inquiries to convey the needs of Indigenous Australia and distributes significant amounts of Commonwealth funding to promote self-determination and to improve outcomes generally for Indigenous Australians. It also aims to ensure that mainstream government agencies provide adequate funds and pursue sound policy directions, so as to help meet Indigenous priorities.

However, relations between ATSIC and the federal and Northern Territory governments were strained on occasion in the late 1990s in part because of ATSIC's resort to international human rights consultation and discrimination complaints mechanisms to aid in the resolution of domestic Indigenous grievances about mandatory sentencing, native title and Indigenous heritage management. For example, ATSIC sought to have the Kakadu World Heritage area placed on the List of World Heritage in Danger because of concerns about the impact of uranium mining at Jabiluka and the possible desecration of sacred sites such as the Boywek Almudj complex. Although UNESCO's World Heritage Committee decided not to inscribe Kakadu on the in danger list, it did express deep regret that the construction of the mine decline at Jabiluka had not been suspended voluntarily and grave concern about the possible serious impacts to the living cultural values of Kakadu National Park posed by the proposal to mine and mill uranium at Jabiluka. The Committee emphasised the need for confidence and trust building through dialogue, so that the issues relating to the proposal to mine and mill uranium at Jabiluka could be resolved.<sup>11</sup>

ATSIC is currently promoting better regional governance. In September 1999 ATSIC released a discussion paper inviting Indigenous Australians to express their views on structures of governance. Although ATSIC is already substantially regionalised, with 38 Regional Councils being popularly elected by Indigenous people living in each Regional Council area,<sup>12</sup> it sees potential in the creation of more Regional Authorities. Regional Councils currently participate in regional ATSIC policy formulation, planning and decision-making. They also participate in negotiations with other organisations and agencies and elect the ATSIC Board of Commissioners. This elected Board works with an administration of public servants on Indigenous issues. But ATSIC is currently recommending that additional Regional Authorities be established in regions where prescribed criteria can be met. A precedent has been established with the Torres Strait Regional Authority. The Kimberley Region is also seeking the creation of a Regional Authority.<sup>13</sup>

The *ATSIC Report on Greater Regional Autonomy*<sup>14</sup> found that many Indigenous Australians support enhancing the functions of Regional Councils, particularly by empowering them to enter into agreements on a regional or sub-regional basis. Regional agreements are the foundation mechanism that most advocates for the rights of Indigenous Australians currently promote as the best means to improve Indigenous governance nationally. ATSIC suggests that agreements could be entered into between Regional Councils and other Aboriginal and Torres Strait Islander organisations and communities and Commonwealth, state, territory and local governments and their agencies. Such agreements would be primarily concerned with the co-ordinated provision of services to the Indigenous people of the region. They could also inform the development of governance structures, including under the Regional Planning Framework.<sup>15</sup> The Report also recommended that structures of Indigenous self-management and self-governance should be sufficiently flexible to accommodate diversity and allow people to have a real say in how they organise their affairs. The Report's other recommendations included that:

- more flexible funding and accountability arrangements should be developed to enable Councils to channel funds to areas of greater need at local and regional levels;
- Regional Councils should have their capacity to make agreements enhanced through greater use of instruments such as protocols and partnership agreements with other regional bodies, and by being empowered to receive funds from external providers;
- Regional Councils should be enabled to better monitor arrangements for the provision of services to the Indigenous people of the region, and ways in which effectiveness and co-ordination of services might be improved;
- there should be increased monitoring and reporting requirements for state/territory and local governments on funding and delivery of programs to address Indigenous need; and
- alternative employment arrangements should be developed, such as the use of private contractors by Regional Councils.

The Report suggested that the development of regional authorities and autonomy structures should be secondary to consideration of the development of regional agreements. In particular, further work needs to be undertaken to develop criteria that a Regional Authority would be required to meet. Recommendations could then be made to the Minister to obtain the necessary legislative approval for the establishment of a Regional Authority in any given case that met the criteria. The scope for regional agreements under native title and other legislation is discussed further in Chapter 15. The Report was endorsed by the ATSIC Board in June 2000.

### Land councils

As noted above, the reach and depth of governance structures for country is variable around Australia. The unequal experience of, and participation in, environmental governance partly derives from the uneven recognition of property rights, and governance powers, in relation to country. Property rights still provide the main basis for Indigenous Australians' management (or co-management) of land, seas, waters, wildlife and other natural resources and cultural heritage. Australian and overseas experience indicates that Indigenous peoples are in a much stronger negotiating position to strengthen self-governance when they have established ownership or it is reasonably likely that they will succeed in the near future. This partly explains why land councils are one of the relatively long-established governance institutions associated with Indigenous land. Land councils are examined in more detail in Chapters 11 and 12.

In relation to the management of some protected areas under the *Environment Protection and Biodiversity Conservation Act 1993* (Cth) (EPBC Act) land councils also have a limited negotiating function. Boards with a majority Indigenous membership can manage Commonwealth reserves where the appropriate land council and the Minister agree and where the Commonwealth reserve is wholly or partly on Indigenous people's land that is leased to the Federal Director of National Parks.

Land councils have been established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALR (NT) Act): the Northern Land Council, the Central Land Council, the Tiwi Land Council (for Bathurst and Melville Islands) and the Anindilyakwa Land Council (for Groote Eylandt and Bickerton Island). New land councils can also be established under the Act. In 1998 a major review of the ALR (NT) Act was released which recommended that the land council structure in the Northern Territory be reformed. John Reeves QC<sup>16</sup> recommended that a new system of Regional Land Councils (RLCs) and a Northern Territory Aboriginal Council (NTAC) be established. This recommendation has subsequently been strongly criticised and it is unlikely to be agreed to by the federal parliament.<sup>17</sup>

Under the ALR (NT) Act land councils are bodies corporate with perpetual succession and a common seal and have the right to acquire, hold and dispose of real and personal property. They may also sue and be sued in their corporate name. Land Councils under the Act are subject to the *Commonwealth Authorities and Companies Act 1997* which is concerned with reporting and accountability, banking and investment and the conduct of officers.

Under the *Aboriginal Land Rights Act 1983* (NSW) there are local Aboriginal land councils, regional Aboriginal land councils and the state-level New South Wales Aboriginal Land Council. Local and state-level land councils in NSW can hold freehold title to former Aboriginal Trust Lands and to lands successfully claimed under the Act. They can also hold land under perpetual leasehold if the land successfully claimed under the Act is in the Western Division of the state. They can also acquire property by purchase, lease, devise or bequest.

The *Aboriginal Lands Act 1995* (Tas) establishes the Tasmania Aboriginal Land Council. An indicative list of some of other land councils in Australia includes: the North Queensland Land Council (Qld), Quandamooka Land Council (Qld), Woorabinda Land Council (Qld), Goolburri Aboriginal Corporation Land Council (Qld), Cape York Land Council (Qld), Central Queensland Land Council (Qld), Darambul Land Council (Qld), Gubbi Land Council (Qld), Gurang Land Council (Qld) and the Kimberley Land Council (WA).

### **Specialised local and regional land management agencies**

There is a growing number of Aboriginal and Torres Strait Islander local and regional specialised land management agencies. Some are located within or work closely with long-established governance bodies such as land councils. These include the Pitjantjatjara Lands Resources Centre (SA), the Northern Land Council Caring for Country Unit (NT), the Kimberley Land Council's Land and Sea Management Office (WA) and the Balkanu Cape York Development Corporation (Qld). Others less closely associated with land councils include the Kowanyama Land and Natural Resource Management Office (Qld), the Torres Strait Regional Authority and the Torres Strait Coordinating Council (Qld). More localised management agencies include the Dhimurru Land Management Aboriginal Corporation at Nhulunbuy (NT), Bawinanga Aboriginal Corporation at Maningrida (NT), Jawoyn at Katherine (NT), Quandamooka Land and Sea Management Agency at Dunwich on Stradbroke Island (Qld), Giringun at Cardwell (Qld), Manth Thayan at Aurukun (Qld) and Bama Wabu at Cairns (Qld).<sup>18</sup> An exploration of the aims and performance of each of these agencies is beyond the scope of this Chapter. But by way of example, the operations of the Kowanyama Land and Natural Resource Management Office, those of the Dhimurru Land Management Aboriginal Corporation and Indigenous governance strategies in Torres Strait will be elaborated briefly.

*Kowanyama Land and Natural Resource Management Office*

The Kowanyama community has become a respected major stakeholder in the management of the west coast of Cape York Peninsula in Queensland. Its environmental governance has evolved subtly and over a relatively long period of time. It is evolving towards self-governance, unmediated by government agencies or models of co-management. The Kowanyama Office has management responsibilities over about 2000 square kilometres of the Mitchell River delta and catchment, which includes Deed of Grant in Trust land and a former pastoral station. It also manages the increasing competition within and outside the Indigenous community for natural resources (including fishing, grazing, mining, conservation and tourism). The Kowanyama Office gets its directives from an active Community Council and a Council of Elders, comprising elders from the three main clan groups in the area. The Office is run on the following principles: community development, intergenerational sustainability, recognition of native title rights, capacity building, caution towards externally driven large-scale projects and seeking external expertise only in accordance with community requirements. The Office has achieved substantial respect and credibility for its pro-active professionalism and innovation in negotiations with external agencies and resource users such as the commercial fishing industry and tourism interests.<sup>19</sup>

Kowanyama community has followed an incremental strategy to achieve joint management of fisheries resources in the Mitchell River delta. Until the mid-1980s the community had no say in the management of the fisheries. They were concerned that illegal fishing practices would reduce subsistence fish stocks, while licensed commercial fishermen were concerned about alleged Aboriginal interference with nets. The community sought to achieve recognition as a legitimate resource user by government and the fishing industry by:

- controlling tourism and recreational fishing on its land through establishing camping areas and charging for camping, appointing a community ranger, enacting by-laws and conducting camping surveys aimed at reducing the impact of recreational activity;
- making helicopter patrols, paid for with camping fees, to record illegal fishing. This provided data for Kowanyama's discussions with the fishing industry; and
- participating in meetings between the fishing industry, government and other interested parties.

Through these activities Kowanyama developed relationships with government and industry bodies. These led to the negotiation of management agreements designed to protect subsistence and commercial fisheries stocks in waters adjacent to Kowanyama lands. With the authorities' concurrence, the community closed sections of the river by purchasing commercial fishing licenses which it had no intention of using. The Community has also been successful in the enforcement of these policies.



To deal with the problems of over-fishing, the community employed a community ranger. The Head Community Ranger, John Clarke, went to Sydney in 1993 to train in fishery law enforcement. He has now been appointed a fully authorised fishing inspector who has the power to search and seize vehicles, boats or aircraft that he suspects of breaking state fishery or community by-laws. This enforcement function has been a very important dimension in the success of the Office.

Kowanyama community is also developing a Water Catchment Management Plan for the Mitchell River basin, as the integrity of the ecosystem affects land and natural and cultural resources in the delta. Its ideas have been inspired by contact with Native American groups in Washington state. Co-operative planning, incorporating all interest groups, is integral to Kowanyama's plans. A Mitchell River Watershed Management Conference with other landowners and interest groups including representatives of government departments and the fishing industry established a representative working group to plan for the sustainable management of the catchment and its resources. This working group, on which Kowanyama has two representatives, is assessing the condition of the watershed and is working on the development of an integrated management strategy.

#### *Dhimurru Land Management Aboriginal Corporation*

Another of the most successful Indigenous regional agencies specialising in natural and cultural resource management is the Dhimurru Land Management Aboriginal Corporation based at Nhulunbuy in north-east Arnhem Land (NT). Dhimurru employed five full-time Yolngu rangers and two full-time non-Indigenous administrators in 1998.<sup>20</sup> Its land and sea management activities include sustainable and culturally appropriate development of commercial operations, control of access to Yolgnu estates, education and interpretation activities, environmental assessment and monitoring, visitor management, endangered species and habitat protection, land rehabilitation and protection, turtle management and feral animal and noxious weed control. Dhimurru works well with a range of federal and Northern Territory government agencies that provide technical and capacity-building assistance and the Miwatj ATSIC Regional Council and Northern Land Council, amongst others. Dhimurru's success has been attributed to factors such as its commitment to community-based but collaborative management with a wide range of agencies, incremental development strategies, equitable employment terms and conditions for Yolgnu staff, emphasis on reconciling traditional ecological knowledge with non-Indigenous science and commitment to customary and statutory land title as the basis for resource management rather than lease-back or rental arrangements with conservation agencies.<sup>21</sup>

### *Torres Strait Regional Authority and Island Coordinating Council*

Several Torres Strait Islanders contributed to the sea change in the Australian common law, which recognised native title to land, by persevering with what has become known as the *Mabo (No 2)* case. Local aspirations are still unmet regarding the recognition of various incidents of native title in the sea, including the right to regulate access to customary marine territories and for native title holders to make management decisions concerning commercial take. But in the Torres Strait there is legislative recognition of the rights and interests of Torres Strait Islanders in the management of fisheries, the marine environment in Torres Strait and the maintenance of traditional and community rights. This recognition is inherent in the *Torres Strait Fisheries Act 1984* (Cth) and the Torres Strait Treaty entered into between the Australian and Papua New Guinea governments. Some traditional fisheries in the Torres Strait Protected Zone, including dugong and turtle and the commercial trochus and pearl shell fisheries, are also reserved for Torres Strait Islanders and for prescribed traditional inhabitants of Papua New Guinea.<sup>22</sup> But there are continuing calls for the negotiation of enhanced rights for Torres Strait Islanders under these arrangements. This is manifest in the so-called ‘fishing war’ that is being waged in the Australian courts.<sup>23</sup> There are other challenges for sustainable development in the Torres Strait including the Chevron Gas Pipeline and the Ok Tedi Mine on the Fly River, but an examination of these is beyond the scope of this Chapter.

One of the most progressive aspects of governance in the Torres Strait is the provision for the representation of Torres Strait Islanders on various advisory bodies under the fisheries management arrangements established jointly by the Commonwealth and Queensland governments for the administration of the Treaty. These include the Torres Strait Fisheries Management Committee, the Torres Strait Fisheries Scientific Advisory Committee, the Torres Strait Fishing Industry, the Islanders’ Consultative Committee and the Torres Strait lobster, mackerel, pearl shell, and prawn licensing groups. Nevertheless, this is a far cry from the advances that many Indigenous groups have secured in other jurisdictions such as Canada, the United States and New Zealand. In particular, Torres Strait Islanders aim to secure greater participation in, or returns from, the highly lucrative prawn fishing industry and more say in commercial fisheries management generally.

Torres Strait Islanders have also been particularly active in pursuing community-based management strategies for their region. In 1999 the Torres Strait Regional Authority and the Island Co-ordinating Council adopted a Marine Strategy for the diverse residents of the Torres Strait. As part of that Strategy, a Community Management Plan is being developed to ensure that communities are involved in the monitoring of dugongs and turtles and in implementing a management program to arrest the worrying decline in the populations of these species in the region.<sup>24</sup> Whilst these are positive developments, Torres Strait Islanders wish to control other aspects of the governance of the region and continue to insist on the promotion of greater autonomy for Torres Strait Islanders. Currently this

is a useful bargaining strategy which has increased funds flowing to the region. It has also delivered more independence for Islanders through the creation of the Torres Strait Regional Authority, but many Islanders believe that much remains to be done.

**Land holding bodies (for instance land trusts and native title or land rights bodies corporate)**

Prior to the creation of prescribed bodies corporate under the NTA and the *Aboriginal Councils and Associations Act 1976* (Cth) (ACA Act), land trusts and trustees of land established under state and territory land rights and other land title legislation were the most important entities that held title to land on behalf of Indigenous communities. Land Trusts usually have perpetual succession and a common seal. They may sue and be sued in their corporate name and are capable of acquiring and holding real and personal property and do other acts and things that bodies corporate may usually lawfully do.

The extent of Land Trusts' powers and functions varies around the country. In New South Wales the Aboriginal Lands Trust under the *Aborigines Act 1969* had its role taken over by local land councils under the *Aboriginal Land Rights Act 1983* (NSW). In the Northern Territory, Aboriginal Land Trusts established by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) hold title to land for the benefit of Aboriginal people entitled by Aboriginal tradition to the use or occupation of that land. But the Trusts have to exercise their functions in relation to land in accordance with directions from the relevant Aboriginal Land Council after the Council has consulted with and has the consent of the traditional Aboriginal owners of that land and after consulting with any other Aboriginal community or group that may be affected by the proposed action.

In South Australia, under the *Aboriginal Lands Trust Act 1966*,<sup>25</sup> the Aboriginal Lands Trust can hold title to land, and deal with this land for the benefit of Aboriginal communities. In practice it leases its land to Aboriginal communities who occupy and manage the land, with the Trust spending much of its time on lease management. The South Australian Aboriginal Lands Trust is involved in various enterprise development schemes and projects. It employs a handful of full-time staff who work on land management operations and training. Some of the issues the Trust has to address include invasive plants, feral animals, water and soil erosion and ecosystem restoration through activities such as intensive tree-planting.

Also in South Australia, the *Pitjantjatjara Land Rights Act 1981* (SA) constitutes a body corporate called the Anangu Pitjantjatjara (representing the Pitjantjatjara peoples who comprise the Ngaanajara, Pitjantjatjara and Yungkutatjara groups). Its executive board comprises 11 elected members and the administration of its affairs is governed by a Constitution. The Act specifies the functions of the Anangu Pitjantjatjara in broad terms. They include: to ascertain the wishes and opinions of traditional owners in relation to the management, use and control of the lands and to seek, where practicable, to give effect

to those wishes and opinions; to protect the interests of traditional owners in relation to the management, use and control of the lands; to negotiate with persons desiring to use, occupy or gain access to any part of the lands; and to administer land vested in Anangu Pitjantjatjara. The powers of the Anangu Pitjantjatjara are also broadly described in the Act. They include the power: to sue and be sued, to grant a lease or licence for prescribed terms, to enter into contracts, to appoint and dismiss staff, to receive and disburse moneys, to obtain advice from persons who are expert in matters with which Anangu Pitjantjatjara is concerned, to establish offices, to make and to take such other steps necessary for the performance of its functions. The Act also provides that the Anangu Pitjantjatjara must have regard to the interests of, and consult in accordance with the Act, with, traditional owners having a particular interest in land in relation to which any proposal relating to the administration, development or use of any portion of the lands, may be authorised.

The Anangu Pitjantjatjara currently has limited power to make council by-laws, including those pertaining to gambling and the possession and use of alcohol and other substances.. A by-law made under section 43 must be submitted to the Governor for confirmation and is subject to disallowance by parliament. The Governor may make regulations regulating, restricting or prohibiting the depasturing of stock upon any specified part of the lands; regulating, restricting or prohibiting any activity on the lands that may have adverse environmental consequences; prescribing other matters contemplated by the Act, or necessary or expedient for the purposes of the Act, but only on the recommendation of the Anangu Pitjantjatjara body corporate. It does not appear that any regulations currently exist which broaden the powers of Anangu Pitjantjatjara to make by-laws. The High Court upheld the *Pitjantjatjara Land Rights Act 1981* as a special measure within the meaning of section 8(1) of the *Racial Discrimination Act 1975* (Cth) in *Gerhardy v Brown* (1985) 57 ALR 472.

Under the *Maralinga Tjarutja Land Rights Act 1984* (SA) the Maralinga Tjarutja body corporate is established. The Maralinga Tjarutja Council, which comprises the leaders of the traditional owners, have various powers under the *Maralinga Tjarutja Land Rights Act 1984*, but they do not have the power to make by-laws. However the Governor may make regulations applicable to their lands. Under section 44 of the Act, the Governor may make regulations in relation to a range of matters, including a model form of agreement for exploratory activities, the depasturing of stock, regulating or prohibiting any activity that may have adverse environmental consequences, relating to the supply or consumption of alcohol and prescribing penalties (not exceeding two thousand dollars) for breach of, or non-compliance with, any regulation. Subsection 44(2) details requirements for consultation with the Maralinga Tjarutja, since the making a regulation requires their prior recommendation.

Some other Indigenous community councils or corporations in South Australia may benefit from the exercise of powers and functions, and the provision of grants and loans

under the *Outback Areas Community Development Trust Act 1978* if the community is not within a mainstream local government body area. Others may form mainstream local governments, discussed below.

In Victoria, fee simple title to the Framlingham reserve is vested in the Framlingham Aboriginal Trust under the *Aboriginal Lands Act 1970* (Vic). Fee simple title to the Lake Tyers reserve is vested in the Lake Tyers Aboriginal Trust. The Framlingham Aboriginal Trust and the Lake Tyers Aboriginal Trust can buy, sell, lease, exchange and dispose of land so long as this is done with the unanimous resolution of the Trust.<sup>26</sup>

In Western Australia, under the *Aboriginal Affairs Planning Authority Act 1972*, the Aboriginal Lands Trust can hold title to and manage land transferred to it. The Trust comprises persons of Aboriginal descent.

In Queensland, Aboriginal and Torres Strait Islander councils can be formed under various Acts, including the *Community Services (Aborigines) Act 1984* (Qld) and the *Community Services (Torres Strait) Act 1984* (Qld). These Councils are trustees of Deed of Grant in Trust (DOGIT) lands for DOGIT communities. Trustees of Aboriginal land can also be appointed under the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld).

Following the passage of the NTA and the making of the Native Title (Prescribed Bodies Corporate) Regulations 1999 (NT (PBC) Regulations), Prescribed bodies corporate (PBCs) (which when registered become Registered Native Title Bodies Corporate (RNTBCs)) are the legal entities that hold title to native title land on behalf of its traditional owners or to act as their agents. Under the Act, applications can be made by eligible bodies to be the representative body to represent those with native title interests for an area and to discharge claim-related functions under Division 2, Part 11 of the NTA. PBCs and RNTBCs under the NTA can enter into agreements, represent native title holders' interests, enter into Indigenous land use agreements and undertake other activities depending on whether they are agents or trustees.<sup>27</sup> Only organisations that are incorporated under the ACA Act can become PBCs. PBCs can act as trustees or agents for native title holders, and whichever role is preferred by those native title holders will largely determine the functions and powers that the PBC can perform and exercise. Once a PBC is incorporated it has a range of attributes such as separate legal personality, limited liability, an ability to enter into contracts, perpetual succession, representative capacity and formalised decision-making procedures.

## Corporations

Corporate structures of governance have become increasingly important over the last decade for Indigenous Australians, particularly where Indigenous groups are required to be incorporated to engage in legal transactions and to expend public money. There are diverse means by which Indigenous bodies can be incorporated under federal or state or

territory legislation. Incorporation can occur under the federal *Corporations Law*, the ACA Act, under federal, state or territory legislation for the incorporation of clubs and societies or the administration of land rights, state or territory local government or community services legislation, or state or territory co-operatives legislation.<sup>28</sup>

One of the most significant national-level corporations is the Indigenous Land Corporation (ILC), established in 1995. The ILC is the first national statutory organisation whose functions relate solely to Indigenous land acquisition, ownership and management. The ILC is a corporation with a seven-member board appointed by the Minister for Aboriginal and Torres Strait Islander Affairs. It assists Indigenous peoples to purchase and to manage Indigenous-held land. Its operations are resourced through the Indigenous Land Fund which is provided for in the same legislation. The ILC's land acquisition functions and the legislative provisions for Indigenous corporations are detailed in Chapter 12.

An example of an Indigenous corporation being established under the federal Corporations Law to hold title to property acquired by the ILC and then transferred to traditional owners, is BALLOTT Land Enterprises Ltd. Traditional owners in the Brewarrina area (the Ngemba) formed the company primarily to hold title to the former Cowga pastoral station, which was to be established as an economic and cultural base for Aboriginal people in the Murdi Paaki/Orana Region and to provide a drug and alcohol rehabilitation service. The company is incorporated under the Corporations Law as a company limited by guarantee. Its other objectives include providing 'economic, educational, environmental, social, sporting and cultural benefits to the Members of the Company'. Cultural activities such as fishing, hunting, painting, tool making and other types of artwork are intended to be part of the rehabilitation program offered at the station.<sup>29</sup>

Other examples of economically, socially and politically active Indigenous corporations include: the Kirrae Whurrong Aboriginal Corporation and the Kerrup-Jmara Elders Aboriginal Corporation in Victoria; the Foundation for Aboriginal and Islander Research Action (FAIRA) Aboriginal Corporation, the Biloela Aboriginal and Torres Strait Islander Corporation, and the Goolburri Aboriginal Corporation Land Council in Queensland; and the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Aboriginal Corporation in South Australia.

### **Local governments, community councils and regional coordination councils**

In recent years there has been significantly increased international and domestic academic and policy attention paid to the role of local government in natural and cultural resource management planning and delivery, and there is scope for enhancing these. This has partly arisen as a result of the implementation of the international Local Agenda 21

(Chapter 28 of Agenda 21), but it also derives from the diversification of governance bodies internationally as a result of self-determination developments for Indigenous peoples.

Academics and policy makers have been particularly interested in the capacity of local governments or equivalent bodies to use incentive-based instruments to conserve native remnant vegetation and wildlife, to enter into binding management agreements and conservation covenants with local land-holders and to address perverse rating systems so that the biodiversity values of uncleared land are properly assessed.<sup>30</sup> Indigenous participants in Environment Australia's Indigenous Protected Area Program have also recommended that federal, state and territory legislation be assessed to ascertain the extent to which it permits local governance bodies to enforce environmental regulations, the aim being to then develop policies and practices accordingly. The capacity and willingness of regulatory agencies to delegate enforcement powers in a range of resource management bodies, and to train and accredit wardens, rangers and inspectors, may be a growth area of policy-making in coming years, particularly if progressed with the aid of the Australian Local Government Association (ALGA) or other organisations promoting reconciliation.

The ALGA was an active supporter of reconciliation initiatives, particularly negotiated agreements, involving Indigenous communities and local governments.. The ALGA was a signatory to the 1992 National Commitment to Improved Outcomes in the Delivery of Services for Aboriginal Peoples and Torres Strait Islanders along with other tiers of government. The ALGA has published guides, with the support of ATSIC and the NNTT, to assist local governments to negotiate such agreements.<sup>31</sup> But ongoing difficult issues such as rates liabilities and service delivery, particularly for Indigenous landowners, still hamper relations between councils and Indigenous communities in many jurisdictions.<sup>32</sup>

Local governments, community councils and regional coordination councils have variable memberships, functions, powers and capacities in relation to the management of Aboriginal and Torres Strait Islander peoples' country. Local governance bodies established for Indigenous communities in the Northern Territory and in Queensland arguably best meet the needs of those communities. There are also special councils created under legislation, such as the Wreck Bay Aboriginal Community Council, under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth). In the Northern Territory, local councils can be incorporated under the *Local Government Act* (NT), the *Associations Incorporation Act* (NT) or the ACA Act. Under the *Local Government Act* (NT) an Aboriginal community may apply to the Local Government Minister to establish a community government council for the area occupied by that community. The Minister may negotiate a Community Government Scheme allowing for a community government council to be elected from the community and for the performance of a range of agreed functions by a community government council. The community government council has the power to make by-laws.

In Queensland, DOGIT councils under land rights legislation, and other councils recognised under the Community Services Acts, perform a range of mainstream local government type functions. There may be change if traditional owners use native title procedures to reclaim customary title to territories and seek new governance structures and functions. Another type of local government structure is evident in the Aurukun and Mornington Island Shire Councils in Queensland, established under the *Local Government (Aboriginal Lands) Act 1978*. A Council established under one of these Acts has various planning, development, by-law making and enforcement powers. Under the *Nature Conservation Act 1992* (Qld) local council powers must be exercised consistent with a management or conservation plan for land declared under the Act to be a 'protected area', 'critical habitat' or 'area of major interest'.

There are also significant anomalies and overlaps between incorporated bodies and other governance structures and representative bodies such as ATSIC. For example in Queensland, the Aboriginal Coordinating Council (ACC) comprises the Chair and a Councilor from each of the fourteen DOGIT communities in Queensland. Although established under state legislation it is also supposed to advise the federal minister for Aboriginal and Torres Strait Islander Affairs about matters of concern to ACC communities, yet this function is largely performed by ATSIC.<sup>33</sup> The ACC's counterpart body, the Island Coordinating Council (ICC), was also the ATSIC Regional Council for the Torres Strait prior to the formation of the Torres Strait Regional Authority, but the ACC did not have that Regional Council status. Following a Legislation Review Committee Report in 1991, the Queensland government established an Alternative Governing Structures Program which attempts to improve local governance in selected trial communities. It may also be that, with the transformation occurring because of the restoration of native title, alternative governing structures evolve that provide a range of the structures and institutions.

There is potential in South Australia for new local governments to be formed in predominantly Indigenous communities. Under the *Local Government Act 1999* (SA) the Governor of South Australia can, by proclamation, constitute a new local council and define its boundaries and area or do various other things affecting existing councils (under section 9), but only when acting on the recommendation of the Minister, the Boundary Adjustment Facilitation Panel or in accordance with instructions from both houses of the South Australian parliament (subsection 11(1)). The Act describes the functions and objectives of Councils in a broad way. Under section 7, Council functions include local and regional level planning and service provision; including measures to protect its area from natural and other hazards and to mitigate the effects of such hazards; to manage, develop, protect, restore, enhance and conserve the environment in an ecologically sustainable manner; to improve amenity and to manage, improve and develop resources available to the council.



Several divisions of the Act elaborate the powers that Councils may exercise. These include the power to enter into contracts, undertake strategic management planning, develop management plans for community lands, manage roadworks, implement anti-pollution measures, and exercise specific by-law making and other powers relating to the control and use of land and roads. Councils' general regulatory powers include the power to make by-laws and orders. It is important to note, however, that there are various restrictions on the by-laws that Councils may make, including that they not be inconsistent with any laws of South Australia, retrospective, impose a tax etc.

In Western Australia there is a state-wide conventional local government structure, but there is also special legislation enabling a limited range of by-laws to be enforced by Aboriginal communities on community lands (the *Aboriginal Communities Act 1979*). This legislation has been criticised for unduly restricting self-governance.<sup>34</sup> Indigenous communities can be a significant presence in mainstream local government bodies in Western Australia. For example, in one local government election in the Shire of Wiluna, five Ngangganawili Aboriginal people and two non-Aboriginal people from the shire of Wiluna were elected to the Shire Council.

The argument is clearly available, notwithstanding an increasing participation rate for Indigenous Australians within mainstream local government bodies, that some current Acts do not sufficiently recognise traditional structures and processes. Possible alternatives for Indigenous communities such as bi-cameral councils with one house of elders, or a cluster structure with tiered powers and functions at the community, council and coordinating council level, have been proposed, but not yet agreed to.<sup>35</sup> Whether the discrepancies between the regulatory powers of Indigenous forms of local council and mainstream local government bodies is consistent with the *Racial Discrimination Act 1975* (Cth) is also an issue that warrants further inquiry.

### **Advisory committees and councils**

Most jurisdictions establish numerous advisory committees, councils and other bodies to enable Indigenous Australians to present their views on issues of concern to them. At the federal level for example, the EPBC Act provides for an Indigenous Advisory Committee to advise the Minister on the operation of the Act, taking into account the significance of Indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity, and for Indigenous representation on the Biological Diversity Advisory Committee. These are potentially very important opportunities for Indigenous advisers because, under the EPBC Act, Indigenous Australians' interests should be addressed when bilateral agreements, management plans, recovery plans, wildlife conservation plans or threat abatement plans are being developed, and when permits are issued to Indigenous Australians permitting them to take listed species. Indigenous interests will necessarily have to be taken into account during assessments of

traditional fisheries in the Torres Strait under the EPBC Act, by virtue of its interaction with the *Torres Strait Fisheries Act 1984*.

Other advisory bodies within the Environment and Heritage portfolio include the: Uluru Kata Tjuta National Park Tourism Consultative Committee, Wet Tropics Community Consultative Committee, Willandra Lakes Region World Heritage Property Community Management Council, Wet Tropics Management Authority Board, Great Barrier Reef Marine Park Authority and Consultative Committee, Indigenous Protected Areas Advisory Group, Biological Diversity Advisory Council, Fraser Island Community Advice Committee, Kakadu National Park Research Advisory Committee, National Rangeland Strategy Working Group and the Shark Bay Community Consultative Committee.<sup>36</sup> The range of advisory committees at state and territory level is also extensive, but a detailed examination is beyond the scope of this Chapter.

### **Gender-specific governance**

A relatively new form of governance entity that is likely to become more common is a gender-specific Indigenous organisation. In particular, women's organisations are becoming increasingly incorporated and active. This seems to have occurred most obviously in South Australia where the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Aboriginal Corporation promotes Aboriginal women's participation from communities including the South East, Riverland, Ceduna, Adelaide and Port Pearce communities. An Aboriginal Women's Advocacy Group that includes Indigenous public servants has also been established in South Australia. Other women's groups include the Tugulawa Aboriginal Women's Group in Queensland and the Jarndu Yawuru Women's Group and Kimberley Land Council Women's Executive in Western Australia. Within the New South Wales National Parks and Wildlife Service a new position of Indigenous Women's Heritage Coordinator is expected to be filled in 2001.

### **Examples of the types of governance agreements**

This part of the Chapter explores various types of agreement that the bodies identified in the first part may enter into concerning the management of country. It suggests that legislative provisions in most jurisdictions concerned with conservation covenants and easements, natural and cultural heritage agreements and other agreements under conservation legislation have been relatively underused to date.

### **Agreements under the federal legislative process**

The federal government's major consolidation and reform of its environmental legislation, the EPBC Act, includes various provisions that recognise the important contributions that Indigenous Australians can make to the conservation of biological diversity and sustainable development. Some of these features of the Act were negotiated

during the passage of the EPBC Bill through the federal parliament. This demonstrates the importance of negotiating outcomes to enhance governance for Indigenous Australians. The objects of the EPBC Act include the promotion of a cooperative approach to the conservation and ecologically sustainable use of Australia's biodiversity, involving governments, the community, landholders and Indigenous peoples. Other objects include recognising the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity and the promotion of the use of Indigenous knowledge with the involvement of, and in co-operation with, the owners of such knowledge. The Act also provides for:

- the creation of Boards with majority Indigenous membership, to manage Commonwealth reserves. These provisions apply where the appropriate land council and the Minister agree, and the Commonwealth reserve is wholly or partly on Indigenous people's land that is leased to the Director of National Parks. The Act also includes special rules for the management of Commonwealth reserves in the Northern Territory and Jervis Bay Territory, including the jointly-managed Kakadu, Uluru and Booderee National Parks. These rules create special procedures for involving Indigenous people in the planning process for the management of these reserves;
- management principles that apply to each protected area and Commonwealth reserve, in the EPBC Regulations 2000. Some of these recognise diverse rights and interests either expressly or by implication. For example, 'Australian IUCN reserve management principles' are prescribed in the EPBC Regulations. Reg 10.04 provides that the IUCN reserve management principles for each IUCN category are the general administrative principles set out in Part 1 of Schedule 8. These include: community participation, effective and adaptive management, the precautionary principle, minimum impact, ecologically sustainable use, transparency of decision-making and joint management. The joint management principle provides, in relation to a reserve or zone which is wholly or partly owned by Aboriginal people, that 'continuing traditional use of the reserve or zone by resident Indigenous people, including the protection and maintenance of cultural heritage, should be recognised'. Part 2 of Schedule 8 provides further principles that are applicable in each category of protected area. The Australian World Heritage management principles in Schedule 5 provide that management should make special provision if appropriate for the involvement in managing the property of people who have a particular interest in the property and who may be affected by the management of the property. Many of these principles have the potential to contribute to the sound management of natural and/or cultural values of importance to Indigenous Australians as well as the wider community. Some could also be updated to better reflect evolving management approaches promoted through international law and policy instruments;
- continuing traditional and non-commercial hunting, food-gathering or ceremonial and religious activities by Indigenous persons in Commonwealth reserves. Such traditional usage rights are protected under several Commonwealth Acts such as the

NTA, *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*. However, such activities may be restricted by regulations applicable in a Commonwealth reserve if such regulations have been made to conserve biodiversity and are expressed to affect the traditional use of the area by Indigenous persons;

- Indigenous Australians' interests to be addressed when bilateral agreements, management plans, recovery plans, wildlife conservation plans or threat abatement plans are being developed, and when permits are issued to Indigenous Australians permitting them to take listed species;
- the continuing operation of the NTA and the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); and
- the Minister to enter into conservation agreements for the protection and conservation of biodiversity in Australia. The Act includes provisions concerned with conservation agreements between the Minister and specified Indigenous persons for the protection of biodiversity on land in relation to which Indigenous Australians have usage rights. The Minister is required to take into account key provisions of the Convention on Biological Diversity concerned with the rights and interests of Indigenous and local communities. Conservation agreements are legally binding and can bind successors in title to affected interests although conservation agreements can also be varied.

The EPBC Act also provides that regulations may control access to biological resources in Commonwealth areas. In 1999 the Commonwealth convened an inquiry into issues associated with access to biological resources which would, among other things, address issues of importance to Indigenous communities, such as the equitable sharing of benefits arising from the co-operative use of Indigenous Australians' knowledge. The recommendations of the inquiry were under consideration in 2000.<sup>37</sup>

The EPBC Regulations already provide that the Director of National Parks and a land council may agree to conditions under which Indigenous Australians may engage in certain activities in Commonwealth reserves, which are then not offences under the Act. These activities include entry into restricted or prohibited areas, the taking or keeping of a member of a native species, the use of a means of transport where that is prohibited, the taking of a dog into a Commonwealth reserve, the taking of firewood; and the carrying out of a cultural activity.

### **Diverse agreements for collaborative management**

Joint management or co-management agreements over protected areas are the longest-established type of land management agreement that has involved Indigenous landowners and governments. Natural heritage trust funding agreements are being used increasingly by Indigenous communities. Indigenous Land Use Agreements under the

NTA are a recent development, although land use agreements have existed under some land rights Acts for many years. An indicative list of the range of non-mining-related agreements that are currently available under federal, state and territory legislation includes the following:

**Table 1: Non-Mining Related Agreements Available under Legislation**

<b>Type of agreement</b>	<b>Relevant legislation</b>
<b>Commonwealth</b>	
Indigenous Land Use Agreement	<i>Native Title Act 1993</i>
Conservation agreement, joint management arrangements lease and/or joint management or agreement	<i>Environment Protection and Biodiversity Conservation Act 1999</i> <i>Aboriginal Land Rights (NT) Act 1976,</i> <i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986,</i> <i>Great Barrier Reef Marine Park Act 1975 (not lease)</i>
Natural Heritage Trust funding agreement	<i>Natural Heritage Trust Act 1997 (Cth)</i>
Cultural heritage agreement in Victoria	<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>
<b>Northern Territory</b>	
Agreement between Conservation Commission of the Northern Territory and private landowners	<i>Territory Parks and Wildlife Conservation Act</i>
Registrable conservation covenant	<i>Territory Parks and Wildlife Conservation Act</i>
Agreement between the Commission and an Aboriginal Land Council for the protection and conservation of wildlife and natural features of Aboriginal land	<i>Territory Parks and Wildlife Conservation Act</i>
Agreement for the protection of places on private land and objects	<i>Heritage Conservation Act</i>
<b>Queensland</b>	
Registrable conservation agreement (for natural and cultural resources)	<i>Nature Conservation Act 1992</i>
Conservation covenant	<i>Nature Conservation Act 1992</i>
Agreement for the creation of protected areas on private land (including fauna refuges)	<i>Nature Conservation Act 1992</i>

Lease agreement and management plans for National Park (Aboriginal) land or National Park (Torres Strait Islander) land	<i>Nature Conservation Act 1992;</i> <i>Aboriginal Land Act 1991;</i> <i>Torres Strait Islander Land Act 1991</i>
Agreement to protect designated landscape area, parties can include local government, landowners and Minister	<i>Nature Conservation Act 1992</i>
Agreement to protect registered heritage place (primarily for non-Indigenous areas but can be mixed)	<i>Queensland Heritage Act 1992</i>
Agreement made by a local government with the owner of a designated area of Landscapes Queensland or of an item of the Queensland Estate for preservation of the item	<i>Cultural Record (Landscapes Queensland and Queensland Estate Act) 1987</i>
Cooperative and joint management agreement	<i>Wet Tropics World Heritage Protection and Management Act 1993</i>
Agreement about the content of by-laws for some lands, and functions and powers of authorised officers in relation to Indigenous land	<i>Local Government (Aboriginal Lands) Act 1978; Community Services (Aborigines) Act 1984 (Qld); Community Services (Torres Strait) Act 1984 (Qld)</i>
Property plan	<i>Soil Conservation Act 1986</i>
<b>Western Australia</b>	
Registrable land management agreement for conservation purposes and memoranda of understanding	<i>Conservation and Land Management Act 1984</i>
Registrable heritage covenants	<i>Aboriginal Heritage Act 1972</i>
Heritage agreement	<i>Heritage of Western Australia Act 1990</i>
Agreement between landowners and local governments	<i>Town Planning and Development Act 1928</i>
Conservation covenants or agreement in relation to land	<i>Soil and Land Conservation Act 1945</i>
<b>New South Wales</b>	
Agreement to create revocable wildlife refuges and wildlife management areas	<i>National Parks and Wildlife Act 1974</i>
Conservation agreement	<i>National Parks and Wildlife Act 1974;</i> <i>Wilderness Act 1987</i>

Registrable property agreement to conserve native vegetation	<i>Native Vegetation Conservation Act 1997</i>
Joint management agreement concerned with threatened species	<i>Threatened Species Conservation Act 1995</i>
Hunting, fishing or gathering agreement over private land	<i>Aboriginal Land Rights Act 1983</i>
Wilderness protection agreement	<i>Wilderness Act 1987</i>
<b>South Australia</b>	
Agreement to declaration of plant or animal sanctuary	<i>National Parks and Wildlife Act 1972</i>
Consent to proclamation of wilderness protection area or wilderness protection zone	<i>Wilderness Protection Act 1992</i>
Heritage agreement	<i>Heritage Act 1993</i> <i>Native Vegetation Act 1991</i>
Aboriginal heritage agreement	<i>Aboriginal Heritage Act 1988</i>
Native title land acquisition agreement	<i>Land Acquisition Act 1969</i>
Registrable heritage agreement	<i>Native Vegetation Act 1991</i>
Land management agreement	<i>Development Act 1993</i>
Conservation, rehabilitation or financial assistance agreement	<i>Soil Conservation and Land Care Act 1989</i>
<b>Tasmania</b>	
Conservation covenants	<i>Public Land Administration of Forests Act 1991</i>
Agreed management plans	<i>Aboriginal Lands Act 1995</i>
Planning authority agreement with landowner(s) in area covered by planning scheme or special planning order	<i>Land Use Planning and Approvals Act 1993</i>
Forestry dedication covenant	<i>Private Forests Act 1994</i>
Consent to creation of sanctuary or nature reserve on private land	<i>National Parks and Wildlife Conservation Act 1970</i>
Public authority management agreement	<i>Threatened Species Protection Act 1995</i>
Environmental agreement	<i>Environmental Management and Pollution Control Act 1994</i>

## Victoria

Land management co-operative agreement	<i>Conservation, Forests and Lands Act 1987</i>
Declaration following landowner application of wildlife management cooperative area or wildlife sanctuary	<i>Wildlife Act 1975</i>
Conservation covenant	<i>Conservation Trust Act 1972</i>
Public authority management agreement	<i>Flora and Fauna Guarantee Act 1988</i>
Heritage covenant or agreement and consents about archaeological relics	<i>Heritage Act 1995</i>
Registrable agreement/covenant between responsible authority and landowner	<i>Planning and Environment Act 1987</i>

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## Joint management or co-management agreements

The joint management of protected areas is the most significant and sustained example of cross-cultural resource management in Australia to date, although increasingly Indigenous Australians are asserting rights of self-management and close control over the provision of external assistance. The concept of Indigenous ownership and joint management of national parks in Australia emerged as a response to the increasing legal recognition of Aboriginal rights to traditional lands. The *Aboriginal Land Rights Act 1976* (Cth) was an important impetus for Aboriginal land claims, although other states have provided (usually weaker mechanisms) for recognising Indigenous Australians' interests in their customary territories. Historically, the need for joint management arrangements arose when existing national parks or conservation reserves were claimed under these various laws.

A variety of different models for joint management are currently in operation. Apart from Commonwealth legislation for the Northern Territory, at the state and territory level only New South Wales and Queensland have legislated specifically to address the joint management of mainstream national parks, but there is sufficient scope under existing legislation in other jurisdictions to enable joint management of diverse types of land tenure and protected status to be established, given the evolving context of native title recognition and land transfers by the Indigenous Land Corporation. There are differences in the legislative provisions which establish their joint management and differing lease provisions. Most importantly, from the perspective of practical Indigenous governance, each plan of management is distinct, with differing levels of resourcing and day to day management arrangements.

In 1981 Gurig National Park became the first Australian national park to be jointly managed by Aboriginal traditional owners and a government conservation agency. Smyth



and Sultan argue that the various models of joint management that have evolved over the last 18 years reflect changing political and legal realities and changing community expectations. They summarise the distinguishing features of these models:

**The 'Gurig Model':** Aboriginal ownership; Aboriginal majority on board of management; no lease-back to the government agency; and annual fee to traditional owners to use their land as a national park. An example is Gurig National Park.

**The 'Uluru Model':** Aboriginal ownership; Aboriginal majority on board of management; lease-back to government agency for long period; and negotiated financial payments to traditional owners. Examples include: Uluru-Kata Tjuta, Kakadu, Nitmiluk, Booderee and Mootawingee National Parks.

**The 'Queensland Model':** Aboriginal ownership; no guarantee of Aboriginal majority on board of management; lease-back to government agency in perpetuity; and no statutory financial payment. This model is currently under review by the Queensland government.

**The 'Witjira Model':** ownership of land remains with the government; lease of the national park to traditional owners; and an Aboriginal majority on board of management. An example is Witjira National Park.

Jointly managed national parks provide good examples of the capacity of Indigenous Australians to participate in land-use policy and management in an intensive and effective way. It has also led to advances in cross-cultural education, training and the development of new institutions such as joint management boards. The initial stage of joint management usually focuses on the practical and urgent goals of Aboriginal and Torres Strait Islander people to achieve an equal decision-making role in how the land is controlled and managed. It allows Aboriginal owners to utilise useful resources provided by the national parks services (NPS) and conservation agencies, without allowing the NPS to become the controlling authority. NPSs have also been able to access new financial resources and knowledge by involving and employing Indigenous people in park activities.

Lease agreements (between the Aboriginal owners and a Commonwealth or state or territory NPS and conservation agencies) are particularly important in negotiating the terms of management. The lease is crucial for working out the details of the relationship between the joint managers and for acknowledging changed circumstances when the terms are re-negotiated.

Joint management can help create ongoing institutions which play a positive role in educating non-Indigenous Australians. It can also provide an opportunity for Aborigines to remain on their land and to exercise political and cultural power over decisions affecting their lives and land. Aboriginal people have demonstrated that they can manage both the political and environmental implications of the joint management process effectively.

It is clear that they can and ought to be increasingly involved in regional, state and national decisions about environmental and resource management in a far more significant way.

Joint management institutions and processes in a couple of federal protected areas will be used to illustrate the joint management process, including Kakadu National Park and the incremental moves towards co-management by the Great Barrier Reef Marine Park Authority and some coastal Indigenous communities in Queensland. This latter example has been paradigm-shifting, since few marine protected areas in the world have implemented co-management with Indigenous peoples and other stakeholders. The availability of Natural Heritage Trust funding for the Indigenous Protected Areas Program is increasing the number of joint management agreements that are being negotiated around Australia, as well as facilitating the development of innovative management arrangements by Indigenous landowners directly, as discussed below.

### *Kakadu National Park*

Kakadu National Park was established under the former *National Parks and Wildlife Conservation Act 1975* (Cth) (NPWCA). The Act granted the Director of the Australian National Parks and Wildlife Service decision-making power to administer, manage and control Commonwealth national parks. The Act was amended in 1978 to allow for the leasing of Aboriginal-owned land to the Director, which opened the way for joint management of Stage One of the park. Subsequent leases were negotiated with the Jabiluka and Gunlom Aboriginal Land Trusts. The Act has since been repealed and replaced by the EPBC Act.

The ongoing co-management arrangements require and define a plan of management for the park. They include a Board of Management, first established in 1989. The Board implements the Park's Plan of Management. The membership was comprised of 14 persons in July 2000: ten adult Aboriginal people nominated by traditional owners, the Director of National Parks, and the General Manager (Northern Operations) of the ANPWS, an employee of the Northern Territory Tourist Commission and a person prominent in nature conservation are members. Persons occupying the latter two positions must be acceptable to the traditional owners of the park.

The lease includes specific provisions which require that the park should be managed to promote the interests of Aborigines, to protect their heritage, to promote Aboriginal employment and to utilise the traditional skills of Aborigines in park management. Very important advances have occurred here and at Uluru-Kata Tjuta National Park in the incorporation of Aboriginal knowledge and practices into park planning and management, notwithstanding the ongoing conflict concerning the mine. The development of cross-cultural training programmes for conservation workers in these parks is also significant.

*Commonwealth funding agreements: National Heritage Trust Funding*

A common form of agreement currently used between governments, between governments and industry or between government and non-government organisations, including Indigenous organisations, is a financial assistance agreement under the *Natural Heritage Trust of Australia Act 1997* (Cth). The Natural Heritage Trust (NHT) was established to support the conservation, sustainable use and repair of Australia's 'natural capital infrastructure'. The NHT has a total funding budget of about \$1.5 billion over six years with an additional \$300 million invested in perpetuity. About \$1.35 billion generated from the partial sale of Telstra was placed in the NHT Reserve.

Funds can be drawn from the NHT for projects within the National Vegetation Initiative; the Murray-Darling 2001 Project; the National Land and Water Resources Audit; the National Reserve System; the Coasts and Clean Seas Initiative; environmental protection, sustainable agriculture and natural resources (as defined in the NHT Act); incidental or ancillary purposes; and an accounting transfer purpose (as defined in the NHT Act). These programs affect vast areas of land in Australia, including the most poorly managed and most degraded land affected by overgrazing, soil erosion and salination.

In response to criticisms that Indigenous Australians could not access the NHT equitably, the federal government provided \$4 million over four years to 2001-2 for the Indigenous Land Management Facilitators Project. This project aims to assist Indigenous communities to access NHT programs and to support sustainable land management practices on Aboriginal land or land over which there are Aboriginal interests. However, two consultants' evaluations in the mid-term review of the NHT still found that Aboriginal landowners were accessing relatively less funds than might have been allocated given the extent of the land that they owned or managed. Table 2 gives an indication of the types of projects that Aboriginal and Torres Strait Islander organisations receive through the Community Grants and Endangered Species Programs which distributed funds to community organisations for the first time in 1997-8, just by way of example of the funding agreements currently entered into.<sup>38</sup>

**Table 2: Sample Projects Funded under the Endangered Species Program 1999/2000 Involving Members of the Aboriginal Community**

Project Title	Project Aims	Project Coordinator
<p>Operation Warru: Collaborative Management to Save Threatened Desert Fauna  Endangered Species Program, Natural Heritage Trust</p>	<p>To reduce the risk of the local extinction of Black-footed Rock-wallaby (warru in Ngaayatjarra language) and malleefowl (ngarnamarra in Ngaayatjarra language) within the Central Ranges Biogeographic Region of Western Australia and to produce training and employment opportunities for Aboriginal people in threatened species management.</p>	<p>Ngaayatjarra Land Council</p>
<p>Locating and Managing Populations of Egernia slateri</p>	<p>To re-examine a 350 ha area near Alice Springs to locate populations of this arid zone skink. Once populations have been located, the project will then assess and commence implementation of required habitat management near Alice Springs. Only one population is known to survive in the NT. The project involves cooperation between key stakeholders, including an Airports corporation, NT PWC, Aboriginal and conservation groups.</p>	<p>Arid Lands Environment Centre (ALEC)</p>

Project Title	Project Aims	Project Coordinator
Dhimurru Marine Turtle Monitoring and Recovery	To survey by helicopter and tag for population monitoring purposes three vulnerable species of turtles stranded in marine debris on beaches of Cape Arnhem due to seasonal conditions between April and July. Around 20-30 turtles are likely to be located. Dead animals are to be analysed to monitor the high levels of heavy metals present in the Gulf of Carpentaria and assess the implication for the health of communities using turtles as a food source and to aid analysis of marine debris.	Dhimurru Land Management Aboriginal Corporation
Habitat Restoration for the Yellow-tailed Black Cockatoos	To transfer conservation techniques successfully used for a related species on Kangaroo Island to conserve a threatened population of the Yellow-tailed Black Cockatoo on the Eyre Peninsula. It is a flagship project likely to inspire other conservation initiatives in the Eyre Peninsula region and is a positive model in a region where broadscale vegetation clearance has taken place. The project involves a welcome partnership between an Aboriginal community and the state conservation agency building on their Recovery Team.	The Port Lincoln Aboriginal Community Council (PLACC)

Project Title	Project Aims	Project Coordinator
Habitat Restoration for the Yellow-tailed Black Cockatoos (cont)	The Cockatoo appears to be a distinct sub-species with only around 20 remaining individuals. Conservation works will be focussed on a critical 696 ha property owned by the proponents. Actions include erecting nest boxes, controlling feral competitors for nesting hollows, planting of food plants (including the nationally rare <i>Acacia gillii</i> ), weed control, and fencing to reduce grazing and deter illegal timber harvesting, predator control and reintroduction of Malleefowl.	
Propagation Unit for Nationally Threatened Plant Species	To establish a micropropagation unit to provide plants for recovery programs from a nursery in Warnambool. The initial species list of threatened orchids includes three endangered species and a vulnerable species. Currently, propagation of these species using micro-propagation techniques requires material to be sent to the Kings Park Botanic Gardens in Perth.	Worn Gundidj Aboriginal Co-operative Pty Ltd trading as Ngalawoort Plant Nursery

Project Title	Project Aims	Project Coordinator
Winda-Mara Community Spot- tailed Quoll and Koala Management	To manage 1,500 ha of Aboriginal land in western Victoria, habitat for a nationally significant vegetation community to conserve the vulnerable Spot Tailed Quoll. Activities include determining the numbers and distribution of Quolls and Koalas on the property, controlling foxes, and implementing Koala sterilisation if required. Sign posting and managing visitor access are also proposed. The project represents a partnership between the Aboriginal Corporation, Deakin University and state government conservation agency. The project location contains a nationally significant ecological community, the Stony-Rise Manna Gum Woodland.	Wida-Mara Aboriginal Corporation

Project Title	Project Aims	Project Coordinator
Collaborative Management of Western Australian Threatened Desert Fauna	<p>To ascertain the status and reduce feral predation on the vulnerable Black-Footed Rock Wallaby (Warru) and Malleefowl (Ngarnamarra), and other threatened species, over 20,000 ha of the Central Ranges.</p> <p>Actions include survey using traditional and scientific methods, assessing feral animal populations and instituting an extensive program, reinstating mosaic burning, training local community members, and managing eco-tourist access. A small number of Wallaby populations survive and the Malleefowl is only known from recent reports of the Aboriginal owners. The proponent and CALM will trial an integrated cat and fox baiting program as part of the project. If Malleefowl are not located they will be reintroduced with CALM's help. The project is seen as an extension of another NHT project to establish an Indigenous Protected Area on these lands. Virtually no survey or conservation work has occurred in the area, which is among the most remote places in Australia.</p> <p>This project involves collaboration between WA CALM and Aboriginal organisations.</p>	Ngaanyatjarra Council

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Source: Environment Australia 1999.



### *Indigenous Protected Areas*

Arguably the most important NHT program for Indigenous communities is its funding of co-operative joint management arrangements for protected areas and the Indigenous Protected Areas program. Between 1997 and 1999 about \$2 million was committed from the NHT to fund projects in the IPAP. The two main elements of the IPAP are:

- Indigenous Protected Areas (IPA)—the establishment and management of protected areas on Indigenous owned estates, and
- cooperative management—the establishment of cooperative (joint) management arrangements over government owned protected areas between Indigenous groups and the relevant government nature conservation agencies.

The IPAP is an important component of the National Reserve System Program (NRSP) which is currently administered by the Indigenous Policy and Coordination Section within Environment Australia, in cooperation with state and territory agencies. The NRSP aims for the better conservation of Australia's biodiversity by establishing and maintaining a comprehensive and representative national system of protected areas. The *Interim Biogeographic Regionalisation of Australia* and the *Interim Scientific Guidelines for Establishing the National Reserve System* provide the national framework for planning the development of the reserve system. Since many types of ecosystems occur on lands and waters owned and/or occupied by Indigenous Australians, incentives have been developed to encourage Indigenous Australians to consider including their lands within the NRS.

Some of the most important achievements of the IPAP include:

- the declaration of IPAs at
- Deen Maar in Victoria,
- Nantawarrina, Yalata, Watarru, and Walalkara in South Australia, and
- Oyster Cove, Risdon Cove, and Preminghana in Tasmania,
- the Mutawintji National Park joint management agreement in New South Wales, and
- effective on-ground cooperation in the development of joint management arrangements in the Central Ranges in Western Australia and South Australia.

The Indigenous Protected Areas (IPAs) program works with Commonwealth, state and territory agencies to develop partnerships and agreements with Aboriginal and Torres Strait Islander organisations for the co-operative management of their land and/or sea as a protected area. It also promotes and integrates Aboriginal and Torres Strait Island peoples' ecological and cultural knowledge in the management of IPAs. The IPA Program describes the conservation agreements it establishes for funded areas as stewardship agreements. These are based on a collaborative and co-operative partnership between government conservation agencies, who provide funding and advice to landholders, and

landholders who agree to manage their lands primarily for the conservation of biodiversity and the recognition and protection of cultural values. Under the IPA program, Environment Australia proposes that stewardship agreements be established for periods of 3 to 5 years, with joint proposals from governments and Indigenous organisations being considered most favourably. Current IPAs are shown in Table 3.

An Indigenous Protected Areas Advisory Group (IPAAG) advises Environment Australia about the administration of the IPA program. Some issues that the IPAAG currently wishes to have explored include: options for self-declaration of IPAs by Indigenous landowners, formal recognition of IPAs as a category of protected area in relevant legislation, the delegation of enforcement powers to Indigenous land managers, ongoing resourcing for IPAs, and training and capacity building for IPA managers.

**Table 3: Progress with establishing Indigenous Protected Areas**

Please note: Project funding may or may not have been continued.

<b>Project Name</b>	<b>Organisation(s)</b>	<b>S/T</b>	<b>Date project started</b>	<b>Scope of Works</b>
Wattleridge IPA	Banbai Land Enterprises Limited	NSW	Feb 2000	Property has exceptional floristic diversity and endemic rare and threatened plant species. Declaration of IPA to be investigated. Plan of Management to be developed including possible sustainable ecotourism.
Mootwingee National Park Joint Management	Mutawintji Local Aboriginal Land Council	NSW	Feb 1998	To finalise negotiation of a joint management agreement and lease for Mootwingee National Park.

<b>Project Name</b>	<b>Organisation(s)</b>	<b>S/T</b>	<b>Date project started</b>	<b>Scope of Works</b>
Purta Co-operative Management	Parks and Wildlife Commission of the Northern Territory (PWCNT)	NT	June 1998	NT government and Central Land Council agreed to have Purta scheduled as Aboriginal land and managed for conservation by a committee with majority of traditional owners. The Purta Land Trust may manage the area as an IPA in accord with an agreed management program, but negotiations and project support have been delayed by disagreements amongst parties. Aspirations of traditional owners are unclear.
Amorrduk Joint Management Agreement – West Arnhemland NT	Parks and Wildlife Commission of the Northern Territory and Gummulkban and Ulbul/Bunj Clans	NT	June 1998	Develop cooperative joint management under NT legislation for the conservation and management of the clan areas in Western Arnhem Land, including ranger training and on ground works. Progress has been slow because of disagreement between Northern Land Council, NT government and PWCNT, particularly over occupation of Murgarella settlement.

<b>Project Name</b>	<b>Organisation(s)</b>	<b>S/T</b>	<b>Date project started</b>	<b>Scope of Works</b>
Dhimurru Recreation Areas and Adjacent Seas – Toward Stewardship	Dhimurru Land Management Aboriginal Corporation (DLMAC)	NT	Feb 1998	IPA to be declared following development of Plan of Management for recreation area and appropriate management structure. Scope of works agreed. A working group representing traditional owners and Indigenous organisations, and federal and NT government agencies established to develop management agreement.
Guanaba Environmental Protection of Traditional Lands	Ngarang Wal Land Council	QLD	May 1999	Investigate establishment of IPA over Guanaba and develop draft Plan of Management; begin on ground management including weed control and revegetation; liaise with relevant stakeholders to develop support for the project.

<b>Project Name</b>	<b>Organisation(s)</b>	<b>S/T</b>	<b>Date project started</b>	<b>Scope of Works</b>
Establishing two IPAs on Islands in the Torres Strait	Torres Strait Island Coordinating Council in Cooperation with The Torres Strait Regional Authority	QLD	May 1998	To declare two islands in the Torres Strait as IPAs and implement essential on ground protection and management in accordance with a stewardship agreement and Plan of Management for long term conservation of natural values.
Goolburri Co-operative Management	Goolburri Aboriginal Land Corp	QLD	Approve but not comm. Dec 1999	Develop a regional strategic approach for the development of co-management of protected areas in SW Queensland to avoid case-by-case approach incl. for parks subject to native title claims.
Pulu and Deliverance IPAs	Island Coordinating Council (ICC)	QLD	May 1998	ICC to develop an agreed process of declaring and managing IPA in consultation with traditional owners. Natural and cultural values of the proposed IPA to be identified for the Plan of Management. Steering committee to be estab-

<b>Project Name</b>	<b>Organisation(s)</b>	<b>S/T</b>	<b>Date project started</b>	<b>Scope of Works</b>
Lake Moondarra Axe Quarry Qld	Qld Environment Protection Agency (EPA)	QLD	June 1999	Key stakeholders to identify appropriate tenure and conservation agreement model for Lake Moondarra Axe Quarry located on a Mount Isa Mines pastoral lease near Mt Isa. Working Group to be established with stakeholder representation. Qld EPA to work with several Aboriginal groups to identify cultural values and develop Plan of Management.
Nantawarrina IPA	South Australian Aboriginal Lands Trust (SAALT) and Nepabunna Community Council Inc	SA	April 1998	IPA declared August 98. Adnyamathanha members of Nepabunna community manage Nantawarrina in accord with 3-year Plan of Management. Works include land management activities, development and publication of brochure, restoration of living facilities including sanitation, homestead and camping sites, track restoration, water bore to be refurbished.

<b>Project Name</b>	<b>Organisation(s)</b>	<b>S/T</b>	<b>Date project started</b>	<b>Scope of Works</b>
AP (Anangu Pitjantjatjara Lands IPA Project (Stage One))	Anangu Pitjantjatjara	SA	June 1998	Investigate IPA establishment and identify areas suitable for inclusion in IPA, possibly Walalkara and Watarru. Plan of Managements to be developed. Activities to maintain biological values to be undertaken, incl. feral animal control; community workshops on biodiversity conservation, investigation of possible tourism activities.
Yalata IPA	Yalata Community Incorporated	SA	May 1998	IPA declared October 1999. Plan of Management to be revised with new permit and entry fee structure. Access points and coastal campsite to be developed. Other works include establishment of seed bank for revegetation, and remedial action for natural and cultural resources. Business plan to be developed incl. options for business tourism support (whale watching, biodiversity, dreaming tracks).

<b>Project Name</b>	<b>Organisation(s)</b>	<b>S/T</b>	<b>Date project started</b>	<b>Scope of Works</b>
Cooperative Management of Witjira National Park	Dept of Environment, Heritage and Aboriginal Affairs, and Irrwanyere Aboriginal Corporation	SA	June 1998	Develop business plan for park; review Plan of Management and stakeholder links and communication structures, responsibilities, protocols etc. Develop human resource management policies and programmes.
Finnis Springs IPA	SA Aboriginal Lands Trust	SA	June 1999	Consultations continuing about possible declaration of IPA over Finnis Springs near south end of Lake Eyre. Policies and strategies for managing and conserving Finnis Springs Station and Mound Spring complexes to be developed. Urgent remedial work to be undertaken. Draft Plan of Management to be developed.



<b>Project Name</b>	<b>Organisation(s)</b>	<b>S/T</b>	<b>Date project started</b>	<b>Scope of Works</b>
Risdon and Oyster Cove IPAs	Tasmanian Aboriginal Centre	TAS	May 1998	IPAs at Risdon Cove and Oyster Cove declared on 12 June 1999. Work programs under the Plans of Management are underway incl. control of ferals and weeds, revegetation, interpretation, maintenance of visitor facilities, visitor management.
Tasmanian Land Management	Tasmanian Aboriginal Centre	TAS	May 1998	To investigate potential IPAs and develop draft Plan of Managements for Chapell, Badger and Clarke Islands in Furneaux Group. Works include feral and weed control, revegetation, and biological surveys.

<b>Project Name</b>	<b>Organisation(s)</b>	<b>S/T</b>	<b>Date project started</b>	<b>Scope of Works</b>
Preminghana IPA, north west coast of Tasmania	Tasmanian Aboriginal Land Council	TAS	July 1998	IPA declared on 5 June 1999. Has significant natural and cultural features. Existing Plan of Management was amended to reflect IUCN PA category VI. Work programs under the Plans of Management are underway incl. control of ferals and weeds, revegetation, interpretation, maintenance of visitor facilities, visitor management. Options and mechanisms are being developed to protect natural and cultural values.
Cooperative Management on the West Coast of Tasmania esp. Arthur Pieman Protected Area	Tasmanian State National Parks and Wildlife Service	Tas	June 1998	Remedial works to be undertaken, and interpretive program to be developed. Joint management processes to be developed. Visitor impact to be better managed, Aboriginal cultural interpretation activities to be undertaken.

<b>Project Name</b>	<b>Organisation(s)</b>	<b>S/T</b>	<b>Date project started</b>	<b>Scope of Works</b>
Deen Maar (Yambuk) Indigenous Protected Area.	Framlingham Aboriginal Trust	VIC	January 1996 Second stage April 1998	IPA declared July 1999, IUCN Category VI. The feasibility of establishing a wind farm is being investigated. Wetland restoration underway. Ferals and weed control program in place. Orange Bellied Parrot population is significant on the IPA and revegetation and fencing of feeding areas may encourage some increase in the parrot population. Eco-tourism to be development, plant communities to be mapped.
Wilson's Promontory Co-operative Management	Mirimbiak Nations Aboriginal Corp.	VIC	Marc 1999	Cooperative management arrangements beneficial to Indigenous Victorians and local community to be developed after Indigenous groups' aspirations and options identified. Cooperative relationships with land management agencies to be developed, policy development to be progressed.

<b>Project Name</b>	<b>Organisation(s)</b>	<b>S/T</b>	<b>Date project started</b>	<b>Scope of Works</b>
Dampier Peninsula Co-operative Agreement	Kimberley Land Council	WA	June 1998	Record and assess natural and cultural values of Dampier Peninsula Conservation Park; investigate forms of joint management, negotiate management, employment and training opportunities and structural preparations for joint management.
Joint management of D'Entrecasteaux and Shannon National Parks	Manjimup Aboriginal Corp and WA CALM	WA	Jan. 1998	Develop a joint management agreement which identifies Nyungar values and interests for D'Entrecasteaux and Shannon National Parks, including Aboriginal Park Council; conduct relevant research, develop draft, final and implementation documents.

<b>Project Name</b>	<b>Organisation(s)</b>	<b>S/T</b>	<b>Date project started</b>	<b>Scope of Works</b>
Manguri Protected Areas Project	Manguri Aboriginal Corporation Inc.	WA	June 1998	Protected Area Reference Group comprising Noongar kinship representatives to be established. Protocols and working relationships with government agencies to be developed. Potential IPAs in region to be identified. Draft Plans of Management to be developed.
Paraku (Lake Gregory) Indigenous Protected Area	Kimberley Land Council	WA	June 1998	Consultations to be held with local stakeholders; prepare draft Plan of Management, consult with traditional owners about protecting natural and cultural values.
Gibson Desert Cooperative Management and Central Ranges Indigenous Protected Area	Ngaanyatjarra Council and Department of Conservation and Land Management WA (CALM)	WA	June 1998	Investigate establishment of IPA and establish co-management of the Gibson Desert Nature Reserve with WA CALM and Ngaanyatjarra Council. Identify natural and cultural values of the region. Draft Plan of Management to be developed focusing on biodiversity conservation. Consultations and negotiations are continuing.

<b>Project Name</b>	<b>Organisation(s)</b>	<b>S/T</b>	<b>Date project started</b>	<b>Scope of Works</b>
Avon Wheatbelt	Narrogin Aboriginal Corp	WA	Approved but contract not signed	Develop example of cultural and conservation best practice management applicable elsewhere. Joint steering committee to be established, co-management of protected areas in wheatbelt to be negotiated.
Paraku (Lake Gregory) IPA	Kimberley Land Council	WA	June 1999	Proposed IPA includes Paraku (Lake Gregory) wetlands, currently held as pastoral lease by WA Aboriginal Land Trust. Draft Plan of Management has been developed, discussions continuing including re possible Ramsar declaration.

Table developed from information supplied by the Indigenous Policy Section, Biodiversity Group Environment Australia, March 2000.

Indigenous organisations which have participated in the national workshops on IPAs<sup>39</sup> identify many benefits in the IPA Program. These include:

- Indigenous landowners being able to participate in preliminary and ongoing discussions about aspirations and responsibilities for IPA areas, and the formalisation or modification of existing conservation management arrangements;
- the potential availability of additional support from government agencies for the development of management strategies for natural and cultural resources on Indigenous lands, including cultural site management and interpretation; habitat restoration and maintenance including revegetation, fencing, control of invasive plants and feral animals; and sustainable business ventures including ecotourism;
- recognition of Indigenous Australians' rights to ownership and their traditional and other knowledge; and
- assistance with the resolution of native title claims over areas with high conservation value.

Indigenous organisations' main concerns are that long term funding is not secure, that the conservation dollar is spread very thinly and that progress with IPA proposals is partly dependent on political will. Larger amounts of ongoing and long-term funding for contract employment for both natural and cultural resource management, rather than the current approach of short term grants, is seen as one way of improving the program. This might avoid some of the difficulties experienced when Indigenous organisations and government agencies are in conflict over other issues. The former Contract Employment Program for Aboriginals in Natural and Cultural Resource Management (CEPANCRM) is often raised as a viable alternative approach. In addition, additional technical and financial assistance and training in the development of grant applications is seen by some as necessary in order that sustainable industries might be developed on IPAs. Grass-roots awareness of the IPA program, without raising unreal expectations given the reality of finite budgets, is also seen as desirable.

Some government conservation agencies support IPAs because they increase the amount of land in the protected area system, improve relationships between government agencies and Indigenous organisations, increase revenue from ecotourism and provide for assistance towards resolving native title claims. Their main concerns include funding demands, ensuring that Indigenous organisations are committed to the IPA concept, loss of power in relation to protected area management and uncertainty about the implications of self-declaration.

Other assessments of the IPA program note that because the program aims to contribute to the NRS, national priorities and scientific assessments of the conservation value of the area, for which funding is sought necessarily have an important influence. Such assessments may not correspond with Indigenous perceptions of the value of funding the proposed IPA. It is also difficult for the IPA program to assess the sustainability of some

of the proposed land uses of proposed IPAs in the absence of long-term sustainability studies.

While there has been some concern regarding the way that IPAs have been interpreted by some governmental agencies, there is a general support from diverse stakeholders for the expansion and continuation of such an initiative.

### **Indigenous Land Use Agreements under the Native Title Act 1993**

The NTA has introduced a framework that is designed to facilitate the negotiation of Indigenous land use agreements (ILUAs). These are explored in greater depth in Chapter 15. They are referred to in this Chapter along with other types of agreements concerning country because of their very significant potential to contribute to ecologically sustainable development for Indigenous communities.

Under the ILUA provisions of the NTA, potential native title claimants can enter into ILUAs concerning territories under claim. Many of these agreements are likely to address issues relevant to biodiversity conservation and sustainable use, including the management of terrestrial and marine protected areas, waterways, rangelands and pastoral holdings, and species which may be the subject of native title rights and interests. Canadian, United States and New Zealand precedents concerning common law and treaty-based rights suggest that biodiversity issues are likely to grow in importance legally, politically and economically within agreements concerning native or customary title to territories. In 2000 the Federal Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund established a public inquiry into the operation and effectiveness of ILUAs.

An ILUA registered with the Native Title Tribunal has effect as a contract when registered, except that all native title holders are bound as if they were parties to the agreement. The process for registration varies for each of the three types of ILUAs and is specified in the NTA. All future acts authorised by the registered ILUA are valid to the extent that they affect native title. These negotiated agreements will allow for much greater certainty and elaboration of environmental and natural resource governance issues. ILUAs can potentially involve parties other than native title holders and *may* provide an affordable and flexible mechanism for their involvement in environmental and natural resource governance.

Some types of ILUAs can involve:

- native title holders who have had their native title determined, registered and are represented by a body corporate,
- registered native title claimants,
- native title claimants who have not gone through the registration test but have lodged a claim,



- native title claimants who have failed the registration test, and
- Indigenous persons without any claim application lodged, but who nevertheless assert that they hold native title under common law.<sup>40</sup>

In summary, the three types of ILUA, under the legislation are:

- Body Corporate Agreements which can be made for areas where native title has been proved to exist,
- Area Agreements which are made where there are no registered native title bodies corporate for the whole area and which may deal with a range of future acts and access to non-exclusive agricultural and pastoral leases, and
- Alternative Procedure Agreements which may be made where there are no registered native title bodies corporate for the whole area and which may provide the framework for making other agreements about matters relating to native title rights and interests.<sup>41</sup>

Specifically, an ILUA may deal with the following matters in relation to an area:

- ancillary agreements to the native title claim mediation process,
- negotiated native title settlements, including frameworks for the determination of native title or compensation applications,
- alternative future act agreements,
- land access, use and management agreements,
- wildlife and natural resource agreements,
- co-management or partnership agreements,
- regionally-based agreements specifying relationships with key private or public sector parties, and
- frameworks and alternative procedures for making other agreements.

Chapter 15 explores the more detailed legal and practical aspects of ILUAs and provides some examples which include the Tumut-Brungle Area Agreement.

## Conclusions

Indigenous peoples' representative and public sector organisations and institutions have effectively lobbied, litigated, and networked to ensure the development of laws and policies here and overseas to effect significant legal and political change in relation to the governance of country. The importance of diverse Indigenous organisations has been highlighted. This Chapter has also suggested that there is significant scope for future initiatives particularly concerned with the creation of Regional Authorities within ATSIC, strengthening local and community governments' involvement in conservation partnerships and in Indigenous Land Use Agreements. The interrelationship between local governance structures, regional councils and authorities, and the appropriateness of the functions allocated and powers exercisable by these bodies warrants further analysis, discussion and reform.

It remains to be seen whether joint management arrangements are formalised in protected areas by state and territory governments. Experience to date with joint management and NHT funding agreements suggests that they can accommodate the interests of diverse cultures within the constraints imposed by the goal of ecologically sustainable development. One concern is that any Indigenous involvement in mainstream decision-making processes may lead to reliance on and acceptance of the dominant culture and to a growing dependency on non-Indigenous professionals. The reality, however, is that a trade-off usually takes place during diverse and complex cultural interactions, often promoted by economic incentives and pressures generated by tourism and resource development.

An important question which remains to be resolved is whether or not Indigenous Australians are currently receiving adequate economic benefits from tourism and resource development and/or exploitation in various industries, including eco-tourism. Similarly, are the governance powers available to Indigenous governance bodies equivalent and not racially discriminatory when compared with those exercisable by non-Indigenous bodies? The capacity and willingness of the commercial fisheries sector to recognise the rights of interests of Indigenous Australians is a particularly pressing social justice issue which is being addressed in an insufficiently empathetic way.<sup>42</sup>

Joint management institutionalises co-operation in both the long-term planning for protected areas and in the day to day business of management, including the mediation of disputes and the regulation of tourism. It recognises the importance of cultural and biological diversity, and is a method of utilising the traditional knowledge of Indigenous cultures for the benefit of all humanity. At the same time, it recognises fundamental human rights. It allows new composite categories of national parks to emerge that can cater for continued habitation in national park areas but also help in averting a double tragedy of loss of unique ecosystems and unique cultures. Joint management harnesses the energies and enthusiasm of parties at a grass roots level by providing a participatory framework and encouraging access to decision-making. This kind of joint management philosophy can however come into conflict with the institutionalised and hierarchical nature of government and the national parks systems. There is also an emerging view that lease-back arrangements are unnecessary for joint management. There is no reason why there cannot be Indigenous ownership and a simpler management contract negotiated which is appropriate for each case.

## Notes

<sup>1</sup> D Smyth and R Sultan, *Indigenous land, water and biodiversity management issues: A scoping study for WWF Australia: Final report*, unpub, Smyth and Bahrtd Consultants, 1999, p 7.

<sup>2</sup> For an overview of the institutional arrangements but not specifically relating to management of country, see W Sanders, 'Local governments and Indigenous Australians: Developments and dilemmas in contrasting circumstances' (1996) 31(2) *Australian Journal of Political Science* 153.

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- <sup>3</sup> The use and meaning of the terms Indigenous issues, populations, communities, and people[s] is not yet agreed in international law, with existing instruments and UN agencies using different terms. Indigenous peoples is the writers' preferred term.
- <sup>4</sup> G Neate, 'Future directions in native title' paper presented at seminar organised by the Centre for Energy and Resources Law, University of Melbourne, 17 March 1999.
- <sup>5</sup> B Miller, *Options for the future: Local government and native title on Queensland Aboriginal communities*, Aboriginal Co-ordinating Council, 1994.
- <sup>6</sup> Environment Australia 2000, 'Options for the devolution of law enforcement powers to Indigenous protected area managers: Draft discussion paper' Indigenous Policy and Co-ordination Section, Environment Australia, May 2000.
- <sup>7</sup> *Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992)*, UN Doc A/CONF151/26 (Vol. I-III), 12 August 1992, Annex II.
- <sup>8</sup> United Nations Convention to Combat Desertification (UNCCD) (Paris, 1994), accessed 5 January 2001 from <http://www.unccd.int/>.
- <sup>9</sup> Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar, Iran, 2 February 1971): Resolution VII.8 on local communities and Indigenous people, and guidelines for establishing and strengthening local communities and Indigenous people's participation in the management of wetlands, 7th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar Iran, 1971), San José, Costa Rica, 10-18 May 1999, [http://ramsar.org/key\\_res\\_vii.08e.htm](http://ramsar.org/key_res_vii.08e.htm), accessed 27 December 2000.
- <sup>10</sup> Convention for the Protection of the World Cultural and Natural Heritage (Paris, 23 November 1972). The concept of 'cultural landscape' was included in revised Operational Guidelines for the Implementation of the World Heritage Convention at the sixteenth session of the World Heritage Committee in December 1992. The concept allows for the inclusion of cultural landscapes on the World Heritage List, thereby recognising the interactions of people with their natural/cultural environment in listed sites.
- <sup>11</sup> UNESCO, World Heritage News, 'In depth debate on Kakadu National Park in extraordinary session of UNESCO's World Heritage Committee', 12 July 1999, <http://www.unesco.org/whc/news/news0712.htm>, accessed 27 December 2000. See also: United Nations Educational, Scientific and Cultural Organization, Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee, Third extraordinary session, Paris, 12 July 1999, *Report of the rapporteur*, UN Doc WHC-99/CONF.205/5Rev Paris, 19 November 1999, <http://www.unesco.org/whc/nwhc/pages/doc/main.htm>, accessed 27 December 2000.
- <sup>12</sup> For an assessment of participation and representation in ATSIC elections over the decade 1990-2000 see W Sanders, J Taylor and K Ross, 'Commentary: Participation and representation in ATSIC elections: A 10 year perspective' (2000) 35(3) *Australian Journal of Political Science* 493.
- <sup>13</sup> J Walker, 'Kimberley dreamtime—Aborigines in the Kimberley Region want a regional authority as a step towards self-rule' *Australian Magazine*, 6-7 May 1995, pp 12-17.
- <sup>14</sup> May 2000, prepared by ATSIC Regional Autonomy Commissioners Djerrkura, Bedford and Williams and endorsed by the ATSIC Board in June 2000, accessed 24 October 2000 from <http://www.atsic.gov.au>.
- <sup>15</sup> J Wolfe, 'Regional planning by ATSIC councils: Purpose, process, product and problems' in *Discussion paper no 18*, North Australia Research Unit, Australian National University, 1993.
- <sup>16</sup> J Reeves QC, *Building on land rights for the next generation: The review of the Aboriginal Land Rights (Northern Territory) Act 1976*, AGPS, 1998.

- <sup>17</sup> 'Unlocking the future': *The report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976, Report of the Standing Committee on Aboriginal and Torres Strait Islander Affairs*, 1999; J Altman, F Morphy and T Rowse (eds), *Land rights at risk? Evaluations of the Reeves Report*, Research Monograph no 14, Centre for Aboriginal Economic Policy Research, Australian National University, 1999.
- <sup>18</sup> M Langton, D Epworth, and V Sinnamon et al, 'Indigenous social, economic and cultural issues in land, water and biodiversity conservation: A scoping study for WWF Australia, Vol 1' on behalf of the Centre for Indigenous Natural and Cultural Resource Management, Northern Territory University, pp 54-55; Smyth and Sultan, note 1 above, p 26.
- <sup>19</sup> D Gillespie, P Cooke, with J Taylor, *Improving the capacity of Indigenous people to contribute to the conservation of biodiversity in Australia*, Report commissioned by the Environment Australia for the Biological Diversity Advisory Council, Unpub, 1998, pp 12-15.
- <sup>20</sup> Id, p 19.
- <sup>21</sup> Id, p 22.
- <sup>22</sup> See generally: Torres Strait Protected Zone Joint Authority, *Annual Report 1998-99*, Australian Fisheries Management Authority, 2000.
- <sup>23</sup> See for example DJ Haigh, 'Fishing war in the Torres Strait—Round three: *R v Gesa and Nona; Ex parte A-G*' (2000) 5(2) *Indigenous Law Bulletin* 17. In early 2001 the Queensland District Court found Benjamin Ali Nona and George Agnew Gesa, of Murray Island, not guilty of stealing coral trout from three commercial fishermen in 1998.
- <sup>24</sup> H Garnier, 'Torres Strait Regional Authority' in The National Oceans Advisory Group, *Towards a regional marine plan for the south-east, Australia's oceans policy*, Proceedings of the Forum held in Hobart, Tasmania, 14-15 April 2000, pp 37-39.
- <sup>25</sup> The Act was under review in early 2001.
- <sup>26</sup> Environment Australia and Department of Agriculture, Fisheries, and Forestry - Australia, 'Mid-term review of the Natural Heritage Trust: The response', 2000, p 47, accessed at <http://www.nht.gov.au/review/mtrbrflsept.pdf>.
- <sup>27</sup> C Mantziaris, and D Martin, *Guide to the design of native title corporations*, National Native Title Tribunal, 1999, p 14.
- <sup>28</sup> C Mantziaris, 'Beyond the Aboriginal Councils and Associations Act? Part 1' (1997) 4(5) *Indigenous Law Bulletin* 10, p 11.
- <sup>29</sup> T Simpson and V Jackson, 'Creating an Aboriginal corporate constitution' (2000) 4(27) *Indigenous Law Bulletin* 19.
- <sup>30</sup> See generally: C Binning, M Young and E Cripps, *Beyond roads, rates and rubbish: Opportunities for local government to contribute to the conservation of native vegetation*, National Research and Development Program on Rehabilitation, Management and Conservation of Remnant Vegetation, Research Report 1/99, Environment Australia, 1999; E Cripps, C Binning, and M Young, *Opportunity denied: Review of the legislative ability of local governments to conserve native vegetation*, National Research and Development Program on Rehabilitation, Management and Conservation of Remnant Vegetation, Research Report 2/99, Environment Australia, 1999; G Bates, 'Environmental law: Past and present', paper presented to the National Environmental Law Association National Conference, 'Building towards the future: Does our future lie in our past?' 6-8 September 2000, Fremantle, Western Australia, p 19.
- <sup>31</sup> Australian Local Government Association, *Working out agreements between local government and Indigenous Australians: A practical guide*, prepared by the Australian Local Government Association in cooperation with the Aboriginal and Torres Strait Islander Commission, 1998.

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- <sup>32</sup> Sanders, note 2 above, p 172.
- <sup>33</sup> Miller, note 5 above, p 20.
- <sup>34</sup> D Muir, 'Back home to stoke the fires: The outstations movement in Western Australia' (1999) 4(19) *Indigenous Law Bulletin* 11.
- <sup>35</sup> D Coles, 'The marriage of traditional Aboriginal and western structures in local government in the NT', paper presented to the IPA Conference, Darwin, 8-10 September 1999.
- <sup>36</sup> Erica Biddle, personal communication, December 2000.
- <sup>37</sup> J Voumard, *Access to biological resources in commonwealth areas: Report of the Commonwealth Public Inquiry* (John Voumard Chair), Environment Australia, July 2000.
- <sup>38</sup> Environment Australia, *Helping communities helping Australia, Natural Heritage Trust Annual Report 1997-98*, 1999.
- <sup>39</sup> See for example: Environment Australia, *Record of the 2<sup>nd</sup> Meeting of the Working Group on Indigenous Protected Areas*, 21-24 April 1997.
- <sup>40</sup> D Smith, 'Introduction: Finding a way to just and durable agreements' (1999) 4(21) *Indigenous Law Bulletin* 4.
- <sup>41</sup> G Neate, 'Indigenous Land Use Agreements: An overview' (1999) 4(21) *Indigenous Law Bulletin* 11.
- <sup>42</sup> J Sutherland, 'The coexistence of sustainable development and Aboriginal fishing rights in Canada' (2000) 4(29) *Indigenous Law Bulletin* 18.



## Chapter 15 ■

### Negotiated Agreements and Regional Governance Agreements

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This Chapter provides an overview of Indigenous negotiated agreements relating to matters such as native title, land rights, environment, land use, natural resource and water planning and management and the provision of a contemporary institutional and economic base for Indigenous self-governance. It draws on the experience of a domestic land claims settlement (*Alaska Native Land Claims Settlement Act 1970*) in Alaska and the wider negotiated settlements and governance arrangements that are evolving in Canada and Greenland. In the context of Canada, this Chapter primarily focuses on Regional Agreements which is an attempt to recognise the integrated rights of Canadian Indigenous peoples and to develop implementing processes and institutions. Of the wide variety of models of Regional Agreements under the *Canadian Comprehensive Land Claims Policy*, the Inuvialuit and Yukon experiences are considered in detail as they are the types of arrangements that may be applicable to Australia. Self-government in Canada is negotiated as part of the more recent Regional Agreement processes. They may also add to Regional Agreements or be negotiated independently of them. To a great extent Canadian Regional Agreements are seen as part of the evolution towards increasing Indigenous self-government in Canada and Greenland. Finally, this Chapter provides a review of the regions in Australia where there is considerable potential for Regional Agreements such as the Kimberley Region of Western Australia and the Torres Strait Islands, considers the advantages and disadvantages of Regional Agreements and the likely triggers for Australian Regional Agreements.

#### Introduction

The ideas behind Regional Agreements have been discussed in Australia for some time. They involve the concept of equitable and direct negotiations between Indigenous peoples and governments to recognise Indigenous rights and to protect them in a contemporary legal system. Most significantly, Regional Agreements can provide the resources, organisation and political experience to implement these rights through ongoing Indigenous and bi-cultural institutions and processes. The proposals for Regional Agreements in Australia have been seriously investigated and considered by Aboriginal peoples in the Kimberley region of Western Australia and the Torres Strait. Regional agreements were given consideration as part of the Indigenous consultation process in the Resource Assessment Inquiry into the Coastal Zone.<sup>1</sup>

In 1994 an intensive workshop was hosted by Cape York Land Council on developing Regional Agreements and Aboriginal strategies relating to land-use, resources and environmental issues in northern Australia.<sup>2</sup> The workshop concluded that a Regional Agreements policy and strategy should be developed in northern Australia by Aboriginal communities and organisations. It would be for each region to determine whether to negotiate Regional Agreement(s). An historic Heads of Agreement on the future land use on Cape York Peninsula has been concluded between Cape York Land Council, the Cattleman's Union of Australia, the Australian Conservation Foundation, the Wilderness Society and the Peninsula Regional Council of ATSIC (1994).<sup>3</sup> The submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner (Dr Michael Dodson), on the proposed Social Justice Package, supported Regional Agreements as part of the evolution of Indigenous self-government.<sup>4</sup> The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) has undertaken a detailed study (including case studies) on the potential for Regional Agreements in Australia.<sup>5</sup>

Australian Indigenous peoples have extensive experience in negotiating resource agreements (such as the Zappopan mining agreement with the Jawoyn in the Northern Territory), negotiating specific land claims (as well as the provisions of the recent *Native Title Act 1993* (Cth) (NTA)), negotiating the joint management of national parks (for example, Kakadu and Uluru) and land negotiations and resource management (for example, catchment management by Kowanyana community in Cape York Peninsula). There is a rapidly growing interest among Australian Indigenous organisations and communities in developing regional strategies extending Indigenous self-management beyond these ad hoc arrangements.

A crucial matter which needs to be considered is what rights and political strategies could instigate this type of direct negotiation between Indigenous peoples and governments in Australia. The Regional Agreement provisions in the 1998 amendments to the NTA recognise Indigenous Land Use Agreements (ILUAs) but do not provide resources, triggers or organisations (such as the British Columbia Treaty Commission), which are likely to facilitate agreements that are regional, comprehensive and a step towards self-government, as described below in the discussion of the Canadian Comprehensive Land Claims Policy. There are significant pressures to use ILUAs and other negotiated agreements to settle Australian native title claims by negotiation. However, overseas experience (Greenland and Canada) indicates that real steps towards self-government are most likely when native title settlements are negotiated as a part of the integrated rights of Indigenous peoples on a regional or national basis.

There appears to be some confusion over what existing Regional Agreements are in Canada and what they should be in Australia. Comprehensive Regional Agreements in Canada are sometimes perceived as being too expensive to negotiate, too time consuming to finalise and too complex. On the other hand, some Indigenous peoples expect



Regional Agreements themselves to deliver self-determination rather than being a key aspect of a wider strategy to achieve it. Australian Regional Agreements could involve many different models ranging from negotiating specific matters such as Indigenous control (or joint control) of land-use, wildlife management, land management, environmental protection, resource development, or service delivery to comprehensive and integrated claims similar to the Canadian Regional Agreements described below.<sup>6</sup> The process is meant to be driven from the local level through regional organisations and involves a high level of Indigenous participation which is outside normal bureaucratic and political channels.

### **The concept of regional agreements**

There is no pre-ordained form which a Regional Agreement should take. Rather, it is a means for Indigenous peoples to define their own solutions and obtain legal, administrative and political recognition for these solutions through negotiation with government(s). If one wishes a working definition, it might be that

A Regional Agreement is a way to organise policies, politics, administration, and/or public services for or by an Indigenous people in a defined territory of land (or of land and sea).<sup>7</sup>

The Canadian comprehensive Regional Agreements are examples of wider sorts of Regional Agreements which involve major efforts to implement land/sea rights, resource management, economic strategies and self-determination. Even where native title rights are recognised by the courts, as in Australia since *Queensland v Mabo (No 2)*<sup>8</sup> (*Mabo*) and in Canada since the *Calder*<sup>9</sup> case, it may not be possible to make such rights mean anything in practice without expensive further court actions or without new laws and political and administrative structures. A Regional Agreement is a way to transform vague rights into a clear form of organisation and law so that Indigenous peoples have some real benefit from them. A person may have the right to food, but unless that person is able to hunt or buy or otherwise obtain food, an abstract right will not save them from starvation.

A number of recent Regional Agreements overseas have attracted attention in Australia because they seem to offer a better way of dealing with land/sea rights, self-determination, sustainable economic development and the delivery of public services than previous outcomes of land and sea disputes in this country. These overseas cases are quite well developed agreements involving many issues. They are the sort of approaches which Torres Strait Island leaders have said they are seeking. Some of these overseas cases are noted below:

### *Greenland*

A national Home Rule Act of the Danish parliament, an Act whose contents and implementation structure were negotiated by an equal number of elected Greenland (Inuit) politicians and Danish members of parliament, provides for a Greenland government with powers similar to or greater than those of an Australian state. This governance regime is discussed in detail in Chapter 9.

### *Inuvialuit*

The Inuit of Canada's Western Arctic (the coast of the Beaufort Sea and delta of the Mackenzie River) signed a comprehensive Regional Agreement in 1984. The environmental management provisions (including extensive co-management regimes) and the economic development structures have attracted much interest from others and have been operating for 16 years.

### *Nunavut*

In a region larger than Queensland, the Inuit population have negotiated a comprehensive regional land and sea claims settlement (Regional Agreement) and a self-governing constitution as two separate Acts of the Canadian parliament passed together in 1993.

### *Nisga'a*

Nisga'a government has recently been established in British Columbia (2000) as the first recognition of the inherent-right to self government as part of a treaty settlement (Regional Agreement). The treaty also addresses land and other matters usually included in Canadian Regional Agreements.

### *Alaska*

Alaskan Native peoples have experienced a form of regional settlement through the *Alaska Native Claims Settlement Act 1970* and its implementation through regional and village corporations. This governance regime is discussed, in detail, in Chapter 4.

### *Alaska's North Slope*

The Inupiat (the local name of the Inuit people of the region) obtained a land claims settlement as part of the *Alaska Native Claims Settlement Act 1970*, after forcing government and other Indigenous groups to reject an earlier draft which Inupiat thought too weak. Since then the Inupiat have created and developed a very strong and wealthy regional government, the North Slope Borough, and have created various other structures to strengthen the control by their people of matters important to the region.<sup>10</sup> This governance regime is discussed in Chapter 4.

### *British Columbia treaties*

British Columbia treaties are now being negotiated by Indians with provincial and federal governments, all three of which have created a joint umpiring, planning and resourcing agency, the Treaty Commission, to assist negotiations. The British Columbia agreements will have to work around established white towns and cities, and much prior resource development. They will include major new Indigenous sea rights and sea management provisions in the case of coastal peoples.

Aboriginal and Torres Strait Islander peoples will have their own particular ideas for Regional Agreements. The three inhabited Australian island territories of Norfolk, Cocos-Keeling, and Christmas are examples of types of Australian Regional Agreements and may have lessons for us.

### **Canadian comprehensive regional agreements**

In 1973 the Canadian Supreme Court recognised the native title rights of the Indigenous peoples of Canada (the *Calder* case). They declared that native title existed at common law, irrespective of any formal recognition by the Canadian government. It includes rights to fish, hunt and trap on traditional lands. These rights are collective, as they are based on communal occupation of the land, but also individual, as members of Tribes have personal rights to harvesting resources.

Following this case, the Canadian government developed a *Comprehensive Land Claims Policy* to negotiate comprehensive Regional Agreements. The initial trigger for this negotiation of claims was the recognition of unextinguished native title (similar to the Australian situation after the *Mabo* case). The *James Bay and Northern Quebec Agreement* (1975) and the *Northeastern Quebec Agreement* (1978) were finalised before the commencement of the new Canadian Constitution (*the Constitution Act, 1982*). These agreements were enacted under federal legislation without the constitutional protection subsequently afforded to Aboriginal rights under section 35 of the *Constitution Act, 1982*.

Section 35 of the *Constitution Act, 1982* provides a legal guarantee for 'existing Aboriginal and treaty rights of the Aboriginal peoples of Canada'. Section 52(i) gives constitutional provisions paramountcy over all federal and provincial (state) statutes and the common law. Changes to existing Indigenous rights require the consent of the Indigenous peoples concerned or an amendment to the Constitution. The Canadian government can enact legislation regulating the use of Indigenous rights (for example, requiring an Indigenous person to fish under licence) according to the *Sparrow*<sup>11</sup> case decided by the Canadian Supreme Court in 1990. Therefore, negotiated Regional Agreements which provide for the maintenance rather than the extinguishment of native title rights are constitutionally protected.

Section 25 of the Canadian Charter of Rights and Freedoms (part of the *Constitution Act, 1982*) protects Aboriginal, treaty and other rights from being diminished by other guarantees in the Charter (for example, the prohibition against racial discrimination).

### *Overview of Canadian experience*

At the heart of the Canadian agreements is the idea that they should be both *regional* and *comprehensive*. This means that the agreements are much more than a land tenure settlement for native land claims. It is Indigenous people's unique relationship to the land and the sea which is the basis for their political and legal claims. The agreements are designed to provide a legal framework, procedures and rights for linking Indigenous self-determination with social justice, economic development and environmental protection over large regions.<sup>12</sup> They are not one-off packages, but are meant to establish an ongoing policy framework whereby Indigenous and non-Indigenous interests can co-operate and co-exist through bicultural institutions for land management and planning. The most recent agreement, the *Nisga'a Final Agreement 2000*, also embodies the legal recognition of the inherent right of self-government. The formal title for such Canadian agreements is 'Comprehensive Land Claim Agreement' which tends to understate these wider aspects. This Chapter often refers to them by their common name of 'Regional Agreements'.

The regional nature of the settlement is important to Indigenous peoples because proper environmental management and protection of environmental rights (for example, hunting and fishing rights) can only succeed where decision-making is organised over a sufficiently large area to enable the various ecological and social interactions to be dealt with adequately by the responsible public agencies. Environment management is an essential component of the Regional Agreements strategy, not only because of the central role of land care in Indigenous culture and the Indigenous value system, but also because Indigenous peoples cannot expect to determine their economic and social development without control over the forces which govern—and which can otherwise undermine—their natural resource base.

Regional agreements (in themselves) in Canada have not always resulted in Indigenous peoples obtaining self-government over their traditional territories. The *Nisga'a Final Agreement 2000* is an exception to this. The Nunavut Self Government is recognised in legislation enacted at the same time as the *Nunavut Comprehensive Land Claims Agreement* (1993). The two processes were closely related. However, all of the Regional Agreements have provided a range of political, economic and social benefits that do give a significant degree of self-management and autonomy. For the Indigenous participants, the core objectives in pursuing Regional Agreements appear to have been to:

- define a new legal and political relationship between themselves and Canadian governments (the federal government and the relevant provincial or territory governments),

- establish a clear framework concerning management (co-management), access to and use of land, seas and resources that accommodates the needs of Indigenous peoples and other interests,
- preserve and enhance the cultural and social well-being of Indigenous societies, and
- enable Indigenous societies to develop self-governing institutions and economic bases which will assist them to participate effectively in decisions which affect their interests.

Nevertheless, as Usher<sup>13</sup> notes, there has been considerable diversity in the models and strategies pursued among claimants, ranging from self-determination and political autonomy to participation as full citizens in established Canadian institutional processes.

To date, fifteen Regional Agreements have been finalised, with several claims advanced to Agreements in Principle. The final agreements are:

- *James Bay and Northern Quebec Agreement* (1975),
- *Northeastern Quebec Agreement* (1978),
- *Inuvialuit Final Agreement* (1984),
- *Yukon Umbrella Final Agreement* (1993),
- Seven Yukon First Nations Final Agreements,
- *Gwich'in Final Agreement* (1992),
- *Nunavut Land Claims Agreement* (1993),
- *Sahtu Dene and Metis Agreement* (1994), and
- *Nisga'a Agreement* (2000).

### Components of a Regional Agreement

The terms of these agreements generally are that the Indigenous claimants renounce all, or some of, their native title to the relevant territory, and in exchange receive:

- fee simple title to portions of land traditionally used and occupied (some areas are granted with fee simple title to mines and minerals and the right to work the mines and minerals),
- provisions for resource royalty and royalty sharing,
- rights to hunt, fish and trap wildlife over a larger area of surrounding land,
- rights to advise government authorities, or share in the making of decisions, regarding land use, fisheries, environmental management, wildlife conservation and the regulation of non-renewable resource development planning (management and co-management arrangements), and
- financial compensation for past, unauthorised use of the land and in consideration for land given up.

Some of the Regional Agreements currently being negotiated do not require the extinguishment of native title following extensive controversy on this issue. The Canadian government is now prepared to negotiate this issue (unlike the early Regional Agreements) following the revision of the *Comprehensive Claims Policy* in 1987.

### Structure for negotiating claims

The Canadian comprehensive Regional Agreements are negotiated under the Canadian federal government's *Comprehensive Claims Policy*. The key steps are outlined below:

- claimant group prepare a statement of claim and provide evidentiary documentation;
- office of Native Claims (ONC) accepts or rejects a claim, depending on whether they consider it is historically and legally well-founded;
- if the claim is accepted, a Framework Agreement defines the scope of negotiations, timetables and procedural issues;
- negotiation of an Agreement-in-Principle which must be endorsed by federal Cabinet and the claimant's constituency;
- negotiation of a Final Agreement which must be ratified by respective parties;
- preparation of implementation plans and agreements which identify responsible agencies and organisations, allocate responsibilities, prepare timetables and budgets;
- enactment of federal legislation to give effect to agreement (becomes constitutionally protected under the *Constitution Act, 1982*).

It should be noted that the terminology of 'Final Agreement' is misleading in the Canadian context. The agreements can be amended by a procedure defined in each agreement and each 'Final Agreement' establishes on-going development and management processes which often lead to further issues being negotiated. In this sense they are living treaties. The key Final Agreements are discussed below.<sup>14</sup>

### The Inuvialuit Final Agreement (1984)

The *Inuvialuit Final Agreement* (1984) (IFA) has been operating for 16 years. This agreement was negotiated over a much shorter time frame than the later Regional Agreements. However, agreement provisions were discussed with every household in the region on several occasions before it was enacted by the Canadian parliament. The agreement has proved to be flexible and a good basis for ongoing negotiations and evolving management arrangements (for example, the Inuvialuit are currently negotiating self-government for the western Arctic of Canada and have extended their management of parks, wildlife and natural resources). The Inuvialuit received compensation of \$C152 million (payments between 1984 to 1987) and one-off economic and social grants of \$C17.5 million. The mandate from the Inuvialuit community and elders is that the capital of \$170 million should remain intact. The funds have grown to over \$C230 million through the investments of the corporations (including the Aboriginal Global Investment Corporation). The Inuvialuit have been aggressive in their investment strategies to preserve and increase their capital.<sup>15</sup>

The Agreement provided for a number of corporate structures to administer and manage the Settlement funds, lands and other benefits. The Inuvialuit Regional Corporation, composed of representatives of the six Inuvialuit Community Corporations, functions as

an umbrella organisation of the Inuvialuit to receive initially the Settlement funds and lands, and to coordinate Inuvialuit implementation efforts. An Inuvialuit Land Corporation administers the Settlement lands. The Inuvialuit Development Corporation and the Inuvialuit Investment Corporation carry out the business on behalf of the Inuvialuit and invest Settlement funds on behalf of the beneficiaries. The Final Agreement does not provide for regional self-government as desired by the Inuvialuit. However, the Inuvialuit continue to press for a form of regional government for their Western Arctic homeland, as they believe that the wording of the Final Agreement facilitates this option. Clause 4(3) provides that, where re-structuring of the public institutions of the Western Arctic region occurs, the Inuvialuit shall not be treated less favourably than any other native peoples with respect to government powers and authority.

The IFA establishes a number of institutions to deal with the various components of environmental management, including fisheries, wildlife harvesting and environmental impact controls.<sup>16</sup> These structures are all managed by approximately equal numbers of government and Inuvialuit representatives, except in a few specified cases. A very complex and intricate wildlife system is established under the IFA. The Inuvialuit possess exclusive and preferential harvesting rights to game except for certain migratory species. Compensation is to be provided to Inuvialuit hunters from developers for actual losses that occur as a result of any development undertaken in the Settlement Region (cl 13). At the local level six exclusively Inuvialuit Hunters and Trappers Committees (HTCs) provide representation to each of the communities in wildlife management. The HTCs encourage and promote Inuvialuit involvement in sustainable wildlife use and are collectively represented on the Inuvialuit Game Council (IGC).

The IGC has responsibility for allocating quotas for the harvesting of wildlife among the Inuvialuit communities, as well as advising the two Wildlife Management Advisory Councils (one each for the Northwest Territories and the Yukon North Slope). These two authorities in turn advise the appropriate Minister on wildlife conservation matters. A Fisheries Joint Management Committee (FJMC) advises the Minister of Fisheries and Oceans on matters relating to fisheries and marine mammals in the Settlement Region. Finally a Research Advisory Council, with multi-party representation, coordinates research activities into wildlife and environmental management in the Settlement Region.

Despite the scope for local participation in wildlife and fisheries management, the IFA does not decentralise wildlife harvesting rights to Inuvialuit communities. The power to regulate, allocate and control public access and Inuvialuit participation in management rests with the Wildlife Management Advisory Councils and FJMC. The local HTCs and IGC are left with the power to enforce and provide harvest data.

The IFA also establishes a comprehensive system of regional environmental planning and development control. The Agreement provides for an environmental impact assessment process through two agencies in which the Inuvialuit have rights to participate. It is stipulated that for 'every development of consequence to the Inuvialuit Settlement Region that is likely to cause a negative environmental impact' (cl 11), the development proponent must prepare an environmental impact statement for the assessment by an Environmental Impact Screening Committee (EISC) as to whether it 'could have a significant negative impact on present and future wildlife harvesting' (cl 11). An Environmental Review Board (EIRB) undertakes the review of major development proposals referred to it by EISC. The Board is to make advisory recommendations to the government body on whether or not the development in question should proceed, including any mitigating measures that it feels should be applied to a project in order to minimise its environmental impacts. The EISC and the EIRB both have seven members, comprising three Inuvialuit and three government representatives and a chairperson chosen by the federal government with Inuvialuit approval.

Several major co-management planning initiatives have been completed to date. These are: the Mackenzie Delta, Beaufort Sea Regional Land Use Plan (1990) developed in conjunction with the Gwich'in of the Northern Mackenzie River Basin; the Inuvialuit Renewable Resource Conservation Management Plan; and the completion of six community Conservation Plans, which further identify other areas in their jurisdictions that deserve some level of protection (such as National Wildlife or Wilderness areas) cultural sites, identify specific resource conservation measures and to some degree provide the basis for formal land use decision making and cumulative effects management.<sup>17</sup>

The Inuvialuit have also recognised the importance of international co-operative approaches to environmental management. In 1988 the *Polar Bear Management Agreement for the South Polar Sea* was signed by the IGC and the (Alaska) Inupiat North Slope Borough Fish and Game Management Committee. This was the first time that a wildlife management agreement had been concluded by Aboriginal user groups in two countries.<sup>18</sup> An agreement modelled on this is currently being negotiated by the United States and the Russian Federation. A similar international agreement for the shared management of beluga whales between the Inupiat and the Inuvialuit has also been negotiated resulting in a Beluga Whale Management Plan for the region.<sup>19</sup> The Inuvialuit were also engaged in substantial advocacy work in southern Canada and the United States in the lead up to negotiations of the amendments to the Bonn Convention (*Convention on the Conservation of Migratory Species of Wild Animals*, 1979).<sup>20</sup>

The Inuvialuit land, resource and environmental regimes were reviewed by Peter Usher in his report for the *Canadian Royal Commission on Aboriginal Peoples*.<sup>21</sup> This was part of a wider review comparing negotiated Regional Agreements with each other, and other treaty experiences. He concluded that:



- *The land base*—The Inuvialuit obtained a significant quantum as a proportion of their traditional territory (30 percent). More than any other modern treaty, the Inuvialuit lands were selected in very large, contiguous blocks which enabled more efficient planning and land use. The Regional Agreement has given the Inuvialuit significant control over the nature and impact of development.
- *Harvesting rights*—Exclusive or preferential harvesting rights were obtained for most species throughout the region. Both subsistence and commercial harvesting rights are protected as required by the IFA. Protection of harvesting rights exceed those provided by *Sparrow*<sup>22</sup> and are enhanced by the fact that they are implemented by co-management rather than imposed unilaterally by government.
- *Co-management rights*—There has been a common recognition that there is a high standard of data and information required to operationalise the management regimes under the IFA. In fact, research and information is far superior to other areas, and is mandated by the claim. This research is under significant control of the co-management bodies and effectively of the IGC. There is significant Inuvialuit participation in research, including traditional knowledge and perspectives, and they have had a strong, if not indeed controlling influence, on the priorities and conduct of wildlife related research. There has been a high degree of Inuvialuit integration and participation in the co-management bodies, which is attributable to universal fluency in English, cultural comfort in working with non-Inuvialuit, trust in technical resource staff and the chairs of the co-management bodies and confidence in the strength of the IFA's provisions in protecting the Inuvialuit interest in land and resources. The cost of co-management is about \$C5 million per year. There have been disputes within the North West Territory and Department of Indian and Native Affairs (DIAND) (1995) over the legal responsibility for Inuvialuit participation costs. The securing of adequate future funding in this area is absolutely necessary to the continuation of the success of co-management.
- *Environmental Protection*—The Inuvialuit have effectively participated in wildlife management policy through international agreements. The level of wildlife management and research has improved dramatically in the region. Stocks of fish, wildlife and marine mammals are at least as abundant and as healthy as when the agreement was signed. There is also a greater certainty about the status of these stocks for management purposes. There is a high degree of compliance with fisheries and wildlife legislation. Enforcement requirements are minimal, and the HTC's have taken on a greater responsibility for compliance among their own members.
- *Environmental Assessment*—The EISC and EIRB include the marine as well as the land areas of the IFA region as part of their mandate. This is important because much of the oil and gas exploration is offshore. The review board has made two significant decisions which, although not well liked by some government agencies, have been allowed to stand.

- *Implementation of the IFA*—There have been significant problems associated with the failure by Canada and the government of the NWT to enact consequential and implementing legislation and a formal implementation plan. The formal implementation plan has been a crucial feature of later Regional Agreements such as Nunavut.

### **The Nunavut Final Agreement (1993)**

The Nunavut Agreement is another agreement under the *Comprehensive Land Claims Policy*. It forms a modern treaty between the Inuit of the Nunavut Settlement Area, who were represented in negotiations by the Tungavik Federation of Nunavut, and the Crown in right of Canada—the federal government. Inuit rights and benefits, which are constitutionally protected, include:

- title to approximately 350,000 square kilometres of land of which approximately 36,000 square kilometres will include mineral rights;
- the right to harvest wildlife on lands and waters throughout the Nunavut Settlement Area;
- a guarantee of the establishment of three National Parks in the Nunavut Settlement Area;
- equal membership with government on new institutions of public government (established through the agreement) to manage the land, water, offshore and wildlife of the Nunavut Settlement Area and to assess and evaluate the impact of development projects on the environment. These public institutions include the Nunavut Wildlife Management Board (NWMB), the Nunavut Water Board (NWB), the Nunavut Impact Review Board (NIRB) and the Nunavut Planning Commission (NPC);
- capital transfer payments of \$1.148 billion, payable to Inuit over 14 years (\$580 million in 1989 dollars with interest);
- a share of royalties that government receives from oil, gas and mineral development on Crown lands;
- where Inuit own surface title to the land, the right to negotiate with industry for economic and social benefits from non-renewable resource development;
- measures to increase Inuit employment within government in the Nunavut Settlement Area and increased access to government contracts; and
- Thirteen million dollars for a Training Trust Fund.

As well, the agreement committed the federal government to introduce legislation to create the Nunavut Territory and the Nunavut Territorial government. This is discussed, below, in the section dealing with self-government.

### **Yukon Umbrella Final Agreement (1993)—Yukon First Nations**

The *Yukon Umbrella Final Agreement* (1993) involved another form of negotiation process and comprehensive regime. The Yukon Umbrella Final Agreement involved

many First Nation Indigenous peoples. The areas of land claimed were often separated by land and resources owned by the Crown or non-Indigenous interests. This agreement will be described in detail as this situation has significant similarities to many regions in Australia. The negotiation of a comprehensive claims agreement for the Yukon Territory was an extremely protracted affair, taking about 17 years. An Umbrella Final Agreement was signed in March 1990, comprising 28 sub-agreements on various aspects of land management, non-renewable resources and implementation measures. The agreement is to be ratified by each Yukon First Nation. Other elements in this Regional Agreement package are a Self-Government Agreement and Financial Transfer Agreement, which provide the basis for negotiating individual self-government settlements with each of the 14 Yukon First Nations.

### **YFN settlement lands**

The agreement gives the Yukon First Nations (YFN) title to 41,439 square kilometres, or 9 percent of the Yukon Territory. Yukon settlement lands are parcelled into Category A and Category B lands. The YFN received the equivalent of fee simple title to both surface and subsurface on Category A lands which comprise 25,899 square kilometres. On Category B lands, the YFN are to enjoy fee simple title to the surface only, as ownership of the sub-surface remains with the (federal) Crown. The settlement lands may be expropriated subject to the approval of the Governor-in-Council, although, where possible, alternate lands are to be provided as compensation in kind. An additional proviso is that the settlement lands are to be subject to any existing interests in the land. Like the other Regional Agreements, it provides:

[The Yukon people] shall be deemed to have ceded, released and surrendered to Her Majesty the Queen in Right of Canada all their Aboriginal claims, rights, titles and interests, if any [to the settlement lands] (cl 2. 16).

In selecting their lands from the total settlement area, the YFN peoples were able to choose land with the following characteristics: areas with hunting and trapping values, historical, archaeological and spiritual areas, agriculture and forestry areas and areas of economic development potential.

### **YFN compensation and economic measures**

In consideration for all the comprehensive claims of the 14 Yukon First Nations, they are to receive financial compensation of \$C242 million to be disbursed over a 15-year period. From this sum will be deducted the moneys borrowed to sustain the nearly two decade negotiation process. The agreement gives them a share of resource royalties collected from mining activities in the settlement area. Settlement Corporations are to be constituted to carry out the various financial activities for the YFN. A *Sub-Agreement of Economic Development Measures* commits the government to providing special economic opportunities to the Indians, such as preference in the allocation of licences related to

natural resources development. A *Sub-Agreement on Resource Royalty Sharing* provides a formula whereby they are to receive a minimum share of Crown royalties from non-renewable resource development.

### **YFN land-use and environmental planning**

The Agreement proposes an environmental planning and land-use control system for the settlement area. According to the *Sub-Agreement on Land Use Planning*, the objective is:

- to ensure social, cultural, economic and environmental policies are applied to the management and use of land resources in an integrated and co-ordinated manner,
- to minimize actual and potential land use conflicts, and
- to fully utilize the knowledge and experience of the Yukon Indian people in order to achieve effective land use planning (cl 1.2-1.7).

The planning process is to be informed by ecological considerations and broad public participation in regulatory agencies of mixed Indian and government representation. A Regional Planning Commission is to supervise environmental planning in the region. It is complemented by an environmental impact assessment (EIA) and review structure to scrutinise all major development proposals in the Yukon. Indian membership on the various panels of the committee will vary from one-third to two-thirds, depending on whether the development will impact on non-settlement lands only or on settlement lands.

### **YFN management of wildlife, fisheries and renewable resources**

The YFN peoples have extensive co-management rights relating to the management of wildlife, fisheries and renewable resources. In the territory of each YFN a Renewable Resources Council is the primary instrument for fish and wildlife management. The council, which is to have equal Indian and government representation, is to advise a Fish and Wildlife Management Board to co-ordinate regional wildlife policy. The Board is in turn to advise the appropriate Minister. Subject to conservation requirements, the YFN will have exclusive hunting rights on Category A lands and elsewhere are to receive preferential harvesting allocations based on a basic need for certain species of wildlife. Developers are expected to compensate for any damage caused to traplines. Each YFN is to manage and allocate timber harvests on settlement lands and will participate in forestry management on non-settlement lands. The agreement also envisages a \$C3.2 million government-funded Fish and Wildlife Enhancement Trust Fund. Another feature of the agreement is the establishment of a Yukon Heritage Board. The Board, which would have 50 percent Indian representation, would advise the appropriate government agencies on the conservation and management of the Yukon's cultural heritage resources.

### **YFN implementation measures**

To facilitate implementation of any final agreement reached, a special administrative training scheme and a dispute resolution process was set up. A *Sub-Agreement on Training for Settlement Implementation* provides that the government will establish a training committee to impart the skills to Indians necessary for their participation in the effective implementation process. A *Sub-Agreement on Dispute Resolution* provides for the use of mediation and arbitral processes. It is proposed to set up a Surface Rights Board, with one-third Indigenous representation, to adjudicate upon disputes between holders of surface and subsurface interests in the Yukon. In the case of a dispute over the interpretation or implementation of the agreement, arbitration and mediation procedures are to be used. Mediators and arbitrators are to be appointed from a panel of 12 persons nominated by the federal and territorial governments and the YFN. However, the use of informal conflict resolution techniques is not to be available in all situations, but only in relation to those issues clearly specified in the agreement. Otherwise, the Minister retains the final say.

### **Final Agreements with 7 Yukon First Nations**

To date, final agreements have been negotiated with the seven YFNs (approximately 4,000 beneficiaries) with settlement land of 27,299 square kilometres and financial benefits of \$137,468,620 to be paid in 15 annual instalments. This is their share of the total benefit lands and settlement for the YFNs referred to earlier in the discussion of the YFN Umbrella Agreement.

### **Nisga'a Claim (British Columbia)**

The Nisga'a Tribal Council submitted a land claim to the federal government in 1976 claiming title to 14,760 square kilometres of the Nass River valley. They were also the applicants in the landmark *Calder* case. In 1991 British Columbia (BC) was included in the negotiations and a *Nisga'a Comprehensive Land Claims Agreement* was reached, setting the boundaries for making an agreement-in-principle and final agreement. This agreement was not negotiated under the British Columbia Treaty Commission Process and was concluded under the Federal Comprehensive Claims Policy. In 1991 Canada, BC and the Nisga'a Nation signed a framework agreement. The parties conducted over 500 consultation meetings and public events during the negotiations. The parties signed the final agreement in August 1998. The Agreement calls for a payment to the Nisga'a of \$190 million in cash and the establishment of a Nisga'a central government with ownership of and self-government over approximately 2,000 square kilometres of land in the Nass River Valley. The agreement also outlines the Nisga'a ownership of surface and subsurface resources on Nisga'a lands and spells out entitlements to Nass River salmon stocks and wildlife harvests. The Nisga'a voted in support of ratification of the Nisga'a Final Agreement on 6 and 7 November 1998. The *Nisga'a Final Agreement Act* was

introduced in the BC Legislature on 30 November 1998 and received final Royal Assent on 26 April 1999. Federal ratifying legislation received Royal Assent in April 2000.

### **Major Regional Agreements to be negotiated**

- Dogrib Treaty 11 Claim (NWT)
- Treaty 8 Dene (NWT)
- Atikamekw and Montanais Claims (Quebec)
- Makivik Claim – Offshore (NWT) and Labrador (Onshore and Offshore)
- Labrador Inuit Association (LIA) Claim (Newfoundland and Labrador)
- Innu Nation Claim (Newfoundland and Labrador)

### **British Columbia treaty process**

One of the most important land claims was that of the Nisga'a First Nation. Some of the largest and most difficult land claims occur in BC. Claims negotiation have been difficult because of hostility from the provincial (state) government, the main Opposition Party and the forestry and fishery companies. Some Indian First Nations, such as the Gitksan and Wet'suwet'en, have litigated their claims.<sup>23</sup> The Haida Nation is considering a native title claim, through the courts, to their island of Haida Gwaii.

In BC, the majority of First Nations never signed treaties and treaty making was resisted by colonial governments. In 1992 the government of Canada, the province of BC and the First Nations Summit signed the *British Columbia Treaty Commission (BCTC)*. The BCTC was established on an interim basis in 1993 and the federal government introduced the BCTC legislation in 1995. The BCTC consists of five Commissioners: two nominated by the First Nations Summit; one nominated by each of the federal and provincial governments; and a Chief Commissioner chosen by all three principals. The current Chief Commissioner is Mr Miles Richardson of the Haida Nation.

The BCTC is the Keeper of the Process. Its main functions are to assess the readiness of parties to begin negotiations, allocate negotiation funding to Aboriginal groups, assist parties to obtain dispute resolution services at the request of all parties and monitor and report on the status of negotiations. The BCTC has also played a useful role in reporting to the principals on the impediments to the process. The treaty negotiation process is open to all BC First Nations.

Fifty-one First Nations (126 Indian bands), representing 70 percent of BC's Aboriginal population, are negotiating treaties. Of these, three are in early stages of negotiations, 10 are negotiating a framework agreement, and 37 are negotiating an Agreement in Principle (AIP). Claims in British Columbia represent slightly more than half of the total number of claims (both comprehensive and self-government) currently being negotiated across the country.

The recent experience in British Columbia has been disappointing after initial hopeful signs that this would be expedited and include a fair negotiation process. Many of the offers made by government, as the basis of final agreements, have been considered too low by Indigenous negotiators.<sup>24</sup> This has undermined the role of the BCTC and some First Nations are withdrawing or considering withdrawal from the process. Unless urgent steps are taken to conclude some viable final agreements and action taken on interim measures supported by the majority of First Nations, this problem is likely to continue.<sup>25</sup>

*British Columbia interim measures (TRMs)*

The BC government has developed a new type of interim measure referred to as treaty-related measures (TRMs). The Canadian and BC governments developed TRMs in response to a federal, provincial and First Nations' report of February 1999. The report concluded that all parties wished to accelerate negotiations and create opportunities for earlier access to lands and resources that will be secured in treaties.<sup>26</sup> TRMs can be used for several purposes:

- information gathering and studies to support negotiations,
- protection of Crown lands that are targeted for treaty settlements,
- enhanced First Nations participation in land, resource and park management,
- protection of cultural artefacts,
- enhanced access to lands and resources prior to a final treaty settlement,
- land acquisition for treaty settlement (under the willing buyer/willing seller principle),
- economic development opportunities, and
- developmental measures in support of self-government.<sup>27</sup>

Some examples of the BC government response to TRMs are provided by the Ministry of Environment, Lands and Parks. Their Guidelines on Interim Measures suggest that the Government objective for interim measures should be:

- to help the ministry work more effectively with First Nations,
- to resolve issues arising from attempts to fulfil ministry legal obligations as laid out in the *Sparrow*, *Delgamuukw* and other related court decisions and described in the *Procedures to Avoid Infringement of Aboriginal Rights*, and
- to serve as a pilot for treaty obligations.<sup>28</sup>

Some examples of TRMs are:

- BC has purchased and is protecting lot 6351 which lies between the Taku River Tlingit reserve and cemetery. The property had been slated for development and was a major source of tension between the parties.
- The Haida negotiated a six-month reprieve from logging in the portion of their territory known as Duu Guusd. This reprieve was to last until 1 April 2000, to allow Canada, BC and the Haida to negotiate a forest management agreement. (These negotiations were suspended as of February 21 due to Haida litigation.)

- The Northern Nations Summit are well along in negotiating to participate in the management of limited access hunting in northern BC.<sup>29</sup>

### **Canadian government initiatives in Newfoundland and Labrador**

In November 1999 the government of Canada, Newfoundland, Labrador and Innu signed an Agreement-in-Principle on Interim Measures as a means to provide the Innu with the appropriate tools to address the various issues currently affecting their communities. The Agreement represents a series of interim steps providing the Innu with additional control over programs and services within their communities until the completion of land claims and self-government agreements. It provides for the transfer of provincial Crown lands to Canada, the establishment of Aboriginal policing, provision for costs and eventual transfer of control over education and the establishment of appropriate governance arrangements for the Innu.

Since the signing of the Agreement-In-Principle, an interdepartmental working group has been established with officials from DIAND (headquarters and Atlantic Region) Solicitor General of Canada, Public Works and Government Services Canada and Natural Resources Canada to develop and review options for implementing the various components of the Agreement.

Tripartite discussions are being held in relation to education and governance. Canada has proposed approaches to the other parties for implementing these two major components. To date, no agreement has been reached on an approach which is acceptable to all Parties.

### **Indigenous self-government negotiations**

Along with the comprehensive land claims process there has been a campaign by Indigenous groups for greater powers of self-government. Both the 1981 and 1986 Comprehensive Land Claims policy statements recognised that a limited form of self-government may be included in settlement agreements. The 1986 *Comprehensive Land Claims Policy* allows for the retention of Aboriginal rights on land which Aboriginal people hold following a claim settlement, to the extent that such rights are not inconsistent with the settlement agreement.

The Nunavut and Yukon agreements provide for the greatest measure of self-government, but by different means. Elsewhere, self-government has basically involved the transfer to Indigenous communities of program administration rather than real control over policy making.

In April 1986 the federal government released a policy on Indigenous community self-government negotiations. The policy involved giving communities greater administrative control and service delivery of federally sponsored programs. The DIAND was reorganised into four divisions with one division having responsibility for Indigenous



self-government. The work of this division is directed towards new forms of government established through special legislation and the giving of greater responsibility for administration to band and village units within the terms of the *Indian Act*.<sup>30</sup>

There is no blueprint for community self-government, but a schedule for negotiation of new governmental arrangements is laid down. First, a Framework Agreement for further negotiations is written up. This leads to a Final Agreement which is put to community members and federal cabinet for acceptance. An implementation plan is part of the agreement. Finally, an Act for the operation of self-government is made in the Canadian parliament.

The negotiation of self-government agreements cover:

- organisations and procedures of government,
- membership,
- legal status and capacity,
- land and resource management,
- financial arrangements,
- education, health and other social services, and
- administration of justice.

Under the government of Canada's 1995 *Inherent Right and the Negotiation of Aboriginal Self-Government Policy*, self-government arrangements may be negotiated simultaneously with lands and resources as part of comprehensive land claims agreements.<sup>31</sup> The government of Canada is prepared, where the other parties agree, to constitutionally protect certain aspects of self-government agreements as treaty rights within the meaning of section 35 of the *Constitution Act, 1982*.<sup>32</sup> Self-government arrangements may be protected under section 35 as part of comprehensive land claims agreements. In *Gathering Strength — Canada's Aboriginal Action Plan* announced on 7 January 1998, the government of Canada affirmed that treaties, both historic and modern, will continue to be a key basis for the future relationship between Aboriginal people and the Crown.

Ivanitz outlines some of the differing Indigenous visions of self-governance:

The Inuvialuit and Gwich'in regions support Aboriginal self-government with public government. The Sahtu regional emphasis is on community government as the senior level of government. The Dogribs, further south in the Mackenzie Valley, place a strong emphasis on extensive self-government, in the form of direct governing authority rather than co-management. Treaty Eight Dene reject the federal Comprehensive Claims Policy as a latter-day attempt at assimilation and, instead, are involved in treaty land entitlement negotiations with the federal government. It is obvious that no group or community in the NWT is unanimous in its political and constitutional views but the residents of the Western Arctic hold a particularly diverse range of opinions on their future political course.<sup>33</sup>

## Territory of Nunavut

The negotiations for the creation of an Inuit self governing territory, known as Nunavut, occurred over several decades. In 1992 the Canadian Prime Minister officially committed the Canadian government to the establishment of Nunavut and the government of Canada enacted the legal framework for self-government of Nunavut in 1993. It is a territorial government and all residents of the territory are able to vote and run for office and are eligible for jobs in Nunavut's public service. However, the Inuit make up 85 percent of the population and Inuit culture, tradition and aspirations are able to shape government systems in an unprecedented way. The Inuit language, Inuktitut, is the working language of government but services are also offered in English and French. Training and development for government has occurred over many years, although Premier Paul Okalik argued that training did not start soon enough.<sup>34</sup>

The government of Canada committed about \$40 million for recruitment and skills upgrading and by 1999 about 600 Inuit had benefited from the training programs. The implementation plan under the *Nunavut Land Claims Agreement*, 1993, played a crucial role in these preparations.

In April 1999 the legislative assembly of the Nunavut government elected its first Premier and Cabinet Ministers. The government structure is very decentralised as it serves remote communities. The budget for the first year of operation of Nunavut was \$600 million.

## Nisga'a self-government

The Nisga'a Final Agreement provides for the establishment of an open, democratic and accountable Nisga'a government. It includes representation for Nisga'a citizens through the Nisga'a Lisims government, four Nisga'a village local governments and three urban locals which will provide a voice for Nisga'a who do not reside in the Nass Valley. This is the first time Aboriginal self-government powers have been expressed in a Canadian treaty. The Nunavut arrangements for self-government were contained in legislation passed after their land claims agreement.

The Final Agreement also sets out significant protection for non-Nisga'a residents of the proposed Nisga'a Lands. Those protections include rights of consultation, participation and appeal, where decisions of Nisga'a government may directly and significantly affect them.

The *Nisga'a Final Agreement*, 2000 and the *Nisga'a Constitution* establish the key elements and structure of Nisga'a government. Key features of this democratic structure of government include the following:

- Nisga'a will have the right to run for office and vote for their government representatives;<sup>35</sup>

- The Nisga'a treaty requires that elections must be held at least every five years,<sup>36</sup> and the Nisga'a Constitution meets this requirement by providing for elections every four years;<sup>37</sup> and
- Nisga'a government must have other attributes of democratic government such as conflict of interest guidelines<sup>38</sup> and financial accountability mechanisms,<sup>39</sup> including requirements to prepare budgets, to provide audited financial statements to Canada and BC and to conduct periodic program evaluations.<sup>40</sup>

The *Nisga'a Final Agreement* in 2000 exhaustively sets out the Nisga'a rights of self-government. Consequently there is no need to set out a list of subjects over which Nisga'a government could not exercise authority. Nisga'a laws would only be valid if they are consistent with the *Final Nisga'a Agreement*, Canada's Constitution and the Nisga'a Constitution.

The *Nisga'a Final Agreement* did not provide any exclusive law-making authorities to the Nisga'a government. All Nisga'a laws would operate concurrently with federal and provincial laws, like other jurisdictions in Canada where Canadians are subject to federal, provincial and municipal or regional laws simultaneously. The relationship between Nisga'a laws and federal or provincial laws will be determined by specific rules of priority set out in the Final Agreement.

### **Western Northwest Territories self-government**

The Canadian government considers that the western NWT has a unique opportunity to develop self-government arrangements compared to the situation south of the sixtieth parallel.<sup>41</sup> They would prefer that the inherent right of self-government find expression primarily, although not exclusively, through public government with specific guarantees for Aboriginal peoples.<sup>42</sup>

### **Yukon First Nation self-government**

The YFN agreement also achieved a breakthrough on the role of self-government for Indigenous communities. The federal government had previously ruled out the inclusion of self-government clauses in Regional Agreements because of its fear that such clauses would attract constitutional protection under s.35(1) of the *Constitution Act*. However, the Agreement obliges the Canadian government to negotiate self-government agreements with each of the interested 14 Yukon First Nations.

In contrast to Nunavut which creates a territory-wide government for the people of the region, of which the Inuit are the overwhelming majority, the Yukon agreement is based on Indigenous groups holding pockets of land that are non-contiguous. The YFN self-government agreements are likely to be model agreements for many other First Nations.

Self-government agreements had been negotiated with four YFN First Nations by April 1993. The settlement and self-government legislation was introduced into parliament in 1994 and received assent in the same year. The legislation came into force in February 1995. In 1997 final and Self-Government Agreements were signed with Little Salmon/Carmacks (LSCFN) and Selkirk First Nations (SFN). The Agreements for both LSCFN and SFN came into effect on 1 October 1997. In July 1998, Final and Self-Government Agreement and Implementation Plans were signed with the Tr'ondek Hwech.

Each Self-Government Agreement spells out the nature of First Nation constitutions, financial reporting and other measures for ensuring that the self-government bodies are held accountable to their citizens. The type of broad legislative powers provided are illustrated in the case of the *Champagne and Aishihik First Nations Self-government Agreement*.<sup>43</sup> Clause 13 provides that the Champagne and Aishihik First Nations shall have the exclusive power to enact laws in relation to the administration of Champagne and Aishihik First Nations affairs and operation and internal management of the Champagne and Aishihik First Nations such as:

- use, management, administration, control and protection of Settlement Land,
- use, management, administration and protection of natural resources under the ownership, control or jurisdiction of the Champagne and Aishihik First Nations,
- gathering, hunting, trapping or fishing and the protection of fish, wildlife and habitat,<sup>44</sup>
- planning, zoning and land development,
- administration of justice,
- control or prevention of pollution and protection of the environment, and
- other matters coming within the good government of Citizens on Settlement Land.

## Review of Canadian experience with regional agreements

### Conditions which facilitated the negotiation of Canadian Comprehensive Regional Agreements

The Canadian Comprehensive Regional Agreements provide many lessons about cross-cultural negotiations which have been lengthy and complex. Partly, this was due to the wide range of claims (many of which were integrally related) but the Canadian experience needs to be critically considered, having regard to its strengths and weaknesses. It appears that the following factors have facilitated effective negotiation from an Indigenous perspective:

- **Willingness:** negotiation involves compromise. Negotiations must be bona fide, with the participating parties genuinely committed to settling outstanding grievances and claims.

- **Timing:** comprehensive Regional Agreements cannot be negotiated quickly. The negotiating parties must be patient and adopt a long term policy focus.
- **Communication:** the cultural differences between Indigenous and non-Indigenous society can make it very difficult for the parties to understand each other's values and needs. Consequently, negotiation must be buttressed by a program of education and information so as to bridge different negotiating positions.
- **Information and research:** disagreements over use of Indigenous peoples' land are more likely to be resolved where there is a good information base-line about the issues in contention. Environmental, social and economic studies can help to identify the major issues and allow participants to evaluate the merits of the various options under negotiation.
- **Bargaining power:** to ensure a fair settlement, Indigenous people must be able to speak from a position of strength. Indigenous peoples need access to expert advice and financial resources to enhance their capacity to negotiate fair settlements.
- **Unity:** parties to negotiations must be legitimate and effective representatives of their constituencies. Representation must always be determined by Indigenous communities and their organisations. Negotiations are frustrated where a party is factionalised and does not speak with one voice, and there will be difficulties in implementing any final settlement where a sub-group feels that it was marginalised in negotiations.
- **Geopolitical realities:** claimants are less likely to receive a favourable settlement where provincial (state) government is involved or there are competing non-Indigenous developmental interests at stake.
- **Experience with settlement and development:** the degree of existing poverty and despair among the claimants and the relative urgency of development pressures will shape compromises that are necessary or acceptable to them.
- **Knowledge of existing models and precedents:** the demonstration effect of other settlements can influence negotiating positions.
- **Public attitudes:** public support for claims, either locally or nationally, can lead to significant strategic alliances.<sup>45</sup>

### Problems with the Canadian agreements

The extinguishment provisions of the Canadian Regional Agreements have been the most controversial part of these settlements from the perspective of Indigenous peoples. Much of the controversy surrounding the extinguishment issue stems from the apparent complexity of the legal issues. In a practical sense, the Canadian Regional Agreements involve exchanging one form of land title for another, albeit for generally smaller areas. Native title recognised at common law is ill defined and not immune to expropriation by the Crown (subject to some form of due process and payment of compensation). Regional agreements provide for the exchange of this form of land title for a different type of title defined by negotiated agreement and enshrined in legislation and constitutional protection. Nevertheless, given the fundamental and binding cultural, social and

economic relationship Indigenous people have with the land and sea, any apparent attempt to diminish the depth and integrity of that relationship is bound to be controversial.

Regional Agreements, in themselves, do not necessarily amount to giving Indigenous peoples full sovereignty over traditional lands. It is important that the Regional Agreements provide the basis for on-going negotiation of management arrangements in the settlement area. This provision has allowed the Indigenous beneficiaries to gradually increase their influence over regional development, rather than being locked into an unworkable rigid framework. Stricter environmental controls may provide a new lever for Indigenous peoples to stop unwanted development activity in their homelands. Stricter forms of environmental regulation, however, may be a mixed blessing because it can impinge upon the rights of Indigenous peoples to continue their traditional subsistence economy and engage in hunting and trapping activities. There are substantial difficulties in reconciling Indigenous traditional knowledge and western approaches to resource management in the co-management provisions of the Regional Agreements. The general pattern among the Regional Agreements is that the allocation and licensing is delegated to the co-management boards and the local harvester committees, but management for conservation is reserved to governments.

Similar tensions with cross-cultural environmental management apply to the planning and impact assessment regimes. Indigenous participation in these management structures has been a demanding and costly exercise. The assessment of social and environmental impacts is conceptually very problematic when applied to measuring the adverse effects on tradition and subsistence living. This problem extends to determining compensation payments for disturbance or loss of traditional lands. It is difficult to value in monetary terms the importance of subsistence living which cannot be exchanged in the market place. Compensation tends to be limited to property and production losses and not social and cultural disruption.

The existence of native land rights has been a fundamental basis for all of the negotiated settlements in Canada. No agreement has been negotiated simply on the basis of the social or economic needs of Indigenous people. The Canadian government has dismissed land claims where the applicants cannot demonstrate continuing association to their traditional land or where native title has been extinguished by treaty or other valid actions. Ivanitz<sup>46</sup> and O'Faircheallaigh<sup>47</sup> provide some significant critiques and constructive suggestions for the improvement of the Canadian Regional Agreements process.

## **Regional agreements in Australia**

### *The Kimberley Region of Western Australia*

From 1985 to 1989 the *East Kimberley Impact Assessment Project* (EKIAP) was carried out, at the request of Aboriginal peoples in the East Kimberley region, to assist them in

dealing with environmental, economic and social changes arising from resource development.<sup>48</sup> Aboriginal research and policy strategies were necessary to deal with the biggest diamond mine in the world (developed in Aboriginal land without legal recognition of Aboriginal land rights) and the cumulative impacts of other developments in the region. The focus was very much on how Aboriginal peoples could regain control over their land, social systems and service delivery. The concept of Regional Agreements was discussed as part of EKIAP. Key Aboriginal communities and organisations in the Kimberley are now in the early stages of developing a regional approach to self-determination and empowerment and are looking at ways of using common law rights as a basis for negotiating a new relationship with governments and other economic interests which impact on the lives of Aboriginal peoples.<sup>49</sup>

The major Aboriginal organisations in the Kimberleys, including the Kimberley Land Council, all the resource agencies, the medical services, the Aboriginal broadcasting stations, the law and culture centre, the language resource centre and the ATSIC Regional Councils formed a loose coalition to develop a regional approach to furthering self-determination in the post *Mabo* era. The Coalition of Kimberley Aboriginal Organisations embarked on an extensive consultation process with communities throughout the region. The objective was to develop a broad regional position which will enable Aboriginal people to negotiate a new relationship with governments and other interests such as the mining and pastoral industry.

Sibosado (from the Kimberley Coalition) argues that the whole system of government administration in the Kimberleys, as it is in other areas of regional Australia, is fundamentally flawed. It is paternalistic, overly bureaucratic, inefficient and extraordinarily confusing to Aboriginal people.<sup>50</sup>

Sibosado also suggests that some of the issues that could be addressed in a Kimberley Regional Agreement are:

- the protection of cultural heritage which would provide a better basis for security for Aboriginal and development interests and lessen potential conflict that currently exists under the Aboriginal heritage legislation,
- mining companies to provide economic benefit to Aboriginal people through royalty or equity arrangements and employment strategies for Aboriginal peoples,
- joint management of national parks and conservation areas,
- Aboriginal involvement in environmental strategies,
- the provision of welfare services such as health, education, housing and policing,
- co-existence on pastoral leases in relation to living areas, hunting and cultural and religious practices, and
- partnership with all levels of government in relation to regional planning.<sup>51</sup>

Three regional framework agreements are in the process of negotiation: Balangarra, Kununurra Ord Stage II and Broome.<sup>52</sup> A regional framework agreement covering coastal waters is also being considered.<sup>53</sup> These negotiations have been reviewed by Sullivan and there have been considerable difficulties. The evolution of native title regimes has complicated the Regional Agreement strategies in the Kimberleys:

Early in the Native Title process, it was assumed that Aboriginal people might claim land, might win some of their claims, and then own land as a form of property, simply adding one more category of land title to the Australian repertoire. Little attention was paid to the uses to which the land might be put and how complementary land sharing regimes might be required to further conservation, production and Aboriginal social and cultural needs. ...The implication of the Broome Final Agreement are that a significant new Aboriginal authority will be created.<sup>54</sup>

Peter Yu (Executive Director, Kimberley Land Council) has argued that the common law recognition of native title by Australian courts has been welded onto a system of land and resource management which is still based on the concept of terra nullius.<sup>55</sup> He believes that Regional Agreements should be:

...comprehensive in nature involving land ownership and management, development of Indigenous structures of governance, employment and economic security and more effective provision of citizenship services to Indigenous people.<sup>56</sup>

### *The Torres Strait Islands and marine areas*

The Torres Strait Islanders have regional representative bodies known as the Island Coordinating Council (ICC) and the Torres Strait Regional Authority. They have completed a *Torres Strait Baseline Study*, an *Ocean Rescue 2000 Programme* and a regional marine strategy (for sustainable development).

To quote from the *Corporate Plan*, the Torres Strait Regional Authority has been created as:

...a transitional arrangement providing a basis for a progressive negotiated movement towards greater regional autonomy in the delivery of programs and services for the Torres Strait.

Furthermore,

...the Authority will develop proposals to achieve self-determination in stages, with steps agreed by the people of the Torres Strait area, the Commonwealth and Queensland Governments. The Authority sees self-determination being built on the existing framework of local government on the islands that make up the Torres Strait area.

Regional agreements can be negotiated for marine regimes as well as land-based regimes. This is likely to be a key focus in the Torres Strait. An Australian Parliament Standing Committee published a report on greater autonomy for Torres Strait Islanders in 1997 supporting the strengthening of regional Indigenous institutions.<sup>57</sup> The report



recommends that the existing Indigenous and non-Indigenous regional bodies in the Torres Strait be replaced by an elected Torres Strait regional assembly that would have power to formulate policies for all of the residents of the region.<sup>58</sup> In effect, the report proposes a form of regional government for the Torres Strait, which, stopping short of territorial status, does not rule this out for the future.<sup>59</sup>

Arthurs suggests that the islanders have made considerable progress towards greater self governance through a combination of factors.<sup>60</sup> It has been noted that the islanders have been playing off the Queensland and Commonwealth governments within the arena of welfare politics. Their cultural uniqueness and the nature of the archipelago, has made it easier for them to argue for their specialness and to delineate the Torres Strait as a region. Arthurs emphasises the importance of an international border and the treaty with Papua New Guinea as determining factors in determining the notion of regionalism. He also argues that two forms of Regional Agreement are likely to proceed in parallel - one between Indigenous residents and the state over increased autonomy and the other between islanders themselves over native title issues.<sup>61</sup>

#### *Outcome of workshop on Regional Agreements*

The Cape York Land Council hosted a 4 day Workshop on Regional Agreements and Aboriginal Strategies Relating to Land Use, Resources and Environmental Issues in Northern Australia (Cairns, 25-29 July 1994). The workshop was co-ordinated by Ros Sultan and attended by representatives of Cape York Land Council, Northern Land Council, Central Land Council, Kimberley Land Council and from Cape York and other communities. Indigenous speakers were invited with experience in two major Canadian Regional Agreements (the Inuvialuit Agreement, 1984, and the Nunavut Agreement, 1993) and the Maori fisheries negotiation, 1993. Mr Paul Okalik, current Premier of Nunavut, spoke about the negotiation and implementation of the *Nunavut Comprehensive Land Claims Agreement*, 1993. The workshop proposed two principles for negotiating Regional Agreements:

- that Aboriginal native title holders and groups of traditional and other interests have the sole authority to approve agreements negotiated on their behalf by Land Councils and other bodies, and
- the identification of local needs and aspirations and the principles of representation for regional negotiations.

Regional Agreement strategies were seen to involve the following:

- developing a policy and framework for Regional Agreement options in northern Australia, to be drawn up by a federation of land councils, particularly Regional Councils, in coalition with ATSIC,
- finding resources to provide an executive function to carry out ongoing work developing policies and framework and to negotiate a national Regional Agreement policy,

- finding resources to get local participation, local negotiating capacity and local involvement in negotiations,
- identifying of sources of funding for Regional Agreement negotiations,
- identifying the existing strategies and opportunities which are steps or preconditions towards Regional Agreements. For example,
  - the Grants Commission recommendation for direct funding to Aboriginal Land Councils or Aboriginal organisations for the provision of services,
  - the proposed social justice package (under the previous Labor government), acquisition funds,
  - pressure for industrial and resource development requiring certainty as to land title and land use determination.
- ensuring that Regional Agreements are not substituted for normal citizen rights and services for Aboriginal peoples, for example, housing services,
- ensuring that Regional Agreements achieve more than the recognition of native title, that is more than a package of claims,
- seeking Aboriginal council and local government status for emerging communities,
- identifying principles for comprehensive claims, such as integrated claims to land or management of resources, and bottom lines for negotiation,
- ensuring that Regional Agreements provide the foundation for self-determination,
- arranging to break away from welfare dependency and create a resource and economic basis for Aboriginal peoples,
- establishing direct Commonwealth funding (that is bypassing the states) to Aboriginal regional bodies,
- identifying community development, economic development and other strategies to meet the needs of regions and communities,
- arranging for elected officials to supervise negotiations,
- opening the advisory channels to ATSIC such that Land Councils and Aboriginal resource agencies should advise ATSIC rather than the sole source of the Commission's advice being from the bureaucracy,
- arranging for a meeting of the representative bodies under the NTA to draw up a plan for negotiating with the Commonwealth and the states on a Regional Agreements policy,
- providing for greater Aboriginal involvement in land use, plans and decisions for environmental management, environmental impact assessment and development controls,
- promoting the exercise of the federal government's fiduciary duties to Aboriginal peoples and promote federal pressure on state governments to identify political and legal issues of concern to Aboriginal peoples.

### *Application of Regional Agreements in southern Australian regions*

The current initiatives for Regional Agreements appear to have strongest support in northern Australia where there are substantial areas of Aboriginal land and population. However, if a broad concept of Regional Agreement is adopted, as discussed in this Chapter, forms of Regional Agreements can be negotiated in the southern states. ATSIC, Merimbiak Nations Aboriginal Corporation and the Victorian government have signed a protocol (November, 2000) to negotiate a statewide framework agreement to deal with native title. Regional agreements for marine areas should also be of particular interest in Southern Australia regions, as elsewhere in Australia.

### **The Land Fund and social justice package**

The ATSIC Amendment (Indigenous Land Corporation and Land Fund) Bill 1994 established a \$A1.1 billion fund to enable Aboriginal peoples to acquire and manage land in a way that will provide them with social, cultural and economic benefits. The Land Fund was established in recognition that most Indigenous peoples in Australia cannot benefit from the NTA because they were dispossessed of their land. It completed the second stage of reform following the *Mabo* decision to recognise Indigenous rights and needs. The third stage was developed in 1995, through the social justice package proposed by the federal government.

The ATSIC Issues Paper *Towards Social Justice* focused on measures to enable Aboriginal peoples to get a fair share of funds, services and programmes (state and federal) and for greater recognition and empowerment of Aboriginal peoples. ATSIC considered the following issues in this latter context:

- recognition, in the Australian Constitution, of the special place of Indigenous peoples in Australian society,
- greater measures of self-government for Aboriginal and Torres Strait Islander communities,
- regional agreements between Indigenous peoples and governments which seek to set out rights and benefits, and
- clarification of sea rights.<sup>62</sup>

The submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner (Mick Dodson), on the Social Justice Package, also supported Regional Agreements as part of the evolution of Indigenous self-government.<sup>63</sup> The recommendations in the Dodson submission include:

- that the extinguishment of native title should not be a prerequisite for government approval of Regional Agreements;
- that the Australian government trial projects in at least four regions in northern and southern Australia where Indigenous communities resolve to pursue negotiated settlements on a regional basis;

- that the Australian government fund a Research Resource Centre for Negotiating Indigenous Claims which monitors the trial projects and provides resource and research assistance to Indigenous communities and organisations;
- that the Australian government report on political, financial and legal measures that can be used to facilitate state, territory and local government involvements in Regional Agreements;
- that federal legislation be amended or enacted to allow and promote regional Indigenous corporations with necessary functions to facilitate Regional Agreements (the Dodson submission lists the functions that will be necessary);
- that regional agreements must proceed on the basis that the negotiations do not violate relevant international standards such as those articulated in the Draft Declaration on the Rights on Indigenous Peoples, ILO 169, the *Convention on Biological Diversity* and human rights conventions. The federal government should implement bottom line conditions for negotiations based on such international standards;
- that following trial projects, Indigenous organisations should be funded for the negotiation of Agreements-in-Principle and provided with interest free loans for the Final Agreement;
- that the federal government and Aboriginal organisations investigate the expedited Regional Agreement processes such as the British Columbia Treaty Commission;
- that Regional Agreements be recognised through federal legislation. Constitutional reform proposals should provide constitutional recognition subject to clearly defined amendment processes; and
- that the federal - and any involved state and territory - government enter into implementation contacts, timetables and resource allocation to implement Regional Agreements.<sup>64</sup>

The Labor government lost office before it could act on the social justice package and it lapsed under the Liberal-National government. However, the idea did not die as is demonstrated by the ILUA provisions in the 1998 Amendments to the NTA. The following Section of this Chapter deals with some options for Regional Agreements in Australia based on overseas experience and the opportunities afforded by these recent developments in Australia.

### *Agreements under the NTA*

There are three main areas of the NTA from which agreements may arise: in the determination of native title, through the future act provisions and the right to negotiate and through other negotiated agreements. To a significant extent the growing emphasis on negotiation and agreements relates to ongoing uncertainty about who has native title, what it is (use, access, resources, ownership) and what can be done while native title is being determined. Adjudication is often too slow and fragmented for Indigenous and non-Indigenous people who have to deal with this uncertainty.

When an Indigenous group applies for a determination of native title there is a period of time in which mediation can occur with governments and other interested parties. An agreement can result from the mediation that recognises native title and outlines the relationship between native title rights and interests and any other rights and interests over an area. This sort of agreement can form the basis of a determination of native title. Joint management of national parks and protected areas will be a central feature of many determinations of native title, especially in more populated areas, national parks having been used in the *Mabo* judgment as an example of a land tenure that is consistent with the continued exercise of native title. It is also likely that issues of biodiversity protection will be considered in this context.

In contrast to right to negotiate provisions, the provisions relating to agreements were cursory in the original legislation. Section 21 provided for agreements with Commonwealth, state or territory governments to surrender title or to authorise a future act. Section 21(4) of the Act made the briefest reference to 'agreements – being made by native title holders on a regional or local basis'. The provisions were broad in terms of subject matter and compensation, but gave little guidance in terms of process. In stark contrast to the Canadian Regional Agreements, no resources or clear incentives to negotiate agreements were provided,. However, the potential of the agreement process was immediately recognised, and many parties began to explore negotiated agreements outside the complexity of the right to negotiate process.

### *The 1998 Amendment process*

The changes to the agreements provisions were the least controversial aspect of the government's amendments to the NTA. Changes were made to provide a more detailed and more structured agreements process. While undoubtedly designed to provide greater certainty for non-Indigenous parties entering into agreements there are potential benefits for Indigenous peoples. The provisions have retained the flexibility of the original provisions in relation to subject matter and have made the process more flexible in terms of the parties to agreements, and can avoid the need to involve state and territory governments in many instances.

In the same amendment process, however, the strongest procedural right available to native title holders and applicants, the right to negotiate, was severely curtailed and in some instances removed. This may have an impact on the culture of agreements and negotiation that had begun to develop between native title holders and resource developers as well as community groups and local government. Effective negotiations require reasonably equitable bargaining power, access to information and expertise, realistic time lines for the relevant issues, facilitation and resourcing and cross-cultural approaches designed for each negotiation. The 1998 Amendments did not go much further than the old section 21 in providing for these conditions in ILUA negotiations.

## Indigenous Land Use Agreements

A determination of native title has to be accompanied by a determination of a Prescribed Body Corporate, either to hold the title as trustee or to act as agent for native title holders.

The 3 types of ILUA, under the legislation are:

- Body Corporate Agreements which can be made for areas where native title has been proved to exist,
- Area Agreements which are made where there are no registered native title bodies corporate for the whole area and which may deal with a range of future acts and access to non-exclusive agricultural and pastoral leases, and
- Alternative Procedure Agreements which may be made where there are no registered native title bodies corporate for the whole area and which may provide the framework for making other agreements about matters relating to native title rights and interests.<sup>65</sup>

These types of agreements are discussed in more detail below.

The Act specifies who may be a party to an ILUA. The perceived advantages relate to the flexibility of their content and the legal certainty provided if the ILUA is registered by the National Native Title Tribunal (NNTT) on the Register of ILUAs. The Registrar must give notice of the ILUAs (NTA ss.24BH, 24CH, 24DI). The decision to enter into an ILUA is voluntary. Neate states that those who could benefit from an ILUA include people who want to:

- do things on the land which are inconsistent with native title,
- upgrade their interest in land,
- negotiate the exercise of native title rights and interests on land where other people have legal rights.<sup>66</sup>

Specifically, an ILUA may deal with the following matters in relation to an area:

- side or ancillary agreements to the native title claim mediation process,
- negotiated native title settlements, including frameworks for the determination of native title or compensation applications,
- alternative future act agreements,
- land access, use and management agreements,
- wildlife and natural resource agreements,
- co-management or partnership agreements,
- regionally-based agreements specifying relationships with key private or public sector parties, and
- frameworks and alternative procedures for making other agreements.<sup>67</sup>

The Act provides that persons wishing to make ILUAs can request assistance from the NNTT. A trend anticipated by the Tribunal is that parties to native title determination agreements will increasingly negotiate a number of ILUAs concurrently with consent determinations of native title.<sup>68</sup> This was most noticeable in Queensland and New South Wales.<sup>69</sup> The NNTT provided assistance with 17 ILUA related negotiations during the 1999-2000 period.<sup>70</sup>

This is not an exhaustive list of what can be done under an ILUA. However, there are some limitations. A Body Corporate Agreement or an Area Agreement may provide for the extinguishment of native title rights or interests by surrender to the Commonwealth, state or territory government. The issue of extinguishment has greatly divided Canadian Indigenous negotiators. Notably, under the Act the Alternative Procedure Agreement must not provide for the extinguishment of any native title rights or interests.

### *Types of ILUAs*

The complexity of the legislative provisions make it necessary to clarify who may be a party to particular types of ILUAs and what may be contained in them. These aspects are summarised below.<sup>71</sup>

Body Corporate Agreements are appropriate when native title determinations have been made over the entire area. Accordingly there are registered native title bodies corporate in relation to all of the area). Area and Alternative Procedure Agreements apply to areas where Native Title Determinations have not been made over the entire area. Body corporate agreements and Area Agreements can provide for extinguishment of native title rights or for changing the effect of native title on an Intermediate Period Act. However in these situations the government must be a party. Alternative Procedure Agreements cannot provide for extinguishment or for changing the effect on native title of Intermediate Period Acts.

The major difference between Area and Alternative Procedure Agreements relate to who can be parties and the notice provisions. All registered native title claimants (if any) must be parties to an Area Agreement. Registered native title claimants need not be parties to an Alternative Procedure Agreement although all registered native title bodies corporate and representative Aboriginal or Torres Strait Islander bodies must be.<sup>72</sup>

### *Body Corporate Agreements*

These agreements can only be made after there has been a determination of native title and a body corporate established for the determined native title holders. For a Body Corporate Agreement to be made there must be one or more native title bodies corporate (also known as Prescribed Bodies Corporate).

The registered native title bodies corporate must be parties. Any other person may be a party, including a native title representative body. The government must be a party if the

agreement provides for extinguishment of native title rights by surrender, for validation of an invalid future act or for changing the effect on native title of an intermediate period act. Otherwise, the government may be a party, but it is not mandatory.

These agreements can be about:

- the doing of future acts,
- dealing with future acts that have already been done (including validating them) other than intermediate period acts,
- changing the effect on native title of a validated intermediate period act,
- withdrawing, amending or varying native title claim applications,
- describing the relationship between native title and other rights,
- differentiating the manner of the exercise of native title and other rights and interests,
- extinguishing native title by surrender to the relevant government,
- compensating for past, intermediate period or future acts, and
- describing any other matter concerning native title rights and interests.

#### *Area Agreements*

Area Agreements may cover land or waters where native title has not yet been determined for the whole area. They can be made in any situation other than where there are registered native title bodies corporate for the whole area subject to the proposed agreement (in which case the agreement would properly be a Body Corporate Agreement).

Area Agreements can include the same range of matters covered by Body Corporate Agreements. In addition, an Area Agreement can be made about any matter concerning the statutory rights of access conferred by s.24CB of the NTA. This includes the rights of access of persons with registered native title claims to lands or waters covered by non-exclusive agricultural or pastoral leases.

The Area Agreement must have the native title group as a party (defined in s.24CD(1), (2), (3)). This should include all registered native title claimants and bodies for the area to which the agreement relates (where they exist). The native title group may also include as a party any other Indigenous person, or a representative body, who asserts that they hold common law native title to the area. This type of agreement can be made before there are any native title claims made or registered over the area with Indigenous people who assert a common law claim to native title for the area.

The government must be a party if the agreement provides for the extinguishment by surrender, for validation of an invalid future act or for the changed effect on native title of an intermediate period act. Any other person may be a party.



### *Alternative Procedure Agreements*

An Alternative Procedure Agreement can also cover land or waters where native title has not yet been determined and there are no registered native title bodies corporate for the whole area subject to the proposed agreement (in which case it would be a Bodies Corporate Agreement).

An Alternative Procedure Agreement can include the same range of matters as an Area Agreement with three exceptions. This type of ILUA must not provide for the extinguishment of native title and, as a consequence, may not be used to provide for changing the effect on native title of intermediate period acts. An Alternative Procedure Agreement has an additional role in providing a framework (including alternative procedures) for developing other agreements about native title rights and interests.

The parties to an Alternative Procedure Agreement include a native title group (differently defined than in Area Agreements—see s.24DE). This native title group must consist of (where they exist) all registered native title bodies corporate and all representative bodies in relation to the area covered by the agreement. Every relevant government, according to its jurisdiction, must be a party. Any other person may be a party.

### *ILUA Registration*

An ILUA has the legal effect of a contract while registered and all persons who hold native title are bound by its terms and conditions even if they are not parties to the agreement. This assumes that all actual and potential native title holders have had the opportunity to object to its registration. The process for registration varies for each of the three types of ILUAs and is specified in the NTA.

### *ILUA objections*

There is no right of objection to a Body Corporate Agreement and only persons claiming native title may object to an Area or Alternative Procedure Agreement. The right of objection to registration of an area agreement can only be made in relation to applications certified by representative bodies and on the ground that the representative body did not perform its certification function (NTA ss. 24 CI, 202(8)). The right of objection to the registration of alternative procedure agreements is broader and can be made on the ground that it would not be fair and reasonable to register the agreement having regard to its content, effect on native title, benefits provided and their distribution and any other relevant circumstance (NTA ss.24DJ, 24DL(2)(c)).

### *ILUAs – some examples*

By the end of September 1999 several ILUAs were registered. Some examples are:

- an agreement in New South Wales between a gold mining company and local Aboriginal groups (the Tumut-Brungle Area Agreement),

- an agreement over horticultural land near Katherine in the Northern Territory (the Venn Blocks-Warlangluk Agreement), and
- two area agreements registered in Queensland on 24 August 1999.<sup>73</sup>

Since then an ILUA between Telstra and the Ewamian People in Queensland has been registered. The agreement covers a Telstra radio facility in Etheridge Shire in Far North Queensland and allows the grant of a 20-year lease over the area and the construction of a radio communications tower and ancillary equipment on a fenced site.<sup>74</sup>

Two ILUAs have been lodged for registration in Victoria relating to the Lara to Birregurra gas pipeline. The South Pacific Pipeline Company has advertised its intention to negotiate ILUAs in relation to the Papua New Guinea gas project. The project involves the building, operating and maintenance of a gas pipeline from Kutubu in Papua New Guinea to Gladstone in Queensland. The proposed agreements relate to the Cape York and Central Queensland sections of the proposed pipeline.<sup>75</sup>

In August 2000, an ILUA was concluded as part of the largest native title settlement in Australia (50,000 square kilometres). The Nganawongka/Wadjari and Ngarla applications (in Western Australia) were resolved through agreement mediated by the NNTT. This is the most significant ILUA negotiated so far. The claimants (The Spinifex People) are acknowledged as traditional Aboriginal owners of the land but the state maintains ownership of minerals, water and petroleum. The Aboriginal owners are able to maintain their traditional activities and the full right to negotiate will apply.

#### *The Tumut-Brungle Project and Area Agreement*

The process followed in developing this ILUA was described by Geoff Clark.<sup>76</sup> Minco was a small public mining company which applied for a mining lease (from the New South Wales government) for an area near Adelong in the south-west of New South Wales. The Mining Lease Application (MLA) area was predominantly freehold and had been subject to dozens of pastoral, mining and other interests over the past 140 years. A small portion of the MLA area had reverted to the Crown at the end of last century and was held under a lease. At the time of the MLA (April 1998) there was considerable legal uncertainty in the context of the *Wik* debate and the proposed amendments to the NTA.

The New South Wales government considered that it was very likely that native title had been extinguished but asked Minco to resolve the native title issue before the government would issue the mining lease. If native title continued on part of the MLA then the mining lease would constitute a future act. Minco did not wish to be dragged into the native title debate. It wanted its lease to be issued without adversely affecting native title rights, if such interests were found to exist. Minco, following this strategy, decided to lodge a non-claimant application under the NTA. The company realised that they would need the trust and co-operation of local Indigenous people and agreed not to lodge a claim in the two-month period during which the non-claimant application was being advertised.

Minco approached the Tumut-Brungle Aboriginal Land Council, which advised that the wider local Aboriginal community would also have to be involved in the process. The Tumut-Brungle Aboriginal Land Council received assistance from the New South Wales representative body, the New South Wales Aboriginal Land Council, in the form of expert advice. Formal negotiations were commenced and the parties resolved to develop a protocol as a first step in the negotiation process. The protocol was a crucial element in the success of these negotiations as it set out the framework, timelines and objectives. Other important features of the protocol were that:

- each party would deal only through its nominated representatives and there would be no side meetings or side deals,
- all negotiations would be between the working party and the nominated representatives of Minco,
- specific rules would be developed on funding assistance by Minco to assist local Indigenous people to make informed decisions, and
- there would be agreement on what each party's objectives in the negotiation process were.<sup>77</sup>

After the protocol was signed the project agreement negotiations were concluded in about three weeks. Clark considers that the protocol and Indigenous access to legal, financial and environmental advice were the reasons for this quick outcome.<sup>78</sup> A major problem in the negotiations related to compensation. This was resolved when Minco proposed making a placement of equity to the Indigenous people, not just from the mineral lease but from all of Minco's activities. This was accepted and a body corporate was established to hold the equity on behalf of the Indigenous community.

Around this time the ILUA provisions in the amended NTA were enacted. Minco and the local Indigenous people saw the opportunity for a further agreement in the form of an ILUA (Area Agreement). Minco had exploration licenses over large areas in southern New South Wales and proposed that the parties enter into an Area Agreement over the entire Land Council area in return for further equity placement. Local Indigenous people and the Tumut-Brungle Land Council agreed to this proposal. The representative body was also made a party to this agreement.

The benefits of the process (both the contract and the ILUA) for local Indigenous people included:

- recognition by Minco that the Indigenous people held interests in the land, which had to be recognised and accommodated,
- the right of the Indigenous people to enforce environmental standards,
- involvement in environmental monitoring and archaeological clearance with secure rights to protect significant areas,
- jobs, education and training opportunities and sub-contracting arrangements, and
- a base for economic self-sufficiency through equity in Minco.<sup>79</sup>

The benefits of the contract and the ILUA for Minco included:

- allowing the issue of a mining lease at a strategically important time in its corporate history and in the middle of a tense political debate and uncertainty which had frozen much of both the government process and mining activity in many other parts of Australia,
- guaranteeing certainty with respect to native title and future acts in the area covered by the agreements,
- a willing and co-operative Aboriginal workforce within the project area,
- a dramatic improvement in the relationship between the Aboriginal community, the mining company and the wider community since the signing of the agreement.<sup>80</sup>

### **ILUA negotiation issues**

Maintaining the bargaining position of Indigenous parties to agreements and ensuring they are adequately resourced for the exercise are crucial factors to achieving outcomes that will be of lasting benefit to native title holders. For Indigenous people the native title process sometimes heightens internal disputes, which continue to hamper the process of agreement. It also affects the willingness of parties to enter agreements. The benefits of the process provide their own concomitant obstacles. The fact that agreements can be binding and final settlements of compensation and may involve the surrender of native title rights and interests creates a significant burden for Indigenous negotiators to ensure fair and equitable outcomes for present and future generations.

Parties to ILUAs need to follow stringent ethical and practical guidelines if an ILUA is to be concluded. Non-native title holders need to ensure that they are dealing with native title holders for the area under the Act. It is especially important that all people who should be parties are involved in the negotiations and that they are adequately resourced. The negotiations need to accord with time frames for such cross-cultural negotiations and contain details relating to implementation and dispute resolution. In Canada, all of the Regional Agreements (after the Inuvialuit Agreement, 1984) have required separate implementation agreements with provisions for Indigenous training, allocation of responsibility for provisions in the Regional Agreement, budget and timing for each obligation.

In these negotiations there are often non-Indigenous complaints about delay. Indigenous people in Australia see native title rights as a recognition of their law and the basis for their future. Matters affecting native title rights have constitutional and fundamental meaning. They are never just a deal regardless of whether an ILUA is large or small. In the case of Canada, delays in negotiating Regional Agreements have often been caused by governments.

## Precedents

The confidentiality of agreements has meant that, to a large degree, parties have been re-inventing the process at each negotiation. While larger Indigenous organisations such as the Cape York Land Council or the Northern Land Council have their own historical precedents to rely upon, many representative bodies and the native title holders themselves are often faced with the simple question ‘what should we be asking for?’ There may be clear ideas of what they want for their community and their people, but often it is not clear what they can or should expect.

John Ah Kit argued that particulars of individual agreements cannot necessarily be relied upon as precedent but that the process of negotiation can be. In relation to Mt Todd for example, Ah Kit argued that what was of value as a precedent was the willingness of the mining company to adopt best practice in choosing to negotiate with Aboriginal interests ‘from a position of equity rather than intransigence’.<sup>81</sup> On the same agreement, former Chair of Zapopan, Terry Strapp, is reported to have said that parties must be prepared to accept a less-than-perfect outcome.<sup>82</sup>

## The role of the non-government sector

Government support for the process, both actual and perceived, would go a long way to fostering a culture of agreement. As in the past, however, it will be corporations and community groups that will lead the way in forging partnerships with Indigenous peoples. There seem almost limitless possibilities for agreements—whether reached in relation to a determination of native title, in future act processes or in relation to ILUAs—for re-negotiating existing structures of land use and management. The process of reaching agreement will not only involve Indigenous peoples in the protection and development of their lands but has the potential to bring together diverse community interests. In doing so, it gives the community the opportunity to participate in the recognition of Indigenous peoples’ inherent rights and responsibilities for their land.

## ILUAs and Regional Agreements

It appears that ILUAs will be an important form of negotiated agreement in Australia. Many ILUAs will relate to native title issues in small areas and/or specific projects or future acts. A comprehensive Regional Agreement goes considerably beyond native title issues and builds upon them as a basis for self-government. Obviously, ILUAs could provide part of a Regional Agreement process relating to the exercise of native title rights (in the above contexts), the doing of particular future acts and compensation issues. However, they seem to be intended (by the federal government) to be a flexible and (sometimes) quicker alternative to native title adjudications and the determination on future acts. They are not intended as a means of negotiating a future for Indigenous people relating to their ownership, use and management of their land, waters and

resources at the regional level. The government has power to extend ILUAs by amending the Act in the future or utilizing other legislation for broader Regional Agreements. The risk to Australian Indigenous peoples is that ILUAs will be a continuation of ad hoc, uncoordinated agreements which fail to achieve long-term gains for them.

An option for future Indigenous governance would be to propose a negotiated comprehensive Regional Agreement outside the NTA or by adding on to the ILUA process. A comprehensive agreement involves many issues other than native title and could provide for funding and Indigenous governance of environment and natural resources based on need rather than ownership. This would require special (usually federal) legislation, resourcing and facilitation of negotiations. The South Australian government has recently approved \$900,000 to support native title agreement negotiations in that state. By necessity, in a federal system, state and local governments usually have to be a party to the negotiation as well.

### **Significance of ILUAs for Indigenous governance**

The opportunities provided by ILUAs are very significant for Indigenous and non-Indigenous Australians. In most cases, equitable, well planned and resourced and bona fide negotiated agreements are preferable to and more enduring than adjudicated or bureaucratically imposed solutions. There are some serious concerns about the inequitable bargaining power of Indigenous Australians given the erosion of their right to negotiate in the 1998 Amendments to the NTA. Further, there does not appear to be any co-ordinated federal or state government policy to provide the resources and facilitation required if ILUAs are to meet their potential for just and lasting agreements.

It is also a concern that ILUAs involve notice to prescribed parties but registered ILUAs are confidential. This adds to the ad hoc and fragmented approach that already plagues environmental planning and natural resource management. If there is to be evolving cross-cultural arrangement for Indigenous involvement in these areas at the regional level, the ILUAs will be an inadequate mechanism.

There does not appear to be any monitoring to evaluate whether ILUAs are likely to deliver long term benefits to Indigenous Australians or how they could be improved. They have the advantage of providing a mechanism for agreement without government involvement under certain circumstances and a more flexible approach to dealing with native title issues. These factors seem to have facilitated the conclusion of several ILUAs and the parties have often been creative and co-operative in arriving at compromises and mutually advantageous positions.

From the wider perspective, ILUAs cannot, by themselves, cover the large geographic areas and range of issues included in the Canadian Regional Agreements. To have a comprehensive Regional Agreement, relevant governments should be parties and the legal framework will need to extend beyond the NTA. This form of agreement will be more

time consuming and complex than an ILUA but it is more likely to address the fundamental needs of Indigenous Australians for the recognition of their human rights and specific Indigenous rights, as well as the delivery of services to them in a way that is comparable to other Australian citizens. Native title recognition under the legislation is painfully slow. ILUAs may speed up some determinations. However, there is no reason why Indigenous management, co-management and use issues related to land, waters, seas, resources and wildlife cannot be negotiated in a more coherent regional context along with sustainable economic strategies. These frameworks should address the needs of contemporary Indigenous Australians and should not be dependent on the formal recognition of native title. These negotiations should be based on approaches like the proposed social justice package<sup>83</sup> and go considerably further than ILUAs and native title in addressing the disadvantage of Indigenous Australians and the development of new governance strategies by them.

### Options for regional agreements in Australia

There is now an opportunity for Australian Aboriginal peoples and Torres Strait Islanders to negotiate forms of Regional Agreements based on the *recognition of native title and need* (through the Land Fund and other regional initiatives). There does not appear to be any good reason why Australian Regional Agreements should be based only on settling native title claims (although this could be part of many agreements). Many concerns of Australian Indigenous peoples relate to control and management of their lands, seas, resources and wildlife and service delivery. Gaining Indigenous control of service delivery is likely to be a very important aspect of Australian negotiations.

Regional agreements could include any (or all) of the following topics:

- *Settlement of native title claims*: Individual claims under the NTA can be negotiated through the processes under the Act. However, this could be costly and time-consuming for Indigenous claimants. There will be ‘winners’ and ‘losers’ and there may be arguments between Indigenous people over who belongs to what land. Another strategy would be the negotiation of ILUAs under the 1998 Amendments to the Act.
- *Constitutional development*: Alternatively, Regional Agreements could result in specific legislation which overrides inconsistent state and federal laws. Native title claimants could seek to negotiate regional settlement of claims to land and sea outside the NTA. Specific legislation could provide that native title rights could continue for land which is successfully claimed by Indigenous peoples and granted in fee simple.
- *Extending Indigenous control over land and sea use resource decisions*: Regional agreements can be negotiated to provide for Indigenous control of land-use and development on land that they own. Resource royalties may also be granted to them for development on this land. This can provide a financial base for further

Indigenous economic initiatives in the region. There is a precedent for this under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). However, policies and decisions relating to areas and resources outside the ownership and control of Indigenous peoples, may affect their resources and land and sea rights. Therefore, Regional Agreements can create new institutions and processes that give Indigenous peoples a legal and practical right to participate in planning, development control, environmental and social impact assessment, resource allocation policies and decisions for an area which is considerably larger than that which they own. This provides the opportunity for Indigenous peoples who cannot establish native title to regain some control along with native title holders.

- *Management and use of land, sea, natural resources and wildlife through bioregional planning*: Regional agreements can be negotiated to provide for Indigenous peoples' control or co-management over their lands and the wider region. Regional agreements extend co-management from conservation (for instance, joint management of national parks) to the management of land, resources and wildlife which is to be sustainably used by Indigenous and non-Indigenous people.
- *Pastoral properties—Settling use and access rights of Aboriginal peoples*: Regional agreements can be negotiated to resolve legal disputes over the co-existence of native title rights with pastoral leases. Pastoralists, conservationists and the Cape York Land Council have negotiated an historic Heads of Agreement on these issues.<sup>84</sup>
- *National parks, conservation and world heritage issues*: Regional agreements ensuring Indigenous control and co-management of national parks, world heritage areas and environmental management processes would be a recognition of Indigenous rights and of benefit to all Australians.
- *Participation in resource development and other economic initiatives*: Regional agreements can provide the framework for Indigenous enterprises, joint ventures and benefit sharing from major projects. The Tumut Brungle ILUA illustrates this potential.
- *Provision of services to Indigenous peoples by Indigenous organisations*: Existing funding and service delivery arrangements do not meet the basic needs of Indigenous peoples who are often denied the normal citizenship rights of other Australians to services such as water, housing, health and education. Direct funding to Indigenous organisations to provide these services could be negotiated through Regional Agreements.
- *Strengthening Indigenous local government*: Regional agreements provide an important opportunity to negotiate new powers and resources for Indigenous local government, policing and community justice.

### **Triggers for Australian regional agreements—getting the bargaining powers**

Australian Aboriginal peoples are essentially in the same legal and political situation as many Canadian Indigenous peoples in the late 1970s. Many Canadian Indigenous peoples had no treaty rights and had unspecified native title rights following the



*Calder* decision. Negotiations for Canadian comprehensive Regional Agreements began during this period. They were seen as modern treaties which provided for settlements which were just and enduring. Australia is attempting a similar political reconciliation through the NTA, the Land Fund and the reconciliation process. There are no legal or constitutional impediments to the negotiation of comprehensive Regional Agreements in Australia. The issue is political will and the priority in the strategies of Indigenous Australians.

The federal government could fund several trial projects on Regional Agreements (for example, in the Kimberley region, Torres Strait and in a southern region of Australia). The package would provide funding for Aboriginal communities and organisations to fund the development of policies, resources, community consultation and identification of needs and the negotiation of the agreement(s). The federal government should make a good faith commitment to these negotiations and attempt to involve state governments (where their powers are involved). The trial projects could take a staged approach. The 28 sub-agreements in the *Yukon Umbrella Final Agreement, 1990* could have been phased in as each negotiation was completed. This is certainly an option that could be considered.

Aboriginal people and communities throughout Australia could use Regional Agreements to consolidate existing programmes and resources. The bargaining trigger would be efficiency, better Aboriginal economy and skills. Again, this could be demonstrated through the trial projects. A trigger for Regional Agreements in management of land, sea, resources and conservation areas is that Aboriginal people live in these areas and bring unique skills, knowledge and resources. The success of land-care groups can be used as an illustration of the effectiveness of local involvement and control in these areas. Australia could be a world leader in this process.

Another trigger for Regional Agreements is the legal and political uncertainty remaining after the NTA. The effectiveness of the Native Title Tribunals in achieving significant numbers of determinations remains to be seen. Not all native title issues have been resolved by the *Mabo (No 2)* case and this legislation. Resource and tourist developments cannot proceed without an efficient legal approval system. Costly and time consuming challenges could be avoided by the processes established under Regional Agreements. ILUAs demonstrate an evolving trend towards wider negotiated approaches.

The Australian government has an international reputation at stake. Regional agreements provide an important strategy to improve our compliance with existing human rights conventions.

### **Constitutional and legal framework for Australian regional agreements**

Regional agreements which are settlements of native title and other legal claims of Indigenous peoples should be enacted through federal legislation. This overrides state

legislation under the Australian Constitution. However, federal legislation can be amended by later federal legislation (usually subject to compensation where there is an acquisition of property). Therefore, proposals for constitutional reform in Australia should consider constitutional protection for native title rights and Regional Agreements which provide for settlement of these rights.

Regional agreements that cover a substantial range of the areas discussed above could be enacted by federal legislation giving legislative force to the agreements. This legislation should provide that it overrides any federal or state legislation which is inconsistent with the agreements (as enacted). Regional agreements could also be enacted through similar state or territory legislation. If the agreements involve a smaller range of areas (for example, specific service provision by Indigenous organisations), they may be implemented through contracts. The Indigenous communities and organisations could contract with federal, state and territory governments and any other affected parties. Breach of the contract could result in damages being awarded to the aggrieved party.

Aboriginal local governments could assume powers, responsibilities and resources under a wide array of legal and financial frameworks currently applicable to Australian local government. Proposals could be prepared for more autonomy and resources for Aboriginal local governments.

## Conclusions

The benefits of Regional Agreements are great and they are practically achievable in Australia:

- Indigenous peoples have the opportunity to achieve a comprehensive approach to their needs—a benefit also to governments which have tried and expensively failed to meet those needs with piecemeal programmes and solutions offered by non-Indigenous experts.
- Governments avoid the levels of fear and opposition in the white community which occur when a simple transfer of whole territories to Indigenous ownership is discussed.
- Regional agreements can extend Indigenous control over lands and resources that they do not own (but in which they have substantial interest) and can provide an enduring economic base for Indigenous peoples which goes beyond welfare payments.
- Regional agreements reflect the needs and identity of Indigenous peoples as whole communities and provide better means for focussing and co-ordinating efforts to meeting needs and ensuring responsibility of leaders to the people they represent than do other approaches. In other words, Regional Agreements come closer than do other approaches to recognising and restoring Indigenous peoples as political entities in the modern world.

- Although Regional Agreements may be a substitute for a more firmly entrenched arrangement such as the status of an Australian state like Queensland, they are more easily improved to meet changing needs—there is no reason why their status cannot be upgraded or constitutionally entrenched at some later time.

Regional agreements are a most promising policy concept and one which has been used to make significant progress in achieving self government overseas, even when specific problems have been found with the negotiation and implementation of details within an agreement. They can be negotiated in Australia on the basis of native title, the needs of Indigenous peoples and existing legislative provisions without constitutional amendment. Constitutional amendment is not precluded by Regional Agreements and this can be pursued by Indigenous peoples as an important future priority.

This Chapter has considered the Canadian Regional Agreements process in detail. The conditions and circumstances involved cannot uncritically be transferred to Australia but it is essential that we keep a sense of perspective and history. There is no doubt that the Regional Agreements process has been fraught with enormous problems and difficulties for governments and Indigenous peoples in Canada. The difficulty in financing the negotiations, getting consensus from the parties, making heart-breaking compromises (on the part of Indigenous peoples), ensuring implementation arrangements and creating new bi-cultural institutions and forms of self-government cannot be understated. However, many of the criticisms have focused on particular acts of bad faith in the context of negotiations, such as those currently being experienced in British Columbia, or agonising analysis of one aspect of a Regional Agreement process.

The reality should be looked at in the context of 25 years of Regional Agreements being negotiated and implemented in Canada. There is no doubt that the gains for Indigenous peoples, have been enormous. They have gone from negotiations with the Canadian government in the early 1980s when Indigenous people were not allowed to speak of self government<sup>85</sup> to new regional governance processes that focus on Indigenous participation in the planning, management and development of resources and land, new economic frameworks and opportunities and the realisation of self government in the case of Nunavut, Nisga'a and some of the Yukon First Nations. Regional agreements are about creating a long term future on Indigenous terms. The experience of Greenland and Alaska has been documented in other Chapters and are also examples of hard-fought Indigenous governance processes. In the case of Greenland, their self-government has become a symbol for the aspirations of many Indigenous nations even though it has gradually evolved as the Inuit increased their autonomy from Denmark. In the circumstances of Canada and Greenland, the initial granting of Indigenous control over land, seas and resources has leveraged their ongoing struggle for self-government.

It is naive to believe that native title settlements and ad hoc local agreements and project agreements in Australia will somehow add up to a Regional Agreement. Even if it takes a long time, the essence of a Regional Agreement is that it is a regionally and locally driven co-ordinated strategy that builds on an Indigenous vision of integrated rights and self-governance. Gradualism will not work without this strategic vision developed by Indigenous people and triggers which force engagement by the government and the private sector.

## Notes

- <sup>1</sup> See Report to the RAC, *A sea of change: Overseas Indigenous-government relations in the coastal zone*, P Jull, 1993.
- <sup>2</sup> A Harris (ed), *A good idea waiting to happen: Regional agreements in Australia*, Cape York Land Council, 1995.
- <sup>3</sup> *Cape York Heads of Agreement: Future land use on Cape York Peninsula*, Cape York Land Council, Cattleman's Union of Australia, the Australian Conservation Foundation, the Wilderness Society and the Peninsula Regional Council of ATSIC, 1996.
- <sup>4</sup> M Dodson, *Indigenous social justice strategies and recommendations*, Submission to the Commonwealth of Australia on the Social Justice Package, 1995, Vol 1.
- <sup>5</sup> M Edmunds, *Regional agreements - Key issues in Australia*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1999, Volume 1 and 2 Case Studies.
- <sup>6</sup> P Sullivan, 'Regional agreements, research project scoping paper 1997' in Edmunds, above note 5.
- <sup>7</sup> D Craig and P Jull, 'Regional agreements – Options for Australian Indigenous peoples' in *ATSIC Regional Agreements Seminar*, Office of Public Affairs for the Strategic Planning and Policy Branch, ATSIC, 1995, p 1199.
- <sup>8</sup> *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1.
- <sup>9</sup> *Calder v the Queen* (1970) 8 DLR (3d) 59; (1973) 34 DLR (3d) 149.
- <sup>10</sup> See Chapter 10.
- <sup>11</sup> *R v Sparrow* (1990) 70 DLR 385; 1 CNLR 145, 9 BCLR (2d) 300 (BCCA).
- <sup>12</sup> The review of Regional Agreements by the Canadian Royal Commission on Indigenous Peoples, is largely contained in the section titled; 'Restructuring the relationship' Volume 2 and endorses negotiated agreements as a centrepiece of national Indigenous policy. See CD-ROM, *For seven generations, the report of the Royal Commission on Aboriginal Peoples* (including background reports), Public Works and Government (publishing), 1997.
- <sup>13</sup> P Usher, *Contemporary Aboriginal lands, resources and environmental regimes – Origins, problems and prospects*, Background paper prepared by Canadian Royal Commission on Aboriginal Peoples, 1993, pp 87-88.
- <sup>14</sup> For a more detailed discussion see B Richardson, D Craig and B Boer, *Regional Agreements for Indigenous lands and cultures in Canada*, North Australian Research Unit, 1995; B Richardson, D Craig and B Boer, 'Indigenous peoples and environmental management: A review of Canadian Regional Agreements and their potential application to Australia – Part 1' (1994) 11(4) *Environmental and Planning Law journal* 320; B Richardson, D Craig and B Boer, 'Indigenous peoples and environmental management: A review of Canadian Regional Agreements and their potential application to Australia – Part 2' (1994) 11(5) *Environmental and Planning Law Journal* 357.

## 15. Negotiated Agreements and Regional Governance Agreements

- <sup>15</sup> L Carpenter, 'Regional Agreements: the Inuvialuit experience in Canada' in *Ecopolitics IX conference papers and resolutions*, Northern Territory University, 1-3 September 1995.
- <sup>16</sup> See D Smith, *Co-management regimes: An approach to the sustainable development of natural resources in the Arctic*, Inuvialuit Game Council, 1995. For a more detailed discussion see Richardson, Craig and Boer, *Regional Agreements for Indigenous lands and Cultures in Canada*, above note 14; Richardson, Craig and Boer, 'Indigenous peoples and environmental management: A review of Canadian Regional Agreements and their potential application to Australia – Part 1', above note 14; Richardson, Craig and Boer, 'Indigenous peoples and environmental management: A review of Canadian Regional Agreements and their potential application to Australia – Part 2', above note 14. Usher, above note 13; M Tatlock, *The negotiation of environmental assessment regimes pursuant to comprehensive land claims in British Columbia*, Policy and Regulatory Affairs, Federal Environmental Assessment Review Office, 1994; L Staples, *Background report* prepared for the Canadian Royal Commission on Aboriginal Peoples, Land, Resource and Environment Regimes Project, 1996.
- <sup>17</sup> Smith, above note 16.
- <sup>18</sup> Ibid.
- <sup>19</sup> Ibid.
- <sup>20</sup> Usher, above note 13.
- <sup>21</sup> Ibid.
- <sup>22</sup> *R v Sparrow* (1990) 70 DLR 385.
- <sup>23</sup> See for example, *Delgamuukw v British Columbia* (1991) 79 DLR (4<sup>th</sup>) 185.
- <sup>24</sup> British Columbia (BC) Treaty Commission—Newsletters 2000—First Nations reject initial offers <http://www.bctreaty.net/updates/feb00reject.html>.
- <sup>25</sup> British Columbia (BC) Treaty Commission—Newsletters 2000—Progress being made in treaty process <http://www.bctreaty.net/updates/oct00progress.html/>.
- <sup>26</sup> Canadian Government - Comprehensive Claims Policy and Status of Claims [http://www.inac.gc.ca/ps/clm/brieff\\_e.pdf](http://www.inac.gc.ca/ps/clm/brieff_e.pdf).
- <sup>27</sup> British Columbia (BC) Treaty Commission—Newsletters 2000—Interim Measures Watch [http://www.bctreaty.net/updates/feb00interim\\_measures.html](http://www.bctreaty.net/updates/feb00interim_measures.html).
- <sup>28</sup> Ministry of Environment, Lands and Parks, *Guidelines on Interim Measures*, 1996, p 3.
- <sup>29</sup> British Columbia (BC) Treaty Commission—Newsletters 2000—Interim Measures Watch [http://www.bctreaty.net/updates/feb00interim\\_measures.html](http://www.bctreaty.net/updates/feb00interim_measures.html).
- <sup>30</sup> *Indian Act R S C*, 1985.
- <sup>31</sup> Government of Canada, Federal Policy Guide, *The government of Canada's approach to implementation of the inherent right and the negotiation of Aboriginal self-government*, 1995.
- <sup>32</sup> Ibid.
- <sup>33</sup> M Ivanitz, 'The emperor has no clothes: Canadian comprehensive claims and their relevance to Australia' *Regional Agreements Paper No 4*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997.
- <sup>34</sup> Harris, above note 2.
- <sup>35</sup> NFA, Nisga'a Government 9(k), p161; Nisga'a Constitution 12(1), p 9.
- <sup>36</sup> NFA, Nisga'a Government 9(k), p 161.
- <sup>37</sup> *Nisga'a Constitution* 28, p 15.
- <sup>38</sup> NFA, Nisga'a Government 9(m), p 161.

- <sup>39</sup> NFA, Nisga'a Government 9(l), p 161.
- <sup>40</sup> FFA 72 and 73, pp 18-19.
- <sup>41</sup> Canadian Government, Comprehensive Claims Policy and Status of Claims [http://www.inac.gc.ca/ps/clm/brief\\_e.pdf](http://www.inac.gc.ca/ps/clm/brief_e.pdf).
- <sup>42</sup> Ibid.
- <sup>43</sup> T Courchene, *Aboriginal self-government in Canada*, Occasional Lecture Series, Australian Senate, 19 April 1993.
- <sup>44</sup> See also *Yukon Environment Act 1991*.
- <sup>45</sup> Richardson, Craig and Boer, 'Indigenous peoples and environmental management: A review of Canadian Regional Agreements and their potential application to Australia – Part 1', above note 14, pp 320-43 and Usher, above note 13, pp 87-88.
- <sup>46</sup> Ivanitz, above note 33, pp 319-43.
- <sup>47</sup> C O'Faircheallaigh, 'Process, politics and Regional Agreements' in *Land, rights, laws: Issues of native title*, Regional Agreements Paper No 5 Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998, pp 343-62.
- <sup>48</sup> HC Coombs et al (ed), *Land of promises*, Aboriginal Studies Press, Australian Institute of Aboriginal Studies, 1989.
- <sup>49</sup> M Sibasado, 'Native title and Regional Agreements: Kimberley region' in Harris (ed), above note 2, pp 37-45.
- <sup>50</sup> Ibid.
- <sup>51</sup> Ibid.
- <sup>52</sup> P Sullivan, in Edmunds, above note 5.
- <sup>53</sup> Ibid.
- <sup>54</sup> Id, p 311-12.
- <sup>55</sup> P Yu, 'Foreward' in Edmunds, above note 5, p iii.
- <sup>56</sup> Id, p iv.
- <sup>57</sup> Parliament of the Commonwealth of Australia, *Torres Strait Islanders: A new deal – A report on greater autonomy for Torres Strait Islanders*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, 1997.
- <sup>58</sup> Ibid.
- <sup>59</sup> B Arthurs, 'Towards regionalism: A regional agreement in the Torres Strait' in Edmunds, above note 5.
- <sup>60</sup> Id, p 77.
- <sup>61</sup> Id, p 78
- <sup>62</sup> ATSIC, *Towards social justice: An issues paper*, Australian Government, 1994.
- <sup>63</sup> M Dodson, *Indigenous social justice strategies and recommendations*, Submission to the Commonwealth of Australia on the Social Justice Package in Volume 1, 1995.
- <sup>64</sup> Id, pp 29-31.
- <sup>65</sup> G Neate, 'Indigenous Land Use Agreements: An overview' (1999) 4(2) *Indigenous Law Bulletin* 11, pp 11-14.
- <sup>66</sup> Id, p 11.
- <sup>67</sup> Smith, above note 3, p 4.
- <sup>68</sup> National Native Title Tribunal, *Annual report 1999-2000*, p 74.

## 15. Negotiated Agreements and Regional Governance Agreements

- <sup>69</sup> Id, p 74.
- <sup>70</sup> Id, p 75.
- <sup>71</sup> This section is summarised from D Smith, 'Indigenous Land Use Agreements: New opportunities and challenges under the amended Native Title Act' in L Strelein (ed), *Land, rights, laws: Issues of native title*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Regional Agreements paper 7, 1998.
- <sup>72</sup> RH Bartlett, *Native title in Australia*, Butterworths, 2000, p 407.
- <sup>73</sup> Id, p 7.
- <sup>74</sup> *Native Title News* (Qld), January 2000, p 1.
- <sup>75</sup> Ibid.
- <sup>76</sup> 'Indigenous people and the mining industry: The Adelong Agreement' (1999) 4(21) *Indigenous Law Bulletin* 21, pp 21-23.
- <sup>77</sup> Id, p 22.
- <sup>78</sup> Ibid.
- <sup>79</sup> Id, p 23.
- <sup>80</sup> Ibid.
- <sup>81</sup> JA Kit 'Native title and best practice' in GD Meyers (ed), *The way forward: Collaboration in country*, National Native Title Tribunal, 1995, p 165.
- <sup>82</sup> P Conran, 'The practicalities of Land Use Agreements – A Northern Territory perspective' in Meyers, above note 81, p 159.
- <sup>83</sup> M Dodson, *Aboriginal and Torres Strait Islander Social Justice Commissioner second report (1994)*, Australian Government Publishing Services, 1995, p 27.
- <sup>84</sup> Cape York Land Council, The Cattleman's Union of Australia, The Australian Conservation Foundation, The Wilderness Society, The Peninsula Regional Council of ATSIC, *Heads of Agreement*, 5<sup>th</sup> February, 1996.
- <sup>85</sup> Personal communication from Les Carpenter relating the Inuvialuit experience.





## Chapter 16 ■

### Conclusions

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The situation of the world's Indigenous peoples is quite particular. They are the prior inhabitants (and prior sovereigns) of lands and waters that have been taken over by other peoples in what are now sovereign States. They have continually asserted their distinctive collective rights as the First Peoples, in relation to such matters as territory, self-government and culture, as well as claiming their rights to equality with the other peoples that make up those current nations.

The attitude of the colonising peoples in the past may have been to totally ignore the prior rights and status of the earlier inhabitants. Such an approach is facilitated by philosophical outlooks that treat the Indigenous peoples as inferior in terms of levels of 'civilisation'; such an approach also makes it much easier for the newcomers to acquire their lands and resources. Once this is achieved, the prior inhabitants can remain side-lined, as depressed residual populations destined to disappear. They may be expected to assimilate within the imposed society. They may, possibly, be actively assisted to achieve that desired status.

British Imperial policy, at least in the seventeenth through nineteenth centuries, was to settle inhabited lands on the basis of treaty recognition. Such treaties were not the source of Indigenous rights but an acknowledgment of pre-existing sovereign rights. There were exceptions in regions of North America—and in all of Australia! But even when there was treaty recognition, all too often such treaties were inadequately respected in practice. The work of the Waitangi Tribunal attests to this fact in the case of Aotearoa/New Zealand.

In recent decades, policies of assimilation in the countries examined have been abandoned as too simplistic. Barriers to equality within the nation have been removed, so that there are few, if any, legal barriers to equality in the enjoyment of citizenship rights. (Social, cultural and economic barriers are more difficult to dismantle.) In addition, there has been some increase in respect and recognition for the distinctive and collective Indigenous rights of the First Peoples.

Of the nations considered in this study, Australia has been the most recent to provide legal recognition to those rights—primarily in relation to land—first by statute, and, even more recently, through the common law. In consequence, Australians are still struggling to adjust to a situation with which the other nations have longer familiarity. Basic principles relating to recognition of native title are still evolving through the judicial system in relation to such matters as sea rights, the establishment of native title, and extinguishment. At the legislative level, the politics of recognising Indigenous rights have been very problematic. Intellectually, it is proving difficult for non-Indigenous peoples to

comprehend the vastly different concepts of relationships between Indigenous peoples and their territories, and amongst each other.

Of course, Indigenous peoples regard their rights as having continued to exist without need for recognition and in spite of acts that the national legal system may regard as having extinguished such rights. In fact, the High Court decision in *Mabo (No 2)* accepts the proposition that formal recognition of native title rights is not necessary; rather, those rights continue from pre-colonisation times by virtue of the application of common law principles.

Numbers of Indigenous peoples world-wide have been estimated at about 300 million. In this project we have concentrated on the comparative experience of several nations whose dominant populations derive from Europe, especially from Scandinavia and Britain. Such experience has relevance to Australia, as has its own experience.

In addition, the experience and the practice of nation states contributes to the evolution of international law. While, as Chapter 2 notes, there are relatively few treaties – mostly quite recent - that deal with Indigenous peoples, treaties of wider application (particularly in the field of human rights) have been interpreted as having particular application to the situation of Indigenous peoples.

When Indigenous peoples are seen as possessing rights which are recognised in national law, the need arises for structures, agencies, or instrumentalities to represent those rights and those peoples in dealings with government and other non-Indigenous interests. The central concern of this study is with the design of such interface structures.

Much of the formative thinking on this topic in Australia derives from the work of Sir Edward Woodward in his reports as the Aboriginal Land Rights Commissioner in 1973 and 1974, as noted in Chapter 12. His recommendations in regard to appropriate entities under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), and his proposals for what became the *Aboriginal Councils and Associations Act 1976* (Cth) made clear the need for such structures to be appropriate to the needs of Indigenous peoples as well as to the requirements of non-Indigenous interests.

As Chapter 12 also suggests, legislation which is initially well-drafted to allow for appropriate structures may in time lose this quality, through legislative amendment or administrative practice. This appears to have been the case in regard to the *Aboriginal Councils and Associations Act 1976* (Cth). The problems caused by this legislation in relation to the design of Prescribed Bodies Corporate under the *Native Title Act 1993* (Cth) are examined in the companion study to this book, Christos Mantziaris and David Martin, *Native Title Corporations. A legal and anthropological analysis*, The Federation Press, 2000.

In some of the Discussion Papers for this project we used the phrase ‘culturally appropriate’. It was pointed out in the Workshop that this phrase is too limiting, to the extent that it suggests a need to fit within traditional patterns of Indigenous society. True, those traditional patterns, where they retain force, need to be accommodated. But there are many examples of Indigenous Australians choosing to use structures devised by governments, such as the Island Courts and Councils in the Torres Strait, for their own purposes. The critical matter is that the Indigenous people concerned have an effective say in the choice and design of any such structure so that it adequately represents their own interests as well as meeting the needs of non-Indigenous society.

Some of the studies surveyed in Chapter 12 use, for this purpose, the term ‘accountability’. Governments are, understandably, concerned to ensure that Indigenous bodies are externally accountable, particularly for the use of funds provided by governments. Indigenous peoples are equally concerned that such bodies are internally accountable to their own members and constituencies. The studies suggest that, when the design of the structure adequately delivers such internal accountability, external accountability is less likely to present a problem.

Not all structures to represent the rights and interests of Indigenous peoples will be solely Indigenous structures. Some will be joint structures with non-Indigenous interests. An example is the system of joint management arrangements for national parks on Indigenous land. Other examples are mentioned in Chapters 14 and 15. Valuable experience is available from the United States, Canada, New Zealand and elsewhere in relation to bodies established for the purposes of shared access to resources or shared responsibility for environmental management.

The development of appropriate structures (sole or joint) need not depend on the formal recognition of Indigenous rights in the particular case. Even where Indigenous rights have not been recognised, or even where they cannot be recognised (for example, because such rights have been extinguished according to Australian law), Indigenous people may still regard themselves as being entitled to speak for the country and to be concerned with what happens there. Increasingly, companies interested in resource development projects, and some governments, are willing to negotiate agreements with such people.

Modern-day treaties, or negotiated settlements in Canada and New Zealand in particular, typically rest upon a foundational recognition of formal rights which may, in some cases, be surrendered in return for other forms of land title, provision of public services, political recognition, authority in relation to resource management, or other benefits. Even where negotiated agreements are not based on formal recognition of Indigenous rights, they tend to involve implicit acknowledgment of Indigenous interests, at least, and their implementation over time may evolve into a recognition of right.

The central thesis of this study, then, is simple. There are needs for structures, known to Australian law, for the representation of Indigenous rights and Indigenous interests, and for joint Indigenous-non-Indigenous purposes. Indigenous societies differ in significant ways from Australian society. To be effective for both Indigenous and non-Indigenous purposes, such structures need to be designed so as to adequately accommodate the needs of the Indigenous people concerned. This requires effective participation by those Indigenous people in the design of such structures.

Experience in Australia and elsewhere shows that to overlook this proposition can cause problems for Indigenous and non-Indigenous communities alike.

## List of Abbreviations

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ACA	<i>Act Aboriginal Councils and Associations Act 1976 (Cth)</i>
AEPS	Arctic Environmental Protection Strategy
AFN	Alaskan Federation of Natives
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALCT	Aboriginal Land Council of Tasmania
ANCSA	<i>Alaskan Native Claims Settlement Act 1975</i>
ARC	Australian Research Council
AustLII	Australasian Legal Information Institute
BLM	Bureau of Land Management
CAEPR	Centre for Aboriginal Economic Policy Research
CERD	Committee on the Elimination of Racial Discrimination
ECOSOC	United Nations Economic and Social Council
EPA	US Environmental Protection Agency
FOGRMA	<i>Federal Oil &amp; Gas Royalty Management Act</i>
GHFLs	Grazing Homestead Freehold Leases
GHPLs	Grazing Homestead Perpetual Leases
ICC	Inuit Circumpolar Conference
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICERD	<i>International Convention on the Elimination of All Forms of Racial Discrimination</i>
ICESCR	<i>International Covenant on Economic Social and Cultural Rights</i>
ILC	International Labor Congress
ILO	International Labour Organisation
IMDA	<i>Indian Mineral Development Act</i>
IRA	<i>Indian Reorganisation Act 1934</i>
IUCN	First World Conservation Congress of the World Conservation Union
IWC	International Whaling Commission
KNAPK	Greenland Association of Fishermen and Hunters ( <i>Kalaallit Nunaat Aalisartut Piniartullu Kattuffiat</i> )
LALCs	Local Aboriginal Land Councils
Land Fund Act	<i>Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995 (Cth)</i>

## Indigenous Peoples and Governance Structures

Land Rights Act	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth)
<i>Mabo (No 2)</i>	<i>Mabo v Queensland</i> (1992) 175 CLR 1.
NAMMCO	North Atlantic Marine Mammal Commission
NNTT	National Native Title Tribunal
NSWALC	New South Wales Aboriginal Land Council
NTA	<i>Native Title Act 1993</i> (Cth)
RALCs	Regional Aboriginal Land Councils
UDHR	<i>Universal Declaration of Human Rights</i>
WGIP	UN Working Group on Indigenous Populations

## Principal Investigators and Contributors

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