NATIVE TITLE: FROM PRAGMATISM TO EQUALITY BEFORE THE LAW*

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[This article presents an overview of the law and practice of native title in the United States, Canada, New Zealand and Australia. The author argues that since colonisation there has been a shift from pragmatism to equality which has informed the determination of native title. This is significant for the development of native title in Australia following the decision in Mabo [No 2] *because there are distinct rationales for pragmatism and equality which have different implications for the incidents of native title, particularly in the area of consent and compensation for extinguishment.]*

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I PRAGMATISM OR EQUALITY BEFORE THE LAW

The concept of native title raises fundamental questions as to the nature and evolution of law. Pragmatism and human experience are the essential foundations of the common law, but such pragmatism does not necessarily accommodate 'justice' or human rights.[1] An examination of the concept of native title enables a study of the degree and manner in which the law may evolve from a foundation in pragmatism and 'injustice' to embrace the most fundamental of human rights, equality before the law.[2]

In *Mabo v The State of Queensland [No 2]*[3] the High Court of Australia was required to consider the rationale for native title at common law. The Court offered two perspectives:

1 The historic pragmatic, but unjust, compromise of the jurisprudence from the United States and Canada, first expounded by Marshall CJ in *Johnson v McIntosh*.[4]

2 The need to recognise the land rights of indigenous inhabitants of settled territories to the same degree as those in territories acquired by conquest or cession. Such recognition was said to be demanded by the requirements of justice and equality before the law.

The Court did not explicitly purport to choose between them. However, although the perspectives are consistent in some areas, for example, content, in others they conflict, for example, compensation for extinguishment and status. Where the approaches conflict regarding compensation for extinguishment the majority of the High Court chose pragmatism. In that respect the High Court of Australia followed the pattern of the United States and Canada. However, the legal systems of all the jurisdictions have responded to the injustice of the pragmatism of the common law. The responses have included various forms of constitutional protection of native title in Australia, Canada and the United States. In the absence of constitutional protection, as in New Zealand, the common law has responded. In all jurisdictions statutory protection has been provided. This article seeks to examine the nature of the various responses and to measure the movement from pragmatism to equality before the law in the rationales underlying the concept of native title. The rationales are explored in a consideration of the implications for the incidents of native title, and the responses are detailed by an examination of the protections extended to native title and the processes used to reconcile native title and other interests.

[1] See, eg, Richard Bartlett, 'Mabo: Another Triumph for the Common Law' (1993) 15 *Sydney Law Review* 178, 179-81.

[2] Hersh Lauterpacht, *An International Bill of the Rights of Man* (1945) 115, cited in *Gerhardy v Brown* (1985) 159 CLR 70, 128 (Brennan J).

[3] (1992) 175 CLR 1 (*'Mabo [No 2]'*).

[4] (1823) 8 Wheat 543; 5 L Ed 681.

A *The Pragmatic Compromise of* Johnson v McIntosh

The landmark decision is that of Marshall CJ of the United States Supreme Court in *Johnson v McIntosh*.[5] The decision is the foundation of the jurisprudence of Canada,[6] and the Privy Council has long acknowledged its authority.[7] The majority of the High Court in *Mabo [No 2]* followed the North American jurisprudence.[8]

In *Johnson v McIntosh*, Marshall CJ explored the dilemma of the conflicting rights of settlers and Aboriginal people and adopted the compromise that is known as native or Aboriginal title at common law. In that case, the United States Supreme Court upheld a grant by the United States over the claims of a private purchaser from the Indian tribes of the same lands. The Chief Justice declared that 'discovery gave title' to the discovering nation.[9] The Court fully recognised that the country had been inhabited, yet had no compunction about using the term 'discovery', expressly rejecting the application of the 'law which regulates ... the relations between the conqueror and the conquered', and declared that the circumstances required 'resort to some new and different rule, better adapted to the actual state of things'.[10] The Chief Justice's determination to 'reject the application of the law which regulates ... the relations between the conqueror and the conquered'[11] is particularly significant in the context of his 'classic' judgment in *United States v Percheman*,[12] which recognised the private rights of the inhabitants of conquered or ceded territories. The Indians were recognised as the 'rightful occupants of the soil', but the Crown had an 'absolute title ... to extinguish that right', and indeed might 'grant the soil, while yet in possession of the natives'.[13]

The Court did not suggest that such a rule was just. Rather, the Court opined that it was the only possible accommodation of the interests of the settlers and of the Aboriginal people. Marshall CJ explained the need to recognise the rights of the settlers:

5 Ibid.

6 See, eg, *Calder v Attorney-General of British Columbia* [1973] SCR 313, 320 (Judson J), 346 (Hall J) ('*Calder*'); *Guerin v The Queen* (1985) 13 DLR (4th) 321, 335 (Dickson J) ('*Guerin*').

7 See, eg, *Nireaha Tamaki v Baker* [1901] AC 561, 579; *St Catherine's Milling and Lumber v The Queen* (1889) 14 App Cas 46, 48; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 403 ('*Amodu Tijani*').

8 See, eg, (1992) 175 CLR 1, 57 (Brennan J) where his Honour placed explicit reliance on the language of Hall J in *Calder* [1973] SCR 313, 416 where the Judge declared as 'wholly wrong' the proposition that native title depended upon governmental recognition. Hall J, in the passage referred to by Brennan J, had observed that the proposition 'is wholly wrong as the mass of authorities previously cited, including *Johnson v McIntosh* establishes'. Additionally, some judges placed particular reliance on the Canadian decisions of *Calder* and *Guerin*: see *Mabo [No 2]* (1992) 175 CLR 1, 83 (Deane and Gaudron JJ) and 183 (Toohey J).

9 (1823) 8 Wheat 543, 574, 592.

10 Ibid 591.

11 Ibid.

12 (1883) 7 Pet 51; 8 L Ed 604.

13 *Johnson v McIntosh* (1823) 8 Wheat 543, 588.

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[14]

The title of the colonists is founded on the taking of the land irrespective of any moral or legal right to do so. Marshall CJ declared that the force which enabled the land to be taken rendered pointless any inquiry as to justification:

> We will not enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.[15]

The Chief Justice explained the motives of the European nations:

> On the discovery of this immense continent [North America], the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire.[16]

The overriding consideration was the desire to take and develop the land and Marshall CJ merely sought a pragmatic compromise of the rights of the Aboriginal inhabitants and the European settlers. The compromise mandated an inferior and subordinate status to native title and denied equality before the law.

B *The Rights of Indigenous Inhabitants of a Settled Territory v the Rights of Inhabitants of a Conquered Territory: The Dictates of Justice and Equality*

A rationale of equality and justice is not that which springs to mind upon a review of native title at common law. However, in *Mabo [No 2]* several members of the High Court cited long established common law propositions that the rights of property of the inhabitants upon conquest or cession are to be 'fully respected'.[17] Brennan J declared that '[t]he preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land'.[18] Deane and Gaudron JJ declared that the 'guiding principle' was the need to accord full respect to the rights of the property of the inhabitants which 'accords with fundamental notions of justice'.[19] The dicta of the members of the High Court in *Mabo [No 2]* expound a more just and equal rationale for native title, but the majority rely upon statute, not the common law, for its implementation.

14 Ibid 591.

15 Ibid 588.

16 Ibid 572.

17 See *Mabo [No 2]* (1992) 175 CLR 1, 56 (Brennan J), referring to *Adeyinka Oyekan v Musendiku Adele* [1957] 1 WLR 876, 880 (Lord Denning).

18 *Mabo [No 2]* (1992) 175 CLR 1, 57.

19 Ibid 82-3. See also Toohey J at 126.

The language of these members of the Court corresponds to that of Marshall CJ writing at the time of his decision in *Johnson v McIntosh* in the 'classic case' of *United States v Percheman*:

> The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed.[20]

However, Marshall CJ, of course, expressly distinguished the application of the principle in relation to the traditional lands of Aboriginal people.

The common law of New Zealand provides a dramatic contrast to that of Australia, Canada and the United States. The New Zealand jurisprudence, early on in *The Queen v Symonds*,[21] rejected the pragmatic aspects of native title which served to deny any suggestion of equality before the law. Subsequent nineteenth century New Zealand courts[22] sought to deny any legal significance to native title but the Privy Council rejected this approach in 1901.[23] The common law of New Zealand recognises a concept of native title that entails equality before the law in the treatment of traditional Aboriginal rights to land. In late 1993 the New Zealand Court of Appeal in *Te Runanganai o Te Ika Whenua Inc Society v Attorney-General*[24] affirmed that concept in seeming to deny executive power to extinguish native title without proper compensation.

II Implications for Incidents of Native Title

A *Extinguishment without Consent or Compensation*

1 *United States and Canada*

In *Johnson v McIntosh* Marshall CJ explained that if 'the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned'.[25] The need to legitimate the dispossession of the Aboriginal people and to validate the grants made to settlers and developers led to the enunciation of the proposition that native title was subject to the 'absolute title of the Crown to extinguish that right'.[26] In *United States v Sante Fe Pacific Railroad* the United States Supreme Court declared:

> The manner, method and time of such extinguishment raise political not justicable issues ... And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.[27]

Moreover, neither consent nor compensation was necessary.

The vulnerability of native title was explicitly set forth in *Tee-Hit-Ton Indians*

20 (1833) 7 Pet 61, 87.
21 (1847) NZPCC 387.
22 See, eg, *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72.
23 *Nireaha Tamaki v Baker* [1901] AC 561.
24 (1994) 2 NZLR 20.
25 *Johnson v McIntosh* (1823) 8 Wheat 543, 591.
26 Ibid 588.
27 314 US 339 (1941), 347.

v United States.[28] The United States Supreme Court rejected a claim for the taking of lands subject to native title. The Court declared that native title was

> a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself *without* any legally enforceable obligation to compensate the Indians.[29]

The Court expressly ascribed this principle to *Johnson v McIntosh.*

In *Delgamuukw v British Columbia*[30] it was argued that native title could not be extinguished without consent. Reliance was placed on *The Queen v Symonds*[31] and the Royal Proclamation 1763. The Court followed the established North American authority and rejected the argument:

> Although treaty making is the best way to respect Indian rights there is no doubt, based on the authorities, that the interest of aboriginal peoples in or in respect of land could, prior to 1982, be extinguished by a clear exercise of constitutionally valid sovereign power. This could be done without the consent of the Indians.[32]

The application of this limitation upon native title is a fundamental aspect of the compromise of the Aboriginal interest which the common law imposed in order to give paramountcy and validity to the interests of the settler society.

A rationale of equality can, of course, be grounded in the predominant practice of treating for lands in North America. In the United States almost all lands, other than Hawaii, have been acquired by purchase from the Aboriginal inhabitants.[33] Where land was not purchased, or where agreements were unconscionable, jurisdiction was provided in the Court of Claims and the Indian Claims Commission to afford a remedy. In Canada a similar pattern has been pursued with the tragic exception of Newfoundland, the regions of Southern Quebec and Maritime Canada, which fell under French sovereignty where the question of native title remains unresolved, and British Columbia, where negotiations are now underway. The processes of reconciling native title and other interests are examined in more detail in Part IV below.

2 *Australia*

In *Mabo [No 2]*, how did Brennan J reconcile the denial of the requirements of consent and compensation with his professed regard for 'fully respecting' the rights of indigenous inhabitants?[34] He did not directly consider the question. The absence of consideration explains the comments of Mason CJ and McHugh J who delivered a short judgment in which they declared their agreement with

28 348 US 272 (1955).

29 Ibid 284-5.

30 (1993) 104 DLR (4th) 470.

31 (1847) NZPCC 387.

32 *Delgamuuku v British Columbia* (1993) 104 DLR (4th) 470, 521, 595.

33 Felix Cohen, 'Original Indian Title' (1947) 32 *Minnesota Law Review* 28, 40. See generally Richard Bartlett, 'Native Title: The North American Experience' (1994) *Australian Mining and Petroleum Law Association Yearbook* 85.

34 See above n 17.

Brennan J, and then added, *inter alia*,

> neither of us nor Brennan J agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages. We note that the judgment of Dawson J supports the conclusion of Brennan J and ourselves on that aspect of the case since his Honour considers that native title, where it exists, is a form of permissive occupancy at the will of the Crown.
>
> We are authorised to say that the other members of the Court agree with what is said in the preceding paragraph about the outcome of the case.[35]

Deane, Gaudron and Toohey JJ all *dissented* from that proposition. Deane and Gaudron JJ concluded, that on 'the weight of authority and considerations of justice', it would be inappropriate or wrong if native title could be 'lawfully terminated at the whim of the Executive'.[36] Their Honours considered that inconsistent grants by the Executive were effective to extinguish Aboriginal title but involved a wrongful infringement by the Crown of the rights of the Aboriginal title-holder.[37] Toohey J recognised the dictates of the authority negating compensation,[38] but refused to accept that a pragmatic compromise was sufficient ground to deny principles which would support compensation. The dissent is essentially driven by a rationale of equality. It dictates a marked divergence from the rationale of *Johnson v McIntosh* and the proposition that permitted unilateral extinguishment of native title without consent or compensation.

Australian history and practice does not afford a basis for asserting a rationale of equality. Only in comparatively recent times could such a rationale be said to have finally been accepted in the statutory provision of 'land rights' in areas where Aboriginal people have maintained a traditional or historical relationship to the land, for example the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and the Aboriginal Land Rights Act 1983 (NSW). Tasmania and Western Australia continued to refuse to accept such a rationale until the extension of Commonwealth protection to native title made it necessary. Following the 1995 High Court decision which struck down the Land (Titles and Traditional Usages) Act 1993 (WA),[39] the State of Western Australia reluctantly introduced legislation to complement the Commonwealth protection of native title.

B *Need for a Clear and Plain Intention to Extinguish*

1 *United States and Canada*

Obviously, as the United States Supreme Court has declared, the concept of native title recognised by the Court 'impaired ... the rights of the original inhabi-

35 *Mabo [No 2]* (1992) 175 CLR 1, 15.
36 Ibid 90, 91.
37 Ibid 110, 112.
38 Ibid 194-5, 216.
39 *Western Australia v The Commonwealth* (1995) 69 ALJR 309.

tants'.[40] In recognition of their entitlement 'as occupants to be protected ... in the possession of their lands' a clear and plain intention to extinguish on the part of the sovereign power must be shown, the onus being upon the party seeking to establish extinguishment.[41] The requirement was explained in *United States v Sante Fe Pacific Railroad*:

> [A]n extinguishment *cannot* be *lightly implied* in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards ... [T]he rule of construction recognised without exception for over a century has been that 'doubtful expressions, instead of being resolved in favour of the United States, are to be resolved in favour of a *weak and defenceless people, who are wards of the nation, and dependent wholly upon its protection and good faith.*'[42]

The requirement of a clear and plain intention to extinguish, and the associated principle that 'doubtful expressions should be resolved in favour of the Indian' have been repeatedly adopted and affirmed by the Supreme Court of Canada.[43]

2 *Australia*

Brennan J in *Mabo [No 2]* relied upon the North American jurisprudence and attributed the requirement to 'the seriousness of the consequences to indigenous inhabitants'.[44] Significantly, Deane and Gaudron JJ declared that native title should be treated '[l]ike other legal rights' and 'ordinary rules of statutory interpretation require ... that clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation.'[45] Their Honours thereby sought to maintain a rationale of equality in the concept of native title. Toohey J, in sympathy with their approach, also suggested that native title did not stand in a 'special position'.[46]

The Court apparently does not consider that the distinct rationales have any particular significance in the application of the requirement that there be manifested 'clearly and plainly an intention to extinguish' native title. In *Western Australia v The Commonwealth*[47] the Court relied upon *all* the judgments in *Mabo [No 2]* as authority for the requirement, despite the different explanations for its origin.

C *Requirement of Consent in New Zealand*

New Zealand jurisprudence has long afforded an exception to the predominant propositions governing the extinguishment of native title at common law. In *The*

40 *Johnson v McIntosh* (1823) 8 Wheat 543, 574.

41 Ibid 591.

42 *United States v Sante Fe Pacific Railroad* 314 US 339 (1941), 354 (emphasis added).

43 *Calder* [1973] SCR 313, 404; *Nowegijick v R* [1983] 1 SCR 29, 36; *Simon v R* (1985) 24 DLR (4th) 390, 402, 405; *Mitchell v Peguis Indian Band* [1990] 2 SCR 85; *R v Sparrow* [1990] 1 SCR 1075, 1099.

44 *Mabo [No 2]* (1992) 175 CLR 1, 64.

45 Ibid 110-11.

46 Ibid 195.

47 (1995) 69 ALJR 309, 315.

Queen v Symonds, Chapman J declared:

> Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, 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.[48]

The *dicta* issued in the context of examining the power of Aboriginal people to alienate native title and of the significance of the Treaty of Waitangi. The Treaty provided for the recognition of the traditional lands of the Maori and for a Crown right to seek to purchase the lands. Chapman J explained its relationship to native title:

> [I]n 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 either in doctrine or in practice any thing new and unsettled.[49]

His Honour referred in his analysis to the 'practice of extinguishing Native Titles by fair purchases ... [which] has long been adopted by the Government in our American colonies, and by that of the United States'.[50] He thereby justified a substantial modification of the compromise enunciated in *Johnson v McIntosh*, grounded in the process of reconciliation adopted in North America and given effect to in New Zealand by the Treaty of Waitangi.

The Queen v Symonds asserted a rationale of native title that requires that the traditional relationship to land of Aboriginal people be 'fully respected', that is, be accorded the same degree of respect as the relationship of other people to their land. The rationale is equality not pragmatism. Chapman J's analysis was approved by the Privy Council in *Nireaha Tamaki v Baker*.[51] However, a rationale of equality was not followed in the legislative limitation of native title following upon the Treaty of Waitangi.[52] Native title was subject to legislative limitation manifesting a 'clear and plain intention'.[53] It was not until 1993 that the New Zealand Courts offered a more explicit articulation of the implications of a rationale of equality. In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, President Cooke of the Court of Appeal declared of the requirement of consent in order to extinguish native title:

> It may be that the requirement of free consent has at times to yield to the necessity of the compulsory acquisition of land or other property for specific pub-

48 (1847) NZPCC 387, 390 (emphasis added).

49 Ibid.

50 Ibid.

51 [1901] AC 561, 579.

52 *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*[1941] AC 308.

53 *Tee Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, 691-2; *Green v Minister of Agriculture and Fisheries* [1990] 1 NZLR 411.

> lic purposes which is recognised in many societies; but there is an assumption that, on any extinguishment of the Aboriginal title, proper compensation will be paid.[54]

A rationale of equality requires, in general, the consent of the Aboriginal people to dealings or grants with respect to their traditional land. The rationale rejects the inferior or subordinate status of native title mandated by the pragmatic compromise of *Johnson v McIntosh.*

D *Content and Compensation*

The rationales of 'full respect' or equality, and pragmatism, appear consistent in a consideration of the content of, and *amount* of compensation appropriate to, native title. As a result the jurisprudence of the various jurisdictions, including New Zealand, are in accord. 'Full respect' requires that the factual relationship of the Aboriginal people to the land be legally recognised and protected. Such recognition and protection has also been provided by the pragmatic compromise of *Johnson v McIntosh.* Marshall CJ had declared that the Aboriginal people were the 'rightful occupants of the land, with a legal as well as just claim to retain possession of it, and to use it accordingly to their own discretion'.[55] In *Mitchell v United States* Baldwin J declared:

> Indian possession or occupation was considered with reference *to their habits and modes of life*; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected.[56]

Judson J declared in the Supreme Court of Canada in *Calder*:

> [T]he fact is that when the settlers came, the Indians were there, organised in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means.[57]

The Privy Council termed such title a 'usufructuary' right in *St Catherine's Milling and Lumber Company v The Queen*[58] and *Attorney-General for Quebec v Attorney-General for Canada.*[59] The Privy Council cited these decisions when concluding that 'full respect' for acquired rights demanded recognition of a 'communal usufructuary occupation' in the *ceded* territory of Southern Nigeria.[60] Accordingly, the Privy Council recognised at an early stage the common principles applicable to the determination of the content of native title under either rationale. The High Court of Australia adopted the principles of *Amodu Tijani* in recognising a 'communal usufructuary occupation' in consideration of

54 [1994] 2 NZLR 20, 24.
55 *Johnson v McIntosh* (1823) 8 Wheat 543, 591.
56 *Mitchell v United States* 4 US 711 (1835), 746 (emphasis added).
57 [1973] SCR 313, 328.
58 (1888) 14 App Cas 46.
59 [1921] 1 AC 401.
60 *Amodu Tijani* [1921] 2 AC 399, 409-10.

Aboriginal rights in the settled territory of Papua as long ago as 1941.[61] The common principles indicate that the content of native title is determined by the traditional uses of and customs practised with respect to the land. It clearly includes traditional sustenance for hunting, gathering and fishing, and may amount to full ownership if such is the nature of the usufructuary interest.[62]

These principles were given effect in the New Zealand case of *Te Runangenui o Te Ika Whenua Inc Society v Attorney-General*.[63] Interim relief was sought against the transfer of hydro-electric dams to energy companies on the ground that the construction and operation of the dams violated native title. The Court of Appeal rejected the claim. In so doing the Court rejected any suggestion that the native title extended to hydro-electric generation. President Cooke observed:

> [T]he treaty must have been intended to preserve for them effectively the Maori customary title, as mentioned in the fisheries case at p 655. But, however liberally Maori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840. No authority from any jurisdiction has been cited to us to suggest that aboriginal rights extend to the right to generate electricity. Nor was the argument for the appellants put to the Court in that way.[64]

Upon the same principles Maori title has been held to extend to commercial fishing. In 1986 the Fisheries Act 1983 (NZ) was amended to provide for commercial fishing on a quota management basis. The legislation provided that allowance would be made for 'the Maori, traditional, recreational and other non-commercial interests'.[65] In September 1987 the Waitangi Tribunal sent to the Ministry of Fisheries a preliminary opinion advising that Maori people had traditionally made 'full and extensive fishery use of the sea surrounding their lands and for a distance of some 12 miles out from the shore' and Maori fishing included a commercial component. In October and November 1987, in *Te Runanga o Muriwhenua Inc v Attorney-General*,[66] the High Court of New Zealand issued interim declarations that implementation of the quota system should cease. Greig J observed:

> What has been done in the promulgation and the operation of the quota management system has been done without taking into account the Maori rights in fisheries, at least in the sense that I have concluded on the interim basis these rights exist.[67]

On appeal the Court of Appeal offered 'help' to the High Court and the parties as to its understanding of native title rights to fish in the sea. The Court of

61 *Geita Sebea v Territory of Papua* (1941) 67 CLR 544, 547, 552.

62 *Amodu Tijani* [1921] 2 AC 399, 405, 411; *Mabo [No 2]* (1992) 175 CLR 1, 88 (Deane and Gaudron JJ).

63 [1994] 2 NZLR 20.

64 Ibid 24.

65 Fisheries Amendment Act 1986 (NZ) s 28C.

66 [1990] 2 NZLR 641.

67 Ibid 647.

Appeal cited Canadian, United States and Privy Council authority in support of the suggestion that 'there is clearly a real possibility that the view of the law, and in particular Maori customary fishing rights' taken in *Muriwhenua* 'will prove to be right'.[68] The Court observed that

> in interpreting New Zealand parliamentary and common law it must be right for New Zealand Courts to lean against any inference that in this democracy the rights of the Maori people are less respected than the rights of aboriginal peoples are in North America.[69]

The decision led to the 'Sealord' settlement of Maori fishing rights providing for both commercial and non-commercial fishing.[70]

The difficult question is the degree of evolution of the content of native title since European 'settlement' which may be recognised. Canadian and New Zealand jurisprudence allows modern methods to be used in the exploitation of a traditional resource. In *Hamlet of Baker Lake v Minister of Indian Affairs* the Federal Court of Canada declared lands subject to native title where the Inuit people hunted, fished and trapped using modern equipment including snowmobiles.[71] The Inuit lived in a contemporary settlement.

In *Ngai Tahu Maori Trust Board v Director General of Conservation*, the New Zealand High Court accepted that a resource that was 'historically used' could be exploited in 'modern ways'. Accordingly, the traditional catching of seals and orca might found a right to engage in seal and orca watching.[72] The decision permitted a different object to be accomplished in the exploitation of the resource than that traditionally sought.

In *Mabo [No 2]* the High Court did not consider that the content of native title was 'frozen' but was less than clear as to the degree of evolution. It would seem that evolution is possible provided that the 'general nature' of the traditional connection is maintained.[73]

The difficulty of justifying or explaining the limitation of the content of native title by reference to traditional uses, when recognition of native title has been long postponed, has led to the finessing of the problem by the provision of financial compensation. The content of the right may not be precisely determined.

Compensation has invariably been assessed on a freehold basis. A long line of United States authorities are to that effect.[74] For that purpose the United States

68 Ibid 654.

69 Ibid 655.

70 Justine Munro, 'The Treaty of Waitangi and the Sealord Deal' (1994) 24 *Victoria University of Wellington Law Review* 389.

71 [1979] 3 CNLR 17, 30, 64.

72 High Court of New Zealand, Neazor J, 23 December 1994.

73 (1992) 175 CLR 1, 59-61, 70 (Brennan J) and 110 (Deane and Gaudron JJ).

74 *United States v Shoshone Tribe of Indians of the Wind River Reservation in Wyoming* 304 US 111 (1938); *Otoe and Missouri Tribe of Indians v United States* 131 F Supp 265 (1955), 290 where the Court of Claims explained that proper consideration must be given to

> the natural resources of the land ceded; including its climate, vegetation, including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession, or merely of potential value.

courts have long recognised that native title is as 'sacred as the fee simple of the whites'.[75] Compensation was also awarded on a fee simple basis in *Amodu Tijani*[76] and *Geita Sebea v Territory of Papua*.[77]

When recognition of native title has been long delayed and the traditional lands have been taken for development, compensation is likely to be a principal aspect of any settlement. In those circumstances compensation assessed on a freehold basis affords one way in which full respect may be accorded the tenor of native title.

III PROTECTION OF NATIVE TITLE: CONSTITUTIONAL AND STATUTORY PROTECTION

The pragmatic compromise of native title entailed a denial of equality before the law and the diminishment of the Aboriginal interest in the interests of non-Aboriginal settlement and development. However, constitutional and statutory protections have been put in place which have removed some of the elements of that diminishment.

A *Exclusive Federal Jurisdiction and the Requirement of Consent to Extinguishment in the United States and Canada*

The federal structures in the United States and Canada offered some protection for native title from local settlers, developers and legislatures. Following the American Revolution the United States Constitution vested exclusive jurisdiction in the federal government. The specific heads of power referred to the power 'of making treaties, and of regulating commerce with the Indian tribes'.[78] White J observed in *Oneida Indian Nation v County of Oneida* that with the adoption of the Constitution 'rights to Indian Lands became the exclusive province of the federal law'.[79] The power of regulating commerce has been construed broadly to include all aspects of relations between Indians and non-Indians. Only the federal government can provide for the extinguishment of native title.

In 1837 the House of Commons Select Committee on Aborigines (British Settlements) had reported:

> The protection of Aborigines should be considered as a duty peculiarly belonging and appropriate to the Executive Government, as administered either in this country or by the Governor of the respective colonies. This is not a trust which could conveniently be confided to the local legislatures.[80]

See also *Miami Tribe of Oklahoma v United States* 175 F Supp 926 (1959), 942.

75 *Mitchell v United States* 34 US 711 (1835), 746; *Oneida Indian Nation v Country of Oneida* 414 US 661 (1975), 669.

76 [1921] 2 AC 399, 411.

77 (1941) 67 CLR 544, 552.

78 United States Constitution Art I s 8(3).

79 414 US 661 (1975), 667.

80 United Kingdom House of Commons, 'Report from the Select Committee on Aborigines (British Settlements)' in British Parliamentary Papers, *Anthropology & Aborigines* (1837) vol 2, 77.

The recommendation of the Select Committee was followed in s 91(24) of the British North American Act, now the Constitution Act 1867 of Canada. Under that section, exclusive jurisdiction with respect to 'Indians and lands reserved for Indians' was assigned to the federal Parliament. Accordingly, provision for the protection of, dealings in and extinguishment of native title is within the exclusive jurisdiction of the federal Parliament. Provincial legislatures have no power to extinguish native title, even incidentally, pursuant to their powers to make laws with respect to the 'management and sale of public lands'.[81] In 1993 a unanimous five member Court of Appeal of British Columbia in *Delgamuukw v Her Majesty the Queen in right of British Columbia*[82] explained how the unique tenor of native title informed its understanding of the scope of exclusive federal jurisdiction. Macfarlane JA (Taggart JA concurring) said:

> The proposition that provincial laws could extinguish Indian title by incidental effect must be examined in light of an appropriate understanding of the federal immunity relating to Indians and of the aboriginal perspective. The traditional homelands of aboriginal people are integral to their traditional way of life and their self-concept. If the effect of provincial land legislation was to strip the aboriginal people of the use and occupation of their traditional homelands, it would be an impermissible intrusion into federal jurisdiction. Any provincial law purporting to extinguish aboriginal title would trench on the very core of the subject matter of s 91(24).[83]

The conferment of exclusive jurisdiction has resulted in a national policy in both countries — the policy requiring the settlement of native title by treaty or agreement. The formal origins of the policy can be traced to the Imperial Royal Proclamation of 1763. In both countries the policy was assisted by the retention of public lands by the federal governments until native title was settled. This is particularly evident in the Prairie and Continental regions, the West, in both Canada and the United States. The policy of seeking settlement by agreement went some way toward removing the consequences of the denial of equality before the law brought about by the diminished concept of native title recognised by the common law.

B *The Retention of Imperial Jurisdiction in Western Australia 1890-1905*

Western Australia has long been a source of concern with respect to the lands and circumstances of Aboriginal people. Recognition of that concern is manifested in the retention of Imperial jurisdiction over Aboriginal affairs upon the introduction of responsible government. In 1887 Governor Broome recommended that 'some special arrangement should be made, when Responsible Government is granted, to ensure the protection and good treatment of the

[81] Constitution Act 1867 (Can) s 92(5).
[82] (1993) 104 DLR (4th) 470.
[83] Ibid 536.

northern Native population'.[84] He recommended that jurisdiction over Aboriginal people and their reserves should remain under Imperial control and not be transferred to the local legislature. Governor Broome justified his recommendation to the Imperial Colonial Office by reference to 'evil-disposed persons' in the Colony, and the 'many despatches and papers in your Lordship's office' which supported that view. He observed that he thought that 'the general principle seems so clear, that I feel I can abstain from bringing forward particular cases in support of it'.[85]

The Governor's advice was followed in the Aborigines Act 1889 (WA). The statute declared that administration of Aboriginal affairs should be the responsibility of the Governor '*without* the advice of the Executive Council'.[86] This jurisdiction could only be amended or repealed upon the assent of the Imperial Government. At the third attempt,[87] the State of Western Australia managed to persuade the Imperial Government to assent to the repeal of this denial of local jurisdiction. The so-called 'slur' on the 'humanity and decency'[88] of the people of the State was removed upon the passage of the Aborigines Act 1905 (WA).

C *The Federal Requirement of Equality Before the Law in Australia*

The Racial Discrimination Act 1975 (Cth) came into effect on 31 October 1975. Section 10 of the Act mandates 'equality before the law'. Its significance to native title was only fully appreciated in 1988 when the High Court held that Queensland legislation which sought to extinguish native title without compensation denied equality before the law to the Miriam people with respect to the right to own property.[89] Brennan, Toohey and Gaudron JJ explained:

> By extinguishing the traditional legal rights characteristically vested in the Miriam people, the 1985 Act abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights while leaving unimpaired the corresponding rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Miriam people.[90]

The Miriam people enjoyed their human rights of the ownership and inheritance of property to a 'more limited' extent than others who enjoyed the same human right.

The Court expressly recognised that the traditional interests asserted by the

84 'Western Australia: Correspondence Respecting the Proposed Introduction of Responsible Government' in P and G Ford (eds), *British Parliamentary Papers: Colonial Australia* (1969) vol 31, 343, 358.

85 Ibid 382.

86 Aborigines Act 1889 (WA) s 3 (emphasis added).

87 Peter Johnston, 'The Repeals of Section 70 of the Western Australian Constitution Act 1889: Aborigines and Governmental Breach of Trust' (1989) 19 *University of Western Australia Law Review* 318.

88 Ibid 325.

89 *Mabo v The State of Queensland [No 1]* (1988) 166 CLR 186 (*'Mabo [No 1]'*).

90 Ibid 218.

Miriam people were interests which could *not* be asserted by others but readily concluded that their abrogation constituted a denial of equality before the law.[91] As Deane J explained, the effect of the Queensland Coast Islands Declaratory Act 1985 (Qld) was to distinguish between interests according to whether they were 'ultimately founded in pre-annexation traditional law and custom or post-annexation European law. It discriminates against the former.'[92] Any regard to the effect of the impugned Queensland legislation, although on its face non-discriminatory, would entail the conclusion that it discriminated against, indeed 'singled out', the rights of Torres Strait Islanders.[93]

In December 1993 the State of Western Australia enacted the Land (Titles and Traditional Usage) Act 1993 (WA) which purported to extinguish native title and substitute 'rights of traditional usage' which might be overridden by any inconsistent grant upon the payment of limited compensation.[94] The Act sought to codify the racist diminishment of native title embodied in the pragmatic compromise of *Johnson v McIntosh*.[95] In September 1994 argument was heard in the High Court of Australia that the Act was in contravention of the requirement of equality before the law imposed by the Racial Discrimination Act 1975 (Cth). It was argued that the general standard applied to other rights and interests in land required that 'full respect' be accorded the particular tenor of all rights and interests in land. That standard required that interests not be denied or diminished:

- arbitrarily, that is, without procedures for notice, objection and their consideration;
- except for a particular public purpose or works; and
- without the provision of compensation according to tenor.

It was argued that equality before the law was denied because the Western Australian Act fell well below the standard. In *Western Australia v Commonwealth*[96] the High Court unanimously concluded that the Western Australian Act violated s 10 of the Racial Discrimination Act 1975 (Cth). The Court declared that s 10 'does not alter the characteristics of native title', but conferred on holders of native title '*security of enjoyment [in their property] to the same extent' as the titleholders of other races*.[97] The Court thereby affirmed the rights conferred by the unique relationship to land of Aboriginal people, and declared their protection by the Racial Discrimination Act. '[T]he *Racial Discrimination Act* is superimposed on the common law and it enhances the enjoyment of those human rights'.[98] The Court declared that the substituted 'rights of traditional usage', as qualified by the Western Australian Act, 'fell short of the rights and entitlements conferred by native title the enjoyment of which is protected by

91 Ibid (Brennan, Toohey and Gaudron JJ), 230-1 (Deane J).
92 Ibid 231.
93 Ibid 231-2.
94 Section 7.
95 (1823) 8 Wheat 543.
96 (1995) 69 ALJR 309.
97 Ibid 324 (emphasis added).
98 Ibid 325.

section 10(1) of the *Racial Discrimination Act*. The shortfall is *substantial*'.[99] The Court rejected the subordination of native title to, and the 'priority' of, other interests set out in the Act.

Three weeks after the enactment of the Western Australian legislation, the Commonwealth enacted the Native Title Act 1993 (Cth). The Commonwealth structured the Act in accordance with its perception of the requirements of equality before the law. The Act seeks to provide for a regime encompassing native title and other interests in land and resources that meets those requirements. In particular it provides that native title may only be extinguished by future acts in circumstances where the act could be done in relation to the land or waters if the native title holders held 'ordinary title'. The High Court considered that the Native Title Act 1993 (Cth) did provide equality before the law and thereby met the standard of protection demanded.

In *Western Australia v Commonwealth* the High Court rejected any suggestion that the Native Title Act 1993 (Cth) in its present form was inconsistent with the Racial Discrimination Act 1975 (Cth) or the International Convention on the Elimination of all Forms of Racial Discrimination.[100] The Court explained:

> The Native Title Act provides the mechanism for regulating the competing rights and obligations of those who are concerned to exercise, resist, extinguish or impair the rights and interests of the holders of native title. In regulating those competing rights and obligations, the Native Title Act adopts the legal rights and interests of persons holding other forms of title as the benchmarks for the treatment of the holders of native title.[101]

D *Constitutional Entrenchment of Native Title in Canada*

In Canada, after Confederation in 1867, only the federal government had the power to extinguish native title. Until 1982, the inquiry as to the extinguishment of native title in Canada was directed to whether or not such extinguishment had been accomplished under colonial authority prior to Confederation or Union, or under federal authority thereafter. In 1982, s 35(1) of the Constitution Act was passed, declaring 'the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed.' Section 35(1) has been construed not merely as a rule of construction, but as providing for the entrenchment of existing Aboriginal and treaty rights. The Supreme Court of Canada has declared that 'section 35(1) is a solemn commitment that must be given meaningful content'.[102] Any attempt by the federal government to interfere with Aboriginal rights must be justified in the context of the need to maintain the honour of the Crown and the fiduciary obligation of the Crown. In the absence of such justification, Aboriginal title may now only be extinguished by a constitutional amendment or by agreement with the Aboriginal people concerned.

[99] Ibid 331 (emphasis added).

[100] Opened for signature 7 March 1966, 60 UNTS 195; 5 ILM 352 (entered into force 1969).

[101] *Western Australia v Commonwealth* (1995) 69 ALJR 309, 352.

[102] *R v Sparrow* [1990] 1 SCR 1075, 1108.

The philosophy of s 35 of the Constitution Act contemplates the entrenchment of the surviving *special* rights of Aboriginal peoples. It seeks to address the dispossession and disadvantaged circumstances of the Aboriginal people and thereby seeks to accomplish equality, but its underpinnings are distinct from equality before the law. The nature of the debate in Canada with respect to Aboriginal rights has not focused upon equality before the law and the Australian protection of native title by that doctrine is unfamiliar to Canadian jurists. The explanation lies in the limited concept of equality before the law, bordering on sameness or uniformity, initially accepted by Canadian courts[103] and the history of gross denial of equality before the law meted out to Aboriginal people in Canada. It may be that in the short-term the results of the distinct forms of protection in the two countries are similar. In the long-term the results and the continued political and constitutional acceptability may be very different.

E *Belated Statutory Protection of Native Title in New Zealand*

The Treaty of Waitangi of 1840,[104] between the Crown and the Chiefs and Tribes of New Zealand, guaranteed the 'full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties'.[105] It also conferred an exclusive right of pre-emption on the Crown.[106] In 1841 the Land Claims Ordinance confirmed such understanding in declaring the title of the Crown to be subject to the 'rightful and necessary occupation and use thereof by the Aboriginal inhabitants'.

However, this acceptance of the dictates of equality before the law was abandoned by legislation for over a century in order to further the interests of 'settlers'. The Native Lands Act 1865 (NZ) established a Native Land Court to ascertain the holders of native title and to encourage the conversion of such interests into titles derived from the Crown which might be alienated. In 1877 in *Wi Parata v Bishop of Wellington & the Attorney-General*[107] the Ngati Toa tribe challenged a transfer of their traditional land. The Court of Appeal rejected the transfer asserting that native title connoted a moral or political right but not a legal right. The Privy Council in *Nireaha Tamaki v Baker* rejected the Court of Appeal's reasoning and upheld the jurisdiction of the Supreme Court to consider a claim that native title had not been extinguished.[108] The legislature responded by passing the Native Land Act 1909 (NZ). The Act declared:

- 'the Native customary title to land shall not be available or enforceable as against His Majesty the King or any officer of the Public Service acting in the execution of his office by any proceedings in any Court or in any other man-

[103] *Attorney-General of Canada v Lavell* [1974] SCR 1349; *Bliss v Attorney-General of Canada* [1979] 1 SCR 183; see also Kathleen Mahoney, 'The Constitutional Law of Equality in Canada' (1992) 44 *Maine Law Review* 229.

[104] Now contained in Schedule 1 of the Treaty of Waitangi Act 1975 (NZ).

[105] Ibid Art 2.

[106] Ibid.

[107] (1878) 3 NZ Jur (NS) 72, 78.

[108] [1901] AC 561, 567.

ner';[109]

- 'a proclamation by the Governor that any land vested in His Majesty the King is free from the Native customary title shall in all Courts and in all proceedings be accepted as conclusive proof of the fact so proclaimed';[110] and
- that no Crown grant shall be 'questioned or invalidated' in any proceedings 'by reason of the fact that the Native customary title to that land has not been duly extinguished'.[111]

Native title to land could be not enforced against the Crown. Moreover, in 1941 the Privy Council in *Hoani Te Heuheu Tukino Aotea District Maori Land Board* rejected the enforcement of the Treaty of Waitangi in the absence of statutory recognition:

> Under Art I there has been a complete cession of all the rights and power of sovereignty of the chiefs. It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law.
>
> So far as the appellant invokes the assistance of the court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the court to some statutory recognition of the right claimed by him.[112]

The argument that the Treaty was part of the Constitution of New Zealand and could be enforced independently of statutory recognition was rejected most recently in *Ngai Tahu Maori Trust Board v Director General Conservation*.[113]

Native title remained, of course, an aspect of the common law of New Zealand. However, instances where it might be claimed in judicial proceedings were limited. One such instance was the native title to the fishery. A savings provision in the Fisheries Act 1983 (NZ) referred to 'any Maori fishing rights'.[114] In *Te Weehi v Regional Fisheries Office* the native title to gather shellfish was upheld as a defence to a charge of violating the Fisheries Act.[115] Williamson J concluded that native title rights continue unless extinguished and rejected 'the view that such rights are excluded unless specifically preserved or created in a statute'.[116]

It was not until 1975 and the Treaty of Waitangi Act 1975 (NZ) that equality before the law with respect to native title, initially given effect to at common law, was recognised by legislation. The Act established the Waitangi Tribunal to consider claims that legislation, or Crown acts, policies or practices were inconsistent with the principles of the Treaty. If the Tribunal finds a claim to be well-founded it may make recommendations to the Crown for compensation or other action. In 1985 the Act was amended to enable claims to be made with respect to

109 Native Land Act 1909 (NZ) s 84, amended by Maori Affairs Act 1953 (NZ) s 155.

110 Ibid s 85, amended by Maori Affairs Act 1953 (NZ) s 157.

111 Ibid s 86, amended by Maori Affairs Act 1953 (NZ) s 158.

112 [1941] AC 308, 324-5.

113 High Court of New Zealand, Neazor J, 23 December 1994, 20.

114 Section 88(2).

115 [1986] 1 NZLR 680, 692. See also *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 654.

116 *Te Weehi v Regional Fisheries Office* [1986] 1 NZLR 680, 692.

acts dating back to the signing of the Treaty in 1840.[117]

In December 1986 the Tribunal issued an interim report expressing concern over the transfer of Crown land to state-owned corporations. It feared that the result would be that it would be 'out of the power of the Crown to return the land to the Maoris'.[118] The Bill authorising the transfer was amended to provide that 'nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi'.[119] The Court of Appeal upheld a challenge to transfers of land under the Act. President Cooke declared that s 9 'must be held to mean what it says'.[120] The Court's responsibility was 'to say clearly that the Act of Parliament restricts the Crown to acting under it in accordance with the principles of the Treaty. It becomes the duty of the Court to check ... whether that restriction has been observed and, if not, to grant a remedy'.[121] The Court of Appeal explained the importance of statutory recognition:

> [T]here will now be an effective legal remedy by which grievous wrongs suffered by one of the Treaty partners in breach of the principles of the Treaty can be righted. I have called this a success for the Maoris, but let what opened the way enabling the Court to reach this decision not be overlooked. Two crucial steps were taken by Parliament in enacting the Treaty of Waitangi Act and in insisting on the principles of the Treaty in the State-Owned Enterprises Act. If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.[122]

In later cases declarations have issued to restrain transfers concerning mining[123] and fishing rights.[124] A challenge to the transfer of the assets of Radio and Television New Zealand failed because '[t]he transfer of the assets will not ... substantially undermine the ability of the Crown to fulfil its obligations under the Treaty'.[125]

The statutory protection accorded the Treaty of Waitangi in the State-Owned Enterprises Act 1986 (NZ) is of special significance because of the degree of Crown ownership in New Zealand and the proposed corporatisation of Crown assets. However, such statutory protection has also been incorporated in the Environment Act 1986 (NZ), the Conservation Act 1987 (NZ) and the Crown Minerals Act 1991 (NZ). The long title of the Environment Act declares its objects to include ensuring 'that, in the management of natural and physical resources, full and balanced account is taken of ... (iii) The principles of the Treaty of Waitangi'. The Parliamentary Commissioner for the Environment and the Ministry of the Environment are required in performance of their function to have particular regard to:

117 Treaty of Waitangi Amendment Act 1985 (NZ) s 3.
118 See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 653.
119 State-Owned Enterprises Act 1986 (NZ) s 9.
120 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 653.
121 Ibid 660-1.
122 Ibid 668.
123 *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513.
124 See, eg, *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641.
125 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513.

> Any land, water, sites, fishing grounds, or physical or cultural resources, or interests associated with such areas, which are part of the heritage of the tangata whenua and which contribute to their well being.[126]

The Conservation Act 1987 (NZ) seeks to 'promote the conservation of New Zealand's natural and historic resources'[127] and authorises the protection of particular areas. The Act declares it 'shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi'.[128] In *Ngai Tahu Maori Trust Board v Director General Conservation* the Court declared 'it is a sufficient direction in my view to make it a requirement that the Director General administer the last named Act [Marine Mammals Protection Act administered by the Director General of Conservation under the Conservation Act] so as to give effect to the principles of the Treaty'.[129] The Director General must accordingly 'act in good faith' and 'consult if a claim referable to the Treaty' arose.[130] Additionally, s 4 of the Crown Mineral Act 1991 (NZ) requires that all persons exercising functions under the Act shall have regard to the principles of the Treaty of Waitangi.

IV EQUALITY: RECONCILING NATIVE TITLE AND OTHER INTERESTS

The concept of native title at common law as developed in North American jurisprudence and accepted in Australia gave effect to the paramountcy of grants to settlers and developers. Native title was a subordinate interest that must give way. However, in each of the jurisdictions under review that paramountcy has been rejected in favour of according at least equal status to the rights conferred by native title. Such equality is derived from:

- the common law itself and belated statutory affirmation in New Zealand;
- the Racial Discrimination Act 1975 (Cth);
- constitutional amendment in Canada; and
- exclusive federal jurisdiction and policy in the United States and Canada.

The denial of paramountcy to grants to settlers and developers requires that some method be adopted to reconcile native title with other interests.

A *Treaties and Agreements*

1 *United States and Canada*

Treaties and agreements form the most long-standing method of achieving reconciliation. In North America most land has been settled by regional treaties or agreements.

The terms of the settlements have provided for:

126 Environment Act 1986 (NZ) ss 17(c), 32.
127 Conservation Act 1987 (NZ) preamble.
128 Section 4.
129 High Court of New Zealand, Neazor J, 23 December 1994, 23.
130 Ibid 26.

1 A homeland: freehold or freehold equivalent, including mineral resources, of a part of the traditional land subject to native title.
2 Traditional rights throughout traditional lands but only in so far as compatible with settlement and development.
3 Social and economic development aid and funding.
4 Certainty provided by:
   - recognition of native title;
   - surrender of native title in an exchange for agreed rights;
   - validation of past and existing interests; and
   - provision for the grant of future interests on and off Aboriginal lands.

A foundation of the settlements has been the acceptance of contemporary development and a provision for Aboriginal participation therein. The settlements provide a bridge between the traditional relationship to land and contemporary development. In doing so the interests of Aboriginal peoples and settlers and developers have been and are met.

The Canadian Government has maintained the policy of regional treaties and agreements in on-going negotiations in the Yukon, Northwest Territories, British Columbia and Labrador. The policy is explained in the Canadian Comprehensive Land Claims Policy,[131] the modern form of which dates from 1973, and the time of the *Calder*[132] decision:

> The Government of Canada is committed to the resolution of comprehensive land claims through the negotiation of settlement agreements. Such agreements must be equitable to Aboriginal people and other Canadians, and must represent final settlements of land claims.
>
> The purpose of settlement is to provide certainty and clarity of rights to ownership and use of land and resources in those areas of Canada where Aboriginal title has not been dealt with by treaty or superseded by law. Final settlements must therefore result in certainty and predictability with respect to the use and disposition of lands affected by the settlements. When the agreement comes into effect, certainty will be established as to ownership rights and the application of laws.[133]

Existing third party interests must be protected and given effect:

> In attempting to define the rights of Aboriginal people, the Government of Canada does not intend to prejudice the existing rights of others. The general public interest and third party interests will be respected in the negotiation of claims settlements and, if affected, will be dealt with equitably. Provision must be made for protecting the current interests of non-Aboriginal subsistence users and for the right of the general public to enjoy recreational activities, hunting and fishing on Crown lands, subject to laws of general application.[134]

The Canadian policy is, of course, a perpetuation of the historic approach, but is

131 Ministry of Indian Affairs and Northern Development (Ottawa, Canada), *Canadian Comprehensive Land Policy* (1986).
132 [1973] SCR 313.
133 Ministry of Indian Affairs and Northern Development, above n 131, 9.
134 Ibid 21-2.

now mandated by s 35 of the Constitution Act.

The Canadian judiciary have accepted the need for agreed settlements. In the landmark case of *Delgamuukw v The Queen in right of British Columbia* the British Columbian Court of Appeal made its view clear that negotiation towards agreement was the preferred manner in which to effect a settlement.[135] Macfarlane JA declared:

> The parties have expressed willingness to negotiate their differences. I would encourage such consultation and reconciliation, a process which may provide the only real hope of an early and satisfactory agreement which not only gives effect to the aspirations of Aboriginal peoples, but recognises that there are many diverse cultures, communities and interests which must co-exist in Canada. A proper balancing of all these interests is a delicate and crucial matter.[136]

The response in British Columbia has been to establish the British Columbia Treaty Commission to co-ordinate and facilitate native title negotiations and settlements.

2 *New Zealand*

The other jurisdiction where treaties and agreements have been significant is, of course, New Zealand. The Treaty of Waitangi between the Crown and the 'Native Chiefs and Tribes of New Zealand' declared in the preamble the need to provide for settlement by emigrants. It provided a guarantee of the Maori right to their traditional 'lands and estates, forests, fisheries and other properties', but also provided for an exclusive Crown right of pre-emption. The Maori were entitled to retain possession as long as they desired and could only be required to sell when disposed to do so at such prices as were agreed. The third clause expressly declared that the Maori would be possessed of all the rights of citizenship of a British subject. The Treaty contemplated the equality of the Maori and their relationship to the land. However, it also contemplated that the land might be released for settlement and development by consensual arrangements. The Native Land Acts made provision for such sales.

In modern times it has been sought to maintain the consensual approach. The Sealord agreement provided for a final settlement with respect to fisheries.[137] Interim agreements have been reached with respect to forestry and lands pending resolution of claims.[138]

B *Mediation and Inquiries*

1 *Canada*

The conduct of inquiries in the process of reconciling native title with settlement and development has a long history in Canada. They include the Joint Commission on Indian Reserve Lands in British Columbia in 1876, and a Royal

135 (1993) 104 DLR (4th) 470.

136 Ibid 547.

137 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (NZ).

138 Crown Forest Assets Act 1989 (NZ); Treaty of Waitangi (State Enterprises) Act 1988 (NZ).

Commission on the same question in 1916. Neither recommended an agreement with the Aboriginal people. More contemporary arrangements have recommended or sought to obtain an agreement with the Aboriginal people as their ultimate objective. The MacKenzie Valley Pipeline Inquiry of 1975 paved the way for the settlements reached or being negotiated in the Northwest Territories.

In 1969 an Indian Claims Commissioner was appointed to, *inter alia*, recommend measures to provide for the adjudication of claims. The Commissioner took the approach that negotiation offered the best hope for resolving claims and sought to facilitate negotiated settlements. The Office was supported by the Specific Claims Process, in which the Office of Native Claims of the Department of Indian Affairs sought to secure negotiated settlements. In 1991 the Indian Claims Commission was established to review specific claims and to assist the parties by arranging for mediation. The Commission is established under the Inquiries Act. It has power to make non-binding recommendations. In 1989 an *ad hoc* Treaty Commissioner of Inquiry was appointed by agreement between the Federation of Saskatchewan Indian Nations and Canada to facilitate land entitlement settlements in Saskatchewan. The process required parties to articulate their positions. The Commissioner then:

- identified common ground and differences;
- initiated and conducted relevant research and investigations:
- arranged meetings;
- made recommendations to parties as to matters impeding settlement; and
- generally directed the resolution process.

The process was successful in resolving a long outstanding dispute as to Indian lands.

In September 1992 agreement was reached on the establishment of a British Columbia Treaty Commission by Canada, British Columbia and the First Nations.[139] The Commission seeks to facilitate native title resolution in British Columbia. It will co-ordinate the schedule of negotiations, develop an information base, and provide dispute resolution services. The process is commenced with submission of a statement of intent to negotiate. As of May 1995, 47 First Nations had submitted statements of intent.[140] It is suggested that the operation of the Commission should be of particular interest to those who would seek regional agreements in Australia.

2 *New Zealand: The Waitangi Tribunal*

The functions of the Waitangi Tribunal include inquiring into and making recommendations on claims submitted to the Tribunal with respect to breaches of the principles of the Treaty by the Crown. The Tribunal is empowered to recommend that 'action be taken to compensate for or remove the prejudice'. The Tribunal may commission any person to investigate any matter relating to a claim and may receive the report in evidence. The Courts have been prepared to

139 The expression 'First Nations' refers to Canada's indigenous inhabitants.

140 British Columbia Treaty Commission (Canada), *Integrated Federal/Provincial Treaty Negotiation List* (1995).

issue interim relief on the basis of the recommendations of the Tribunal, where the treaty has been given statutory significance, as in the State-Owned Enterprises Act 1986 (NZ). Irrespective of such statutory authority the recommendations have been given great weight by the government. In *Te Runanganui o Te Ika Whenua Inc Societies v Attorney-General*,[141] President Cooke observed:

> If they have meritorious claims their most practical remedy may well lie through the Waitangi Tribunal, as the government in the Sealord settlement and others has shown a willingness to remedy past injustices that have been demonstrated.[142]

3 *Australia: Native Title Tribunal*

The National Native Title Tribunal in Australia is expressly authorised to conduct inquiries and mediate in an effort to reach agreements with respect to native title determinations. The Native Title Act 1993 (Cth) seeks to encourage settlement by agreement by:

- the imposition of the duty to negotiate in good faith;
- the provision for mandatory mediation in proceedings before the National Native Title Tribunal and any recognised state/territory bodies; and
- the use of conferences presided over by assessors to resolve any matter in proceedings before the Federal Court.

The Act expressly provides that native title holders may enter into agreements with governments to surrender native title or authorise future acts. Such agreements would, of course, provide certainty and security to development.

C *Adjudicative Mechanisms*

In Canada and New Zealand there are no especial adjudicative mechanisms authorising or compensating the infringement of native title. In both countries any such infringement may be challenged in the courts and if native title is established injunctive relief is sought.

1 *United States: Indian Claims Commission*

In the United States the general policy was to require an agreed settlement. However, in the history of the United States some agreed settlements were considered unconscionable and in other instances agreements were absent. The Indian Claims Commission was established in 1946 to try to bring finality to Indian claims against the United States.[143] It included jurisdiction with respect to the unconscionability of treaties and agreements and

> claims arising from the taking by the United States, whether as the result of a treaty or cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant.

Five years was allowed to file claims. It took until 1978 to hear and adjudicate

141 [1994] 2 NZLR 20.
142 Ibid 27.
143 25 USC §70.

most of the claims; a residue was transferred to the Court of Claims. The only award possible was financial compensation *without* interest. 'An award for land measured by nineteenth century values without interest falls many times short of restoring a tribe to the position it would have occupied had it retained the lost land'.[144] Compensation was awarded at freehold value. One leading commentator has observed that 'substantial relief was granted to many tribes and Indian groups',[145] but there was much criticism of and resistance to acceptance of some judgments, for example, the Ogala Sioux Black Hills dispute.

By 1971 other procedures had been chosen to resolve disputes over land with Aboriginal people. A uniform court-like procedure which provided only money as a remedy did not necessarily provide an effective long-term settlement. The Commission did not actively encourage the settlement of claims and tended to focus on a 'narrow interpretation of the law'. 'The Commission has chosen to sit as a court'.[146]

2 *Australia: The Native Title Act*

The adjudicative model providing financial compensation has been adopted, in conjunction with measures to encourage agreed settlements, in the Native Title Act 1993 (Cth). The adjudicative approach is intimately connected to the general nature of the Act as providing an interim regime. The Commonwealth Government early on in the determination of the form of the Native Title Act rejected a process of regional agreement. The Interdepartmental Committee in March 1993 recommended against such an approach:

> to give effect to the concept on a *national* basis, a very long and difficult negotiation would be inevitable, in which concepts such as self-government over native title lands, constitutional protection of title and the granting of substantial economic and other benefits would come into play as part of the 'grand bargain'. It is not therefore a practicable approach for dealing with immediate land management issues.[147]

This was despite attached commentary upon the Canadian experience that

> if the Canadian model of negotiating agreements was adopted to deal with native title, then existing mining claims ... mining leases, the operators of the mines could continue to operate more or less without disruption to current arrangements.[148]

In the Discussion Paper of June 1993 the Canadian process of settlement, was recognised as having significant advantages but was rejected as an 'option for the long term rather than a feasible approach to the immediate land management

144 William Canby, *American Indian Law in a Nutshell* (2nd ed, 1988) 267.

145 Ibid.

146 John Vance, 'The Congressional Mandate and the Indian Claims Commission' (1969) 45 *North Dakota Law Review* 325, 335.

147 Commonwealth of Australia, Report of the Interdepartmental Committee, *Mabo: The High Court Decision on Native Title* (1993) 16.

148 Ibid 117.

issue which the *Mabo [No 2]* decision raises'.[149]

The Act fails to provide positive provision for negotiation and agreements beyond the piecemeal. It is directed to particular grants and contemplates negotiations and/or compensation with respect to each grant with substantial government and tribunal involvement. Within the framework of such limited negotiations it is much more difficult to compromise issues such as:

- the area of land subject to native title;
- the identity of native title holders; and
- the rights of native title holders as to:
  - ownership of land and resources;
  - management of land and resources; and
  - local and regional government.

The piecemeal approach inhibits negotiation and makes necessary an adjudication to break a stalemate.

The adjudication has two principal aspects: the determination of compensation and of whether a grant may be issued or an act may be done overriding native title. Compensation is payable under the 'similar compensable test' where

> the compensation would, apart from this Act, be payable under any law for the act on the assumption that the native title holders instead held ordinary title to any land or waters concerned.[150]

The Act declares that the same 'principles or criteria' applied to other interests upon a compulsory acquisition, or otherwise, to freehold, be applied to measure compensation for native title.[151] One problem is that principles designed to measure freehold do not necessarily accommodate native title, and may only give effect to a notion of a 'limited' content and fail to recognise the unique status of native title. Negotiating parties may agree upon any form of compensation, including sharing in royalties and profits from resource development. The arbitral tribunal *cannot*, however, impose such a condition. It can only order the payment of financial compensation.[152]

If agreement is not reached the National Native Title Tribunal or a state/territory arbitral tribunal is required to determine whether the grants may issue or the act may be done, and under what conditions. The arbitral body is required to take into account: the effect on native title, on the way of life and culture of the title holders, on the development of social, cultural and economic structures, on their freedom of access to the land, on the preservation of sacred sites and on the preservation of the natural environment; the interests and wishes of the native titleholders; the economic and other significance to Australia and the state or territory; the public interest and any other matter the arbitral body considers relevant.[153]

149 Commonwealth of Australia, Discussion Paper, *Mabo: The High Court Decision on Native Title* (1993) para 6.24.

150 Native Title Act 1993 (Cth) s 240(b).

151 Ibid s 51(2).

152 Ibid s 51(5).

153 Ibid s 39(1).

The requirement that the body consider such factors in reaching a determination cannot disguise the ultimate rejection of the requirement of consensual settlement of the reconciliation of native title and development. However, equality before the law as applied in *Western Australia v Commonwealth*[154] does not, of course, dictate that consensual settlement is required in all circumstances. It would accept the taking of lands for public purposes and, if other interests are so subject, for mining purposes without the consent of the native title holders.

V CONCLUSION

The distinct rationales of pragmatism and equality have very different implications for the incidents of native title, in particular the requirements of consent and compensation for extinguishment. Pragmatism enabled the denial of the traditional relationship to land and compensation against the will of the Aboriginal people. It thereby legitimised the 'settlement' of Aboriginal lands in the United States, Canada and Australia. This overview of the developments in law and practice in the United States, Canada, New Zealand and Australia since colonisation indicates how that rationale has given way to that of equality. In Australia the rationale has been explicitly adopted in Commonwealth legislation and affords the principal protection for native title. In Canada constitutional provision has recognised special rights for Aboriginal people, the results of which in law and practice in the short term may not be different from that in Australia. There may be long term questions as to the political and constitutional acceptability of the entrenchment of special rights if a substantial divergence from equality before the law emerges. In New Zealand native title is protected by the common law acceptance of the rationale of equality and by statutory, but not constitutional, protection. It was in the United States that the concept of native title was first developed. Its limitations remain as they were first declared and its protection remains dependent on federal jurisdiction and policy. The policy has entailed elements of a rationale of equality.

In New Zealand, because of the early adoption of the rationale of equality in the Treaty of Waitangi, and in the United States, because of an early policy entailing elements of that rationale, settlements and compensation have been sought to be provided since the date of colonisation. Neither Canada nor Australia can be said to have met such rationale from that time. In Canada the settlement of lands ceded from France, Southern Quebec and the Maritimes, remains to be addressed. In Australia the Native Title Act 1993 (Cth) provided for a National Aboriginal and Torres Strait Islands Land fund. The Prime Minister declared, during the second reading speech, that 'justice, equality and fairness' demanded a land fund '[a]s a first step' in meeting the social and economic needs of Aboriginal communities dispossessed without consent or compensation.[155] In 1995 the ATSIC Amendment (Indigenous Land Corporation and

[154] (1995) 69 ALJR 309.

[155] Commonwealth, *Hansard*, House of Representatives, 16 November 1993, 2882 (Prime Minister Keating).

Land Fund) Act 1995 (Cth) was passed providing for the establishment of a $1.46 billion land fund. It remains for the future to see to what extent Australia and Canada can address the past dispossession of Aboriginal lands without consent or compensation.