INTERNATIONAL LAW AND NATIVE TITLE IN AUSTRALIA

ANNUAL RICHARD COOPER MEMORIAL LECTURE – 22ND AUGUST 2007

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I ABSTRACT

Customary international law provided for some early recognition of the rights of Indigenous peoples as against European colonisers, but much of this was eroded over the past two centuries. In Britain's colonisation of Australia there was little effective recognition, in contrast to British policy and practice in North America and New Zealand.

Since World War II international law has developed wide ranging treaties relating to human rights generally. These have come to be regarded as applicable to Indigenous peoples. They played a critical role in the events leading to the High Court of Australia's recognition of native title in 1992, and supported the *Native Title Act 1993* (Cth). They provided the basis for international criticism of the 'winding back' of native title in the *Native Title Amendment Act 1998* (Cth).

Since 1982 the UN system has been developing, in collaboration with representatives of Indigenous peoples from around the world, a Draft Declaration on the Rights of Indigenous Peoples. It will be considered later this year at the annual meeting of the UN's General Assembly. How will Australia vote?

II INTRODUCTION

I regard it as an honour to have been invited by Professor Rickett to deliver the 3rd lecture in this series in honour of the late Justice Richard Cooper. The first two lectures in the series, appropriately, reflected his long and distinguished interest in maritime law, especially in international maritime law. But I was particularly asked to make my focus some aspect of native title law. In choosing a focus I decided to look at international law in the evolution and working out of native title law in Australia. And I shall also include assessments of Australian law on native title by reference to evolving international law standards and processes.

So I shall be moving around among three systems of law:

- Indigenous peoples' law
- Australian law
- International law

For those here tonight who may not be lawyers, I begin with a rather simplified explanation of the sources of law in these three systems.

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III THREE SOURCES OF LAW

A *Recognition of Indigenous peoples' rights to 'country'*

Given these three sources of law, what have they said about recognition of Indigenous peoples' rights to 'country'?

1 *Indigenous Laws*

In the customary laws of Australia's various Aboriginal peoples their connection with 'country' is central. Consider the following extract from anthropologist W E H Stanner[1]:

> Particular pieces of territory, each a homeland, formed part of a set of constants without which no affiliation of any person to any other person, no link in the whole network of relationships, no part of the complex structure of social groups any longer had all its co-ordinates. What I describe as 'homelessness', then, means that the Aborigines faced a kind of vertigo in living. They had no stable base of life; every personal affiliation was lamed; every group structure was put out of kilter; no social network had a point of fixture left.

Dispossession from country can have devastating consequences, as was pointed out in 1991 by the Royal Commission Into Aboriginal Deaths in Custody.

The same is true for Indigenous peoples in other parts of the world, according to the 1986 Martinez Cobo report:

> It must be understood that, for indigenous populations, land does not simply represent a possession or means of production. . . . It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture.[2]

The connections between Indigenous peoples and their lands and waters are much deeper and richer than is conjured up by modern Anglo-Australian notions of 'real estate'. And, beyond the 'property' notion, Indigenous peoples also assert their right to 'govern' their lands and waters, and in particular to grant or withhold permission to enter their territories.

2 *International Law*

(a) *Customary law*

International customary law has acknowledged some rights of Indigenous peoples. Greg Marks refers to 'the original European expansion into the New World in the sixteenth century' and asks:

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1 W. E. H. Stanner, 'Continuity and Change among the Aborigines' (1958) in *White Man Got No Dreaming*: *Essays 1938-1973* (1979) 230.

2 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations,* UN Doc E/CN.4/Sub.2/1986/7, Add. 4, 39 (1986). Jose R. Martinez Cobo, special rapporteur.

> By what right did Europeans acquire the territories of others, the Indigenous peoples, without their agreement? The question was studied, debated and contested at the very beginnings of international law, especially by Spanish jurists and theologians such as Francisco de Vitoria and Bartolome de Las Casas.[3]. . . the US Courts and Government have been able to recognise a form of Indian sovereignty, albeit constrained and limited. . . It has been persuasively argued that US law in respect of Indian tribes reflects the doctrines of Indigenous rights argued by Francisco de Vitoria and others in the sixteenth century.[4]

The basis of international customary law is what States actually do. British policy and practice in the settlement of North America was to negotiate treaties, and such negotiation continued after the USA won independence, and in the settlement of much of Canada, continuing to the present day. It was evident in respect to New Zealand through the Treaty of Waitangi, 1840. Such policy had also been written into the secret instructions issued by the Admiralty in 1768 to Lt. James Cook prior to his first epic voyage into the Pacific Ocean, in the event that he should discover the 'Great South Land':

> You are also with the consent of the natives to take possession of convenient situations in the country in the name of the King of Great Britain, or if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.[5]

(b) *Treaty Law*

The first acknowledged breakthrough in modern multi-national treaty law came from the International Labour Organisation which, as long ago as 1921, began to adopt a series of conventions dealing with Indigenous workers. In 1957 it adopted a more comprehensive treaty[6] which it revised in 1989 as the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No 169) 28 ILM 1382.

By contrast, the United Nations has taken much longer to develop an instrument relating comprehensively to the rights of Indigenous peoples. An expert Working Group on Indigenous Populations started on the task in 1982, and the Draft Declaration on the Rights of Indigenous Peoples which eventually emerged awaits the vote of the UN's General Assembly – possibly any day now.[7]

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3 *Indigenous Peoples: Issues in International and Australian Law, (International Law Association (Australian Branch), Martin Place Papers No. 6* (2006) 32. See also, Greg C Marks, 'Indigenous peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de Las Casas' (1992) *Australian Yearbook of International Law* 1-51.

4 Citing, F Cohen, 'The Spanish Origins of Indian Rights in the Law of the United States' (1942) *Georgetown Law Journal* 1. Native American scholar, S James Anaya, explores such issues in *Indigenous Peoples in International Law* (2nd ed, 1996).

5 'British Admiralty, Secret Instruction Book' in J M Bennett and Alex C Castles, *A Source Book of Australian Legal History* (1979) 253-254.

6 ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, opened for signature 26th June 1957, 328 UNTS 247.

7 The Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2002* and *Social Justice Report 2006,* has traced the evolution of the draft Declaration.

But the UN's core human rights instruments have been invoked with some success by Indigenous peoples over the years. The UN Charter itself, signed in 1945, stressed the importance of human rights and fundamental freedoms, and the need for such rights to be enjoyed without discrimination on the basis of race (among other grounds).

The Universal Declaration of Human Rights (UDHR) adopted in 1948 first spelled out what constitute human rights and fundamental freedoms. The list was substantially (but not entirely) reproduced in the two instruments that, in 1966, developed the Declaration into the form of treaties – the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Note, in particular, Article 27 of the ICCPR:

> 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 other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The 1989 Convention on the Rights of the Child (CROC), in Article 30, echoes the wording of ICCPR Article 27 in respect of children but adds specific reference to Indigenous people.

Among the other core instruments, I single out the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 5 (d) (to which I shall return) spells out the categories of rights which are to be enjoyed without discrimination on the basis of race (etc), including:

> (v) The right to own property alone as well as in association with others;
> (vi) The right to inherit;

Australia ratified the Convention in 1975 and enacted the *Racial Discrimination Act 1975* (Cth) to implement the Convention in national law.

There have been other international treaties and instruments that have specifically addressed the rights of Indigenous peoples. And, as noted, even the core human rights treaties have been interpreted by treaty committees and others as applicable to Indigenous peoples' interests and concerns.[8]

Next to consider is how we got to where we are now in terms of Australian law.

3 *Australian Law*

(a) *Common law*

In marked contrast to experience in other British colonies, the initial settlements in Australia were not based on 'the consent of the natives' as required by the Admiralty's 1768 instructions to Cook. Historian Henry Reynolds attributes Cook's

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[8] The sheer variety of modern international law instruments that relate to Indigenous peoples' rights extends beyond those that relate specifically to Indigenous peoples, or even human rights generally, to include such areas as the environment, trade and finance. Sarah Pritchard and Charlotte Heindow-Dolman, 'Indigenous Peoples and International Law: A Critical Overview' (1998) 3(4) *Australian Indigenous Law Reporter,* 473-509. The Aboriginal and Torres Strait Islander Social Justice Commissioner provided a useful selection of relevant standards in *Native Title Report 2006* (2007) Appendix 3, 185-205.

failure in 1770 to gain Indigenous consent to the 'convenient assumption' that there were only scattered groups along the coast, and that the interior would prove to be unpopulated, with the result that the continent could be characterised as, effectively, *terra nullius.* [9]

After very few years it became apparent that there were Aboriginal peoples in all parts of Australia and that they were strongly attached to their 'country'. The British Government in the early part of the 19th century attempted to secure some recognition of their land rights, but with limited success beyond such measures as the establishment of reserves, and requirements that pastoral leases should be subject to continued access by Aboriginal people. Political struggles by Indigenous Australians to secure acknowledgement and protection of their rights under Australian law were largely unsuccessful until quite recently.

In the Northern Territory some 40 years ago the Gurindji people staged a walk-out from a vast cattle station held by Lord Vestey. It began as a protest for better working conditions. It attracted a lot of attention across the nation and a deal of support. Eventually it also became a political assertion of their claim for recognition of their rights as traditional owners of their lands. This was not immediately successful. But some years later much of their land was vested in them under Australian law on the basis of their ancestral rights.

The push for changes to the *law* was led by another Northern Territory people, the Yolgnu from north-east Arnhem Land. Initially their campaign, too, took the form of a *political* protest against the Commonwealth Government for leasing some of their land near Yirrkala for a vast bauxite mining operation, without their consent, and without any provision for them to benefit from the mining. Their bark petition is on display in the lobby of Parliament House in Canberra. But at a later stage they went to the courts claiming that the land should be recognised as theirs.

In 1971[10] a single judge of the NT Supreme Court, Justice Blackburn, rejected government arguments that the Yolgnu had no system of law. But he went on to declare that ' . . . the doctrine [of native title] does not form, and never has formed part of the law of any part of Australia.'[11] He held on the basis of statements in some earlier cases that Australian law simply does not recognise rights under Indigenous law, unless there have been specific provisions enacted for doing so. So, the case failed, and the decision was not appealed. Instead, the movement became one of seeking just such statutory recognition.

In late 1972 the new Whitlam government set up an Aboriginal Land Rights Commission to inquire into *how* – not *whether* – Australian law might best recognise Aboriginal land rights in the NT. The Commissioner, Edward Woodward, QC, had been the leading counsel representing the Yolgnu people in the Gove Land Rights Case.

(b) *Statute*

Woodward's final report in 1974 proposed legislation which was eventually enacted under the Fraser Government as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Close to half the land in the NT is now vested in Aboriginal people under this legislation.

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9 Henry Reynolds, *The Law of the Land* (1987) 31-33, 51, 53, 54.

10 *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 FLR 141.

11 Ibid 244-245.

Woodward also recommended the establishment of a fund, on a national basis, for the purchase of land for Indigenous Australians. This was initially the Aboriginal Land Fund Commission; today it is the Indigenous Land Corporation.

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) vested some land (mainly former reserves) directly in Aboriginal ownership, and it also established a process whereby other 'unalienated Crown land' might be claimed by Indigenous groups who can prove their 'traditional ownership' to an Aboriginal Land Commissioner. Inalienable freehold title to such lands is vested in Land Trusts comprising senior traditional owners.

Any proposals for dealings with such land were placed in the hands of representative Land Councils, of which there are currently four – the large Central Land Council and Northern Land Council, and two smaller Land Councils for offshore island groups. They would act as intermediaries between outsiders, including governments, and the traditional owners. Access by outsiders to Aboriginal land required a permit. Aboriginal owners were given very strong powers to prevent mining or other resource developments on their lands, though not an ultimate veto. If mining proceeded, the royalties were to be paid into a special account from which 30% went to the traditional owners of the land in question; 40% to the Land Councils for operational expenses; and 30% for the benefit of all Northern Territory Aborigines generally.

Some controversy has been aroused by amendments to the Act in 2006 largely directed to allowing the Commonwealth to acquire 99 year leases of township lands in the expectation that this will facilitate sub-leases for economic activities, and help people acquire individual homes.[12] More recent changes, just enacted as the *Northern Territory National Emergency Response Act 2007* (Cth), among other things permit compulsory acquisition by the Commonwealth of five year leases over communities, and make substantial inroads into the requirement of permits to enter land under the Act.

Most of the States enacted land rights statutes of their own. They vary considerably. Not all land rights regimes have a land claims process – apart from the Northern Territory, such a process operates only in NSW and Queensland. NSW also has a land purchase fund of its own.

But the NT statute has stood as the strongest among the Australian models.

Have these statutes resolved all land rights issues for Indigenous Australians? The answer has to be no. Indeed, some people here in Queensland were so unpersuaded by proposals in the early 1980s for State land rights legislation that they, too, went to court to argue that the Gove Land Rights Case had been wrongly decided, and that Australian common law, properly considered, *does* recognise land rights.

IV INTERNATIONAL LAW IN THE LEAD-UP TO THE 1992 *MABO* DECISION

The key cases arose in Queensland.[13] The background to the first was that the Archer River pastoral lease in western Cape York was put up for sale by the

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[12] S Brennan, 'Economic Development and Land Council Power: Modernising the *Land Rights Act* or Same Old Same Old?' (2006) 10(4) *Australian Indigenous Law Reporter* 1. See also, concerning similar proposals for the native title legislation, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005.*

[13] *Koowarta v Bjelke-Petersen & Ors* (1982) 153 CLR 168

leaseholders. The Winchinam people were the traditional owners of the land. They asked the Aboriginal Land Fund Commission to buy the land on their behalf, and the Commission set out to do so. But under the Queensland Land Act the Minister had an 'absolute discretion' whether to give or refuse permission for the sale of pastoral leases. He refused approval on the basis that the Queensland Cabinet had adopted a policy of refusing to approve the acquisition of any further large areas of land by, or on behalf of, Indigenous Queenslanders.

The Commission sought advice. I referred the matter to two of my students (one was Aboriginal) as a research exercise. The general advice we offered to the Commission was that there appeared to be a breach of the *Racial Discrimination Act 1975* (Cth). At that time, there was no right of access to the courts in RDA cases until the Commissioner for Community Relations had attempted conciliation without success. Al Grassby tried to set up meetings with the Queensland Government, but they declined to attend, and he eventually issued the first ever certificate for court action under the RDA.

That matter was picked up by a young lawyer from Western Australia who was employed by the Cairns ATSILS – Greg McIntyre – and he initiated court action to establish that the Minister's decision was in breach of the RDA. The Queensland Government, then led by Joh Bjelke-Petersen, argued that the RDA itself was invalid as being beyond the Commonwealth Parliament's Constitutional power. The resultant 1982 High Court decision is *Koowarta v Bjelke-Petersen.*[14]

Three of the seven High Court justices affirmed the validity of the RDA on the basis of Constitution s 51 (xxix) – the power to pass laws with respect to 'external affairs". Because Australia had ratified the International Convention on the Elimination of All Forms of Racial Discrimination, it thereby gained the power to pass a law to implement its obligations under the convention in Australian law.

But the other four justices held that it was insufficient for the Act to be implementing a treaty ratified by Australia. An additional factor was necessary. The subject matter of the Act, and of the treaty, needed to be such as to affect Australia's relations with other nations. And three of the four held that this was not achieved by an Act which dealt with how Australians treated other Australians within Australia. But the fourth, Sir Ninian Stephen, took a different view: he said that the prohibition of racial discrimination had become a principle of customary international law, and that discriminatory treatment of Indigenous Australians *would* affect Australia's relations with other nations. So the RDA was held to be valid.[15]

A *Mabo (No.1)*[16]

The James Cook University Students' Union held a conference in Townsville on 28-30 August 1981 under the title 'Land rights and the future of Australian race relations'.[17]

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14 (1982) 153 CLR 168

15 In the meantime, I had in 1973 completed a human rights analysis of Queensland laws for Aborigines and Torres Strait Islanders as a report for the International Commission of Jurists (Australian section): *Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law,* (1973). Following legislative changes in both Brisbane and Canberra, I did a further analysis for the ICJ published in 1981: Garth Nettheim, *Victims of the Law. Black Queenslanders Today* (1981)

16 *Mabo and Another v The State of Queensland and Another* (1988) 166 CLR 186.

17 Erik Olbrei (ed) *Black Australians: The Prospects for Change,* (1982).

Eddie Koiki Mabo made a presentation for the Torres Strait Land Rights Committee in Townsville in which he outlined the land holding system on Murray Island (Mer) and proposed a test case based on occupation. In a later session Barbara Hocking Sr. also explored the possibility of a test case, based on research for her Master's thesis.

And Greg McIntyre presented a paper looking at the Common Law's recognition of particular local customs as a basis for seeking acknowledgment of Indigenous land rights.

A small group of people met in a side room to consider whether a test case was a real possibility. Eddie said that he would be willing to be a plaintiff but that he could not afford to run a court case. I suggested that he talk to Greg McIntyre from the Cairns ATSILS office. Nine months later, in May 1982, he filed the statement of claim in the original jurisdiction of the High Court of Australia on behalf of Mabo and four other Meriam plaintiffs.

The High Court was unwilling to hold a trial to determine the facts itself, and asked the parties to see if they could agree on a determination of the facts so that they could rule on the legal issues. Agreement proved impossible, and the High Court remitted the trial of the facts to Justice Moynihan of the Queensland Supreme Court.[18]

But the Queensland Parliament enacted the *Queensland Coast Islands Declaratory Act, 1985* retroactively to extinguish any native title that might otherwise have survived on Murray Island and other islands after their annexation by Queensland in 1879.

In March 1988 the issue was argued before the High Court whether the Queensland Act was valid and effective. If so, it would have spelled the end of the case. The plaintiffs argued that the Queensland Act was invalid as inconsistent with the *Racial Discrimination Act 1975* (Cth), s 10 in that it denied the plaintiffs, on the basis of race, the equal enjoyment of a right referred to in Article 5(d) of the Convention, namely:

> (v) the right to own property alone as well as in association with others;
> (vi) the right to inherit.

A majority of the justices accepted the argument in *Mabo v Queensland (No. 1)*.[19] Brennan, Toohey and Gaudron JJ, in a joint judgment, summarised their assessment in these words:

> 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 human 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.[20]

This meant that the Queensland Act was invalid and that the Mabo action could proceed.

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18 Trevor Graham directed a fine film documenting this stage of the events – '*Land Bilong Islanders*' (1990).

19 (1988) 166 CLR 186.

20 Ibid [96] (Deane J analysis was similar).

Justice Moynihan's determination of the facts raised by the pleadings was delivered on November 16 1990.

V INTERNATIONAL LAW IN THE HIGH COURT'S 1992 DECISION

A Mabo (No.2)[21]

On 3 June 1992 the High Court, by a 6:1 majority, followed cases from the USA, Canada, and elsewhere, and agreed that the Meriam people had enjoyed a communal native title under their law before the islands came under Queensland, then Australian sovereignty. They agreed that such native title continued afterwards under Australian common law, without any need for special legislation.

Justice Brennan in his leading judgement referred to the decision of the International Court of Justice in its *Advisory Opinion on Western Sahara*[22] in critically examining the theory of *terra nullius*. His Honour said:

> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[23]

So, independently of statutes such as land rights legislation, the common law of Australia recognised that native title might have survived. Brennan J invoked both English law and international law to distinguish between the sovereignty which the Crown acquired in respect of a colony and the ownership of land held by prior inhabitants. The Crown could grant that land to others by virtue of its 'radical title', but past statements to the effect that the Crown had acquired the 'beneficial title' when it acquired sovereignty were in error. However Crown grants of title, or appropriations of land for its own purposes, might serve to extinguish native title to the extent of any inconsistency.

Thus the High Court held that native title was vulnerable to 'extinguishment' under legislation which was clearly designed to achieve that objective. It could also be lost if the people themselves lost connection to 'country' or lost the continuity of their laws and customs. It was only through such a 'pragmatic compromise' that the

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

22 [1975] I.C.J.R. 39, discussed in *Mabo (No. 2)* (1992) 175 CLR 1 at 42 40-41.

23 *Mabo,* ibid 42. Other members of the court also referred to international law, particularly the prohibitions of racial discrimination.

survival of native title could be recognised without jeopardising titles to land acquired over two centuries of settlement.[24]

There followed a year and a half of 'Mabo madness' in which State governments, and the mining industry in particular, urged the Commonwealth Government to override the High Court decision, or repeal the RDA, or in other ways to 'exorcise' the threat that the Mabo decision was thought to represent to the nation.

VI LEGISLATING NATIVE TITLE

Commonwealth legislation was deemed by the Government to be necessary. The major reason was to 'validate' any interests in land that might have been granted after the commencement of the RDA in 1975, and before the *Mabo* decision, and which might therefore be invalid. Eventually in December 1993, the Commonwealth Parliament enacted the *Native Title Act 1993* (Cth) to deal with most aspects of native title throughout Australia, with power for State Parliaments to enact supplementary legislation.

Section 3 of the Act set out its main objects as:

(a) to provide for the recognition and protection of native title; and
(b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
(c) to establish a mechanism for determining claims to native title; and
(d) to provide for, or permit, the validation of past acts invalidated because of the existence of native title.

In the meantime, earlier in December 1993, the Parliament of Western Australia had made its own attempt to extinguish native title thoughout the State and to substitute statutory 'rights of traditional usage' which would be subordinate to all other interests. The High Court held that the *Land (Titles and Traditional Usage) Act 1993* (WA) was invalid for inconsistency with the RDA and the NTA, and that the NTA was valid, in *Western Australia v Commonwealth; Wororra Peoples v Western Australia; Biljabu v Western Australia.*[25]

The point is this: without the *Racial Discrimination Act 1975* (Cth) native title would not have survived. And the basis for the validity of the RDA was the International Convention on the Elimination of All Forms of Racial Discrimination.

'Mabo madness' broke out again in 1996 after the High Court's decision in *Wik Peoples v Queensland*[26] that native title could co-exist with pastoral leases under Queensland law – and presumably elsewhere in Australia. The Keating Government had been replaced earlier in 1996 by the Howard Government which was proposing to amend the *Native Title Act 1993* (Cth) even before the *Wik* decision. It reintroduced amendments and, after close to two years of bitter dispute, they were enacted in 1998. The 1993 Act comprised 127 pages. The Act as amended in 1998 numbered 443 pages.[27]

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[24] Richard H Bartlett, 'Mabo: Another Triumph for the Common Law' (1993) 15(2) *Sydney Law Review*178, 178, 185-186.

[25] (1995) 183 CLR 373.

[26] (1996) 187 CLR 1.

[27] I summarised the features of the amendments at the time in Garth Nettheim, 'The Search for Certainty and the *Native Title Amendment Act 1998* (Cth)' (1999) 22(2) *University of New South Wales Law Journal* 564-565; the list is reproduced in Heather

I shall not attempt to indicate the way the Act as amended has worked out over the years, nor to provide a summary of the law that has marked determinations of native title through the Federal Court of Australia and up to the High Court of Australia over the years.

But, out of respect for Justice Cooper's particular interest in maritime law, I will speak briefly about three cases on the rights of Indigenous Australians offshore.

VII INDIGENOUS RIGHTS OFFSHORE UNDER AUSTRALIAN LAW[28]

Some recognition of Indigenous offshore rights was provided for in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Section 73 (1)(d) authorised the Northern Territory legislature to pass reciprocal legislation providing that Aboriginal communities can apply to close sections of the sea adjoining Aboriginal land for two kilometres offshore. In 1978 the legislature enacted the *Aboriginal Land Act 1978* (NT) in which s. 12(1) provides for applicants to apply for sea closures. But any such closures are subject to rights of third parties specified in the Act, particularly those holding fishing licences.[29]

More broadly, the *Native Title Act 1993* (Cth), in its definition of 'native title' (s 223) expressly refers to rights and interests in 'land or waters'. Section 6 of the Act provides:

> This Act extends to each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973.*

In *Commonwealth v Yarmirr*[30] the High Court held that native title does arise offshore. The result has been similar in the United States, in Canada and in New Zealand, and has supported some significant economic activities. But in *Yarmirr* offshore native title rights were held by the majority not to be exclusive, as they were subject to the common law public rights of navigation and fishing, as well as the right of innocent passage.[31]

The applicant peoples in *The Lardil Peoples v State of Queensland* [32] claimed rights in the sea 'as far as the eye can see'. Their claim was lodged before the 1998 amendments to the NTA which exclude sea claims from being registered if they

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McRae, Garth Nettheim, Laura Beacroft and Luke McNamara, *Indigenous Legal Issues. Commentary and Materials* (3 ed, 2003) 260-261.

28 The importance of offshore rights to Indigenous Australians has been examined in a number of publications including 'Turning the Tide*',* (Paper presented at Conference on Indigenous Peoples and Sea Rights, Faculty of Law, Northern Territory, 1993); Gary D Meyers, Malcolm O'Dell, Guy Wright and Simone C Muller, *A Sea Change in Land Rights Law: The Extension of Native Title to Australia's Offshore Areas,* (1996); Nicholas Peterson and Bruce Rigsby (eds), *Customary Marine Tenure in Australia*, (1998); Nonie Sharp, *Saltwater People. The Waves of Memory* (2002).

29 McRae et al, above n 25, 207.

30 (2001) 208 CLR 1.

31 Richard H Bartlett, *Native Title in Australia* (2nd ed, 2004) 235-240. See also: McRae et al, above n 25, 293-295; Lisa Strelein, *Compromised Jurisprudence: Native title cases since Mabo'* (2006) 52-58. After the Federal Court decisions and before the decision of the High Court on appeal, the Aboriginal and Torres Strait Islander Social Justice Commissioner devoted chapter 3 of his *Native Title Report 2000* to the topic 'Native Title and Sea Rights'.

32 [2004] FCA 298.

purport to exclude all other rights and interests (s. 190B (9)(b), and before the Croker Island decision, *Commonwealth v Yarmirr*.

In his determination, the late Justice Cooper declared and determined that 'the nature and extent of the native title rights and interests held by each of the [four] peoples in respect of their separate lands and waters' included the right to access the land and waters seaward of the high water line; the right to access such land and waters for religious or spiritual purposes and to access sites of spiritual or religious significance for the purposes of ritual or ceremony; the right to fish, hunt and gather living and plant resources in the inter-tidal zone for personal, domestic or non-commercial communal consumption; the right to take and consume fresh drinking water from fresh water springs in the inter-tidal zone – all such rights being in accordance with and for the purposes allowed by and under their traditional laws and customs.

But the native title rights held by each of the native title holder groups did not confer possession, occupation, use and enjoyment of the land and waters to which they relate to the exclusion of all others. There was no native title right or interest in minerals or petroleum. The nature and extent of other interests were the interests created by the Crown and the rights and interests of members of the public arising under the common law or international law recognised as applicable in Australia. To the extent of any inconsistency the native title rights and interests would yield to such other interests. The rights and interests specified are subject to regulation, control, curtailment or restriction by valid laws of the Commonwealth or of Queensland.

Gumana v Northern Territory of Australia[33] was decided by a Full Federal Court (French, Finn and Sundberg JJ) on 2nd March 2007, and involved assertions of Indigenous offshore rights under both statutory land rights and native title. The applicants were traditional Yolgnu owners of parts of north-east Arnhem Land including areas of Blue Mud Bay. In May 1980 they had been granted fee simple title of the land, including 'the land' area of Blue Mud Bay, under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

In the 1990s they asserted rights and interests in the inter-tidal areas of Blue Mud Bay. Firstly, in 1997 they sought declarations that there was no power in the NT Government to issue fishing licences in the tidal waters covered by the grants. Secondly, in 1998 they filed an application for a native title determination in the waters and adjacent land.

The proceedings went through various stages which I shall not attempt to summarise beyond noting that fresh proceedings were initiated in 2002 ('the Land Rights Proceedings'), and a revised native title application was filed in the same year ('the Native Title Proceedings'). Both proceedings were heard before Selway J in 2004.[34] The core issue in both proceedings was whether the Yolgnu rights and interests in the inter-tidal zone and in the waters beyond were exclusive to them and whether others could be excluded from those areas. The Full Federal Court [13] articulated the issues as follows:

> 1. The Land Rights Appeal:
>
> 1.1 [w]hether the grant of an estate in fee simple to the Land Trust under the Land Rights Act conferred a right of exclusive possession to the inter-tidal zone;

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33 [2007] FCAFC 23.

34 *Gumana v Northern Territory* (2005) 141 FCR 457.

> 1.2 [w]hether the Fisheries Act authorises the Director of Fisheries (NT) to grant licences under the Act to fish in the inter-tidal zone which is subject to the grant to the Land Trust.
>
> 2. The Native Title Appeal:
> 2.1 [w]hether the absence, from the time of sovereignty, of any recognition by the common law of a right of exclusive possession of the inter-tidal zone is an extinguishment of native title rights and interests and is to be disregarded where s 47A applies to the relevant area;[35]
> 2.2 [Deleted for present purposes].
> 2.3 [w]hether despite the absence of an exclusive right of possession of the inter-tidal zone the native title holders can control access to it by Aboriginal people who recognise themselves as governed by the traditional laws and customs acknowledged and observed by the native title holders.

The Full Court set out its conclusion on the Land Rights Appeal:

> Accordingly we will declare that the *Fisheries Act 1988* (NT):
> (a) has no application in relation to areas within the boundary lines described in the deeds of grant . . . made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth);
> (b) does not confer on [the Director of Fisheries] a power to grant a licence under that Act, which licence would authorise or permit the holder to enter and take fish or aquatic life from areas subject to the grants; and
> (c) is of no effect insofar as it purports to operate with respect to areas subject to the grants.[36]

As to the Native Title Appeal, they dealt with issue 2.1 as follows:

> In our opinion, s 47A does not apply so as to mandate disregard of the omission of the common law to recognise, at the point at which sovereignty was asserted, native title rights and interests conferring exclusive possession in the sea or the inter-tidal zone. In this respect the Native Title Appeal fails . . .[37]

As to issue 2.3, their Honours said:

> It is settled by the highest authority that a native title right that is inconsistent with the public's right of access to the inter-tidal zone and outer waters for fishing and navigation is not recognised by the common law for the purposes of s 223(1)(c): *Yarmirr* 208 CLR 1. Aboriginal people are part of the public, whether they do or do not recognise themselves as governed by the traditional laws and customs acknowledged and observed by the appellants, and accordingly have, since the assertion of sovereignty, had the right to fish in and navigate the inter-tidal zone and outer waters. Accordingly s 223(1)(c) precludes the existence of the 'right to make decisions about access to and use and enjoyment of the inter-tidal zone and outer waters' in par 7(c) of the Determination.

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35 The Full Federal Court, ibid [111] said: 'Sections 47, 47A and 47B have similar although not identical applications. They provide for circumstances in which the extinguishment, by certain acts, of the native title rights and interests in relation to an area the subject matter of an application, must be disregarded.' Citing, Perry & Lloyd, *Australian Native Title Law* (2003).

36 Ibid [105].

37 Ibid [134].

So it seems that claims to exclusive rights in the intertidal zone and beyond cannot succeed under the *Native Title Act 1993* (Cth), but may succeed under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

VIII AUSTRALIAN ASSESSMENTS ON NATIVE TITLE LAW

In the June 2007 issue of *Talking Native Title* published by the NNTT particular note was made of Justice North's consent declaration on 30 March 2007 recognising the Gunditjmara people's non-exclusive native title rights and interests covering some 140,000 ha. of Crown lands, national parks, reserves, rivers, creeks and seas in Victoria. This was the 100th determination in the 15 years since the Mabo decision.

Excellent assessments can be found in a variety of sources.[38] And High Court Justices Kirby, Callinan and McHugh have each spoken, in 2002 decisions, of the complexity and difficulty of native title claims.[39]

But it is fair also to note the number of quite significant claims that have succeeded, increasingly on the basis of negotiated settlements. NNTT President Graeme Neate has commented:

> The steady rise in determinations of native title and the accompanying increase in ILUAs demonstrates that the native title scheme can deliver, and has delivered, direct and positive outcomes for some Indigenous Australians. Much work remains to be done, and improvements to the system are needed.[40]

I now return to consider some developments under international law.

IX INTERNATIONAL ASSESSMENTS OF AUSTRALIAN LAW ON NATIVE TITLE

Key features of the 1998 amendments to the NTA were considered and criticised by several of the international treaty committees over the following couple of years, notably the CERD committee.

> On 11 August 1998 the United Nations Committee on the Elimination of Racial Discrimination Committee (CERD) requested the Australian government to provide it with information to address concerns as to whether the 1998 amendments were compatible with Australia's obligations under the CERD convention. The information was sought under the Committee's early warning and prevention procedure, introduced in 1993.[41]

The Commonwealth Government provided a detailed response which outlined the main provisions of the 1993 legislation, the changes brought about by the 1998

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38 Such works include: Richard H Bartlett, *Native Title in Australia* (2nd ed, 2004); Strelein, above n 29.

39 Reproduced in McRae et al, above n 25, 279, 375-376.

40 *Talking Native Title,* Issue No. 23, June 2007, p. 1.

41 McRae et al, *above n 25* , 63, citing, Darren Dick and Margaret Donaldson, '*The Compatibility of the Amended Native Title Act 1993* (Cth) *with the United Nations Convention on the Elimination of All Forms of Racial Discrimination*' (Land, Rights, Laws: Issues of Native Title, vol #1, Issues Paper No 29, 1999). Terms of the CERD decision are set out in (1998) 3(4) *Australian Indigenous Law Reporter* 590.

amendments, and the justification for those amendments from the government's point of view.[42]

On 18 March 1999 the CERD Committee delivered its concluding observations. It expressed:

> . . . concern over the compatibility of the *Native Title Act*, as currently amended, with the State party's international obligations under the Convention. While the original *Native Title Act* recognises and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 *Native Title Act* was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for Governments and third parties at the expense of indigenous title.

In particular, the Committee noted:

> . . . four specific provisions that discriminate against indigenous title holders under the newly amended Act. These include the Act's 'validation' provisions; the 'confirmation of extinguishment' provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses … These provisions raise concerns that the amended Act appears to wind back the protection of indigenous title offered in the *Mabo* decision of the High Court of Australia and the 1993 *Native Title Act.* As such, the amended Act cannot be considered to be a special measure within the meaning of articles 1(4) and 2(2) of the Convention and raises concerns about the State party's compliance with articles 2 and 5 of the Convention . . . the lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State party's compliance with its obligations under article 5(c) of the Convention.

The Committee called for a suspension of the amendments, and continued negotiation with Indigenous people.[43]

The Commonwealth Attorney-General rejected the conclusions. On 16 August 1999 CERD reconvened, affirmed its earlier decision, and decided to continue consideration of the matter in March 2000.[44]

At its March 2000 meeting the Committee expressed continuing concerns about the approach of the Australian government to native title (and to other aspects of government policy towards Indigenous peoples), in particular, the unsatisfactory response to its earlier requests.[45]

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42 These are largely set out in McRae et al, above n 25, 263-271.

43 CERD Committee Decision on Australia, Committee on the Elimination of All Forms of Racial Discrimination 54th Session, Decision 2 (54) A/54/18, Para 21(2), 18 March 1999 at <www.faira.org.au/cerd/> The decision is set out at (1999) 4(2) *Australian Indigenous Law Reporter* 140-141.

44 The Government's formal response is set out in (1999) 4(4) *Australian Indigenous Law Reporter* 144-147, followed by CERD's draft response at 148. Professor Hilary Charlesworth has written, in relation to negative findings on individual complaints to treaty committees, that the government has chosen to reject them, or simply to ignore them: 'Human rights: Australia versus the UN', Discussion Paper 22/06 (August 2006). See also, Elizabeth Evatt, 'How effective has the United Nations Human Rights system been in promoting human rights observance by Australian governments?' (August 2005) available at <http://democratic.audit.anu.edu.au>,

45 Committee on the Elimination of Racial Discrimination 56th Session, 'Concluding Observations By The Committee On The Elimination Of All Forms Of Racial

In March 2005 the Committee again met to consider periodic reports from Australia which had been due in 2000 and 2002. In its Concluding Observations, the Committee returned to the issue of native title. It reiterated its previous views, and continued:

> 16. The Committee recommends that the State party should not adopt measures withdrawing existing guarantees of indigenous rights and that it should make all efforts to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all.

And it added a concern based on the developing case law:

> 17. The Committee is concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The high standard of proof required is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands (article 5).
>
> The Committee wishes to receive more information on this issue, including on the number of claims that have been rejected because of the requirement of the high standard of proof. It recommends that the State party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of indigenous peoples to their land.

On the positive side, the Committee noted the statistics as to determinations of native title. It also acknowledged the provisions introduced in the 1998 amendments regarding Indigenous Land Use Agreements, as well as the creation of the Indigenous Land Fund in 1995 to purchase land for indigenous Australians unable to benefit from recognition of native title.[46]

In 2007 the Australian Government has submitted its common core document (Report) to the UN which incorporates Australia's Fourth Report under ICESCR and the Fifth Report under ICCPR.[47]

Discrimination: Australia', (April 2000) available at <www.unhchr.ch/tbs/doc.nsf/> reproduced in (2000) 5(4) *Australian Indigenous Law Reporter* 135-137. In the same year the Human Rights Committee under the International Covenant on Civil and Political Rights, and the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights also expressed concern about the native title issue (and other matters), reproduced in (2000) 5(4) *Australian Indigenous Law Reporter,* 127-129 and 131-133. The *Native Title Report 2000* (2001) 5-46, discussed the dialogues with the CERD committee and the Human Rights Committee in Chapter 1, 'Nation in Dialogue'.

[46] The Concluding Observations are reproduced in (2005) 9(2) *Australian Indigenous Law Reporter* 117-119.

[47] On 27 July 2007 the National Association of Community Legal Centres (NACLC) published a critique alleging that the Report failed to adequately report on a number of human rights issues including 'Rights and Access to Traditional Lands and Preservation of Indigenous Culture' in its past and continuing amendments to the NTA, and in failing to seek the participation or informed consent of Indigenous Australians before decisions

The Committees established to monitor compliance by States parties to human rights covenants and conventions constitute the 'treaty-based mechanisms' of the United Nations systems for human rights. As well as focusing on the performance of particular State parties to the treaty in question, the Committees also produce occasional General Comments or General Recommendations for the guidance of all States parties on specific aspects of the treaties.

X CHARTER-BASED MECHANISMS

The 'Charter-based mechanisms' are not dependent on States being parties to particular treaties, and are constituted by Working Groups or Special Rapporteurs for particular States or for particular issues. They have been overseen by the former Commission for Human Rights, recently replaced by the Human Rights Council. It is early to assess the adequacy of the new body as against its predecessor, but some positive aspects are that it is to meet for at least ten weeks per year (over two or three sessions) as against the Commission's single six-week session. It will also coordinate periodic reviews of every UN member's human rights record and commitments. And, after some initial doubt, it appears that the work of most of the Special Rapporteurs will continue.

A *Special Rapporteurs on Indigenous issues*

In 2001 the Commision on Human Rights appointed a Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples – Professor Rodolfo Stavenhagen from Mexico. His mandate was renewed in 2004. His first thematic report, in April 2003, focused on the impact of large scale or major development projects on the human rights and fundamental freedoms of indigenous peoples and communities.[48]

In his first and general report to the General Assembly,[49] Professor Stavenhagen offered the following comments on the land rights issue:

> A. Rights to land, territory and access to natural resources
>
> 14. From time immemorial indigenous peoples have maintained a special relationship with the land, their source of livelihood and sustenance and the basis of their very existence as communities. The right to own, occupy and use land is inherent in the self-conception of indigenous peoples and generally it is in the local community, the tribe, the indigenous nation or group that this right is vested. For economically productive purposes this land may be divided into plots and used individually or on a family basis, yet much of it is regularly restricted for community use only (forests, pastures, fisheries, and so on), and the social and moral ownership belongs to the community. This has often been recognized in the national legal system, but just as often certain kinds of economic interests have attempted to turn communal possession into individual private ownership, a process

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were adopted. (NACLC Media Briefing Document, *'Human Rights or Human Blights? Australia's Reporting on its International Treaty Obligations')*.

48 United Nations Human Rights: Office of the High Commissioner for Human Rights, <http://www.unhchr.ch/indigenous/rapporteur.htm>.

49 General Assembly, *The situation of human rights and fundamental freedoms of indigenous peoples – Report of the Special Rapporteur*, UN Doc: A/59/258, 12 August 2004; 2005 9(1) *Australian Indigenous Law Reporter* 102.

> which began during the colonial period in many countries and intensified during post-colonial times.
>
> 15. Indigenous peoples everywhere have been gradually dispossessed of their ancestral lands. The defence of their farming and territorial rights is one of the most urgent issues involved in the protection of their human rights, often giving rise to negotiations, disputes and conflicts. . . .
>
> 16. The demand by indigenous peoples for the recognition of their ancestral lands sometimes brings them into conflict with the interests of States, which may consider that such recognition undermines the unity and integrity of the nation. However, examples such as that of the Nunavut in Canada demonstrate that recognizing indigenous land rights does not detract from the unity of the State and may, at the same time, satisfy the demands and aspirations of an aboriginal people.
>
> 17. The land rights issue cannot be separated from the issue of access to, and use of natural resources by indigenous communities, and is an essential issue for the survival of indigenous peoples, which must be carefully studied, since access to the natural resources present in their habitats is essential to their economic and social development.
>
> V. Conclusions and Recommendations
>
> 68. The issues of land, territory and access to natural resources remain central to observing the human rights and fundamental freedoms of indigenous people. They have crucial implications for the indigenous communities' enjoyment of civil and political and economic, social and cultural rights everywhere in the world.

The Special Rapporteur's second general report to the General Assembly[50] also contained references to land-related issues:

> IV. Status report: major human rights problems affecting indigenous peoples
>
> 31. Since indigenous peoples historically identify with 'Mother Earth' and base their cultural identity primarily on their long association with the earth and its fruits, when this relationship is disrupted or eroded, situations arise that impair their human rights. The Special Rapporteur has received and continues to receive numerous complaints alleging human rights violations related to conflicts over the tenure and collective ownership of land, access to natural resources such as water and forests and serious environmental problems such as pollution, deforestation, desertification and toxic waste, which adversely affect the lives of individuals and communities.
>
> 33. The Special Rapporteur is troubled by frequent complaints about evictions and forced displacements of indigenous communities, despite international legal provisions such as International Labour Organization (ILO) Convention No. 169 concerning indigenous and tribal peoples in independent countries, which clearly establish the rights of indigenous peoples in such circumstances. . . .
>
> 69. A matter of crucial importance, to which the Special Rapporteur plans to devote the thematic portion of his report to the Commission on Human Rights at its sixty-third session, is the growing gap between legislation on indigenous rights (such as constitutional reforms, indigenous laws and the ratification of international

[50] General Assembly, *The situation of human rights and fundamental freedoms of indigenous peoples – Report of the Special Rapporteur*, UN Doc: A/60/358, 16 September 2005.

> conventions and agreements) and the real, day-to-day situation of indigenous people in their communities.
>
> 70. All indications suggest that the main problem is not lack of suitable legislation (although much remains to be done in that regard), but shortcomings in terms of implementation, the efficiency of institutions and the procedures and mechanisms for the full realization of human rights. If legal reforms in the area of indigenous people's human rights are not accompanied by institutional, social and political reforms that open up new opportunities for broad democratic participation by indigenous people in the management of institutions, mechanisms and procedures whose effective operation is essential for the full enjoyment of their human rights, such legal measures will fall short of their objectives.

The Special Rapporteur's report to the Commission on Human Rights explored these issues in more detail with examples from a number of countries.[51] It should be noted that he now reports to the new Human Rights Council, and did so recently on 20 March 2007.[52]

The Special Rapporteur's theme of 'the implementation gap' between human rights and actual outcomes has been picked up by the Aboriginal and Torres Strait Islander Social Justice Commissioner in his annual Social Justice Reports. In *Social Justice Report 2006*, launched in July 2007, Commissioner Tom Calma considered the question 'What makes good Indigenous policy?' and listed a number of factors including the following:

- A commitment to human rights
- Engagement and participation of Indigenous peoples in policy making
- . . .
- Monitoring and evaluation
- A culture of implementation and government accountability.

And he proceeded to examine 'the new arrangements for Indigenous affairs' in the light of such factors.[53] For the purpose of this paper I select extracts from what the Commissioner had to say about 'A commitment to human rights'.

> Chapter 4 of this report discusses the existence of what is being referred to internationally as 'the implementation gap' between the human rights obligations accepted by government and their application in domestic policy frameworks for Indigenous issues. We do not protect the rights of Indigenous peoples in Australia well, and we have not adopted a human rights based approach to policy or service delivery. A human rights based approach … emphasises the necessity for Indigenous participation at all stages of the policy development and implementation processes.[54]

What is being sought under international law are regimes under national law and practice which provide adequate recognition of indigenous peoples' relationship

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51 *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc E/CN.4/2006/78, 16 February 2006.

52 This material can be located on the website of the United Nations High Commissioner for Human Rights – www.ohchr.org His mandate expires in December this year., and in September there will be presented to the Council a draft report on the future of the Working Group on Indigenous Peoples and of the Special Rapporteur.

53 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* 2006 (2007) Ch 1,15-18, Ch 2 and 3.

54 Ibid 3-4.

to their lands, territories and resources. These should include procedural restrictions on developments which may adversely affect their interests, preferably requiring their free, prior and informed consent before such developments proceed. They also seek effective remedies, through the court system or otherwise, and fair compensation for any damage to indigenous interests.

B *The Permanent Forum on Indigenous Issues*

Another recent Indigenous-specific development in the United Nations system has been the establishment of the Permanent Forum on Indigenous Issues by resolution of the UN Economic and Social Council.[55] It first convened in 2002.

> The Permanent Forum on Indigenous Issues integrates indigenous peoples and their representatives into the structure of the United Nations. It marks the first time that representatives of states and non-state actors have been accorded parity in a permanent representative body within the United Nations Organization proper.
>
> The Permanent Forum on Indigenous Issues will be a subsidiary organ of the Economic and Social Council. It will consist of eight members nominated by governments and elected by the Council, and eight members to be appointed by the President of the Council following broad consultations with indigenous organizations and groups. The selection process is to take into account the diversity and geographical distribution of the world's indigenous peoples as well as principles of transparency, representativeness and equal opportunity. All members of the Forum are to serve in their personal capacity as independent experts on indigenous issues for a period of three years with the possibility of re-election or reappointment for one further period. Governments, intergovernmental organizations, NGOs in consultative status with the Council, as well as organizations of indigenous people complying with procedures previously applied by the Working Group on Indigenous Populations, may participate in the Forum as observers.
>
> According to ECOSOC Resolution 2000/22, the Permanent Forum on Indigenous Issues 'shall serve as an advisory body to the Council with a mandate to discuss indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights.'[56]

Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, in chapter 4 of his *Social Justice Report 2006*, discusses international developments over the previous five years on the rights of Indigenous peoples. Those developments include the creation of the Human Rights Council, and the Permanent Forum on Indigenous Issues, and the roles of the Special Rapporteurs and the Working Group on Imdigenous Populations.[57]

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[55] *Establishment of a Permanent Forum on Indigenous Issues,* Economic and Social Council Resolution. 2000/22, adopted on 28 July 2000, available at, <http://www.un.org/documents/ecosoc/dec/2000/edec2000-inf2-add2.pdf> 50-52.

[56] John Carey and Siegfried Wiessner, 'A New United Nations Subsidiary Organ: The Permanent Forum on Indigenous Issues' (2001).

[57] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2002) 185-197. He provided a helpful Diagram 1: Overview of Indigenous mechanisms within the UN system, with a focus on human rights procedures (at 189).

XI THE DRAFT UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

In 1982 a Working Group on Indigenous Populations was established as a subsidiary of the 26-member Sub-Commission on Prevention of Discrimination and Protection of Minorities. At that time this Sub-Commission (composed of independent experts) reported to the Commission on Human Rights which was composed of some 53 representatives of governments. Above the Commission was the Economic and Social Council (ECOSOC), and, above it, is the General Assembly of the United Nations.

The tasks of the 5-member Working Group on Indigenous Populations were to 'review developments' pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, and to give special attention to the 'evolution of standards' concerning their rights.[58] Over some years, starting in 1985, and with the eventual participation of up to 1000 representatives of Indigenous peoples from around the world, plus representatives of States, work was completed in 1993 on the Draft Declaration on the Rights of Indigenous Peoples. This went up in 1994 to the Sub-Commission, which quickly accepted it. It then went to the Commission on Human Rights which set up its own working group in 1995 where it bogged down for further years.

Two years ago, as part of the reforms of the United Nations system, the Commission was replaced by a new and higher level body, the Human Rights Council. In June 2006, in its first session, the Human Rights Council finally adopted the Draft Declaration and reported it up the line to the General Assembly.[59] The General Assembly deferred a vote on it last year, and is to consider whether or not to adopt it this year.

I will not take you through all the preambular paragraphs and the 46 Articles in the Draft Declaration, but shall pick out those Articles which establish broad overall principles and those that relate most closely to native title issues. In doing so, it needs to be noted that the rights of Indigenous peoples, as set out in the draft Declaration, are inter-related, and the document needs to be read as a whole.

Article 1

> Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

> Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

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58 *Study of the problem of discrimination against indigenous populations,* Economic and Social Council Resolution 1982/34, adopted on 7 May 1982. Overviews of the process leading to the creation of the draft Declaration may be found in Aboriginal and Torres Strait Islander Social Justice Commissioner, ibid 185-189; Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 49, 227-242.

59 The terms of the draft Declaration are set out in (2006) 10(3) *Australian Indigenous Law Reporter* 108-115.

Article 3

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

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

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

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior 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 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, 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 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 25

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

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the

customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

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

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

XII HOW WILL AUSTRALIA VOTE?

At times in the development of the Draft Declaration Australian Governments have been reasonably supportive. But in recent times they have expressed concerns at references to self-determination, provisions relating to land, territories and resources, and provisions that seem to prioritise collective rights over individual rights.[60]

In fact there appears very recently to have been formed a bloc known as the CANZUS group consisting of Canada, Australia, New Zealand and the US. At the meeting of the Permanent Forum on Indigenous Issues on 17 May 2006 the Head of the New Zealand delegation put forward a statement on behalf of Australia, New Zealand and the United States which included the following concerns:

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[60] Commissioner Calma summarises these concerns and responds to them in Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 49, 237-242.

> Madame Chair, the provisions for articulating self-determination for indigenous peoples in this text, for example, are inconsistent with international human rights law. Indeed, some of its provisions attempt to reinterpret the Covenants. They could be misinterpreted as conferring a unilateral right of self-determination (Article 3) and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity and indeed the security of existing UN Member States. Article 3 in the text, unqualified as it is at present, has the potential to create instability.
>
> The draft text also appears to confer upon a minority, a power of veto over the laws of a democratic legislature (Article 20). While we strongly support the full and active engagement of indigenous peoples in democratic decision-making processes, no government can accept the notion of creating different classes of citizenship. Nor can one group in society have rights that take precedence over those of others. In this context, it is important to be mindful of the Convention on the Elimination of Racial Discrimination.
>
> Madame Chair, the provisions on lands and resources are particularly unworkable and unacceptable. They ignore the contemporary realities in many countries with indigenous populations, by appearing to require the recognition of indigenous rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous (Article 26). Such provisions would be impossible to implement.[61]

The head of the Australian Delegation made additional statements on behalf of the three governments over subsequent days.[62] The second of them related specifically to requirements of Indigenous consent. He noted that there had been discussions of the notion of 'free, prior and informed consent' for indigenous peoples in a number of other international fora, and that there was not yet a common understanding of what such a requirement might entail. He said that the three governments:

> [s]upport efforts to increase indigenous peoples' participation in decisions that affect them … This applies in particular to such areas as land and resources, culture and heritage, traditional knowledge and intellectual property.
>
> But the fundamental point is that neither indigenous nor non-indigenous peoples enjoy an overarching or exclusive right of free, prior informed consent, regardless of circumstances.
>
> Australia, New Zealand, and the United States of America's position is that discussions about indigenous participation in decision-making must recognise that different approaches may be necessary in different circumstances, and must balance the rights and interests of all those affected, including the responsibility of governments to act in the interests of the common good.[63]

The Aboriginal and Torres Strait Islander Social Justice Commissioner concludes his discussion of the debate about the draft Declaration in these terms:

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61 (2006) 10(2) *Australian Indigenous Law Reporter* 108.

62 Ibid 110 and 112.

63 Commissioner Calma discusses 'the development through the UN processes and international law of an emerging principle of free, prior and informed consent' in Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 49, 201-207

> Indigenous peoples have advocated the need for additional, specifically defined forms of recognition due to the existence of a 'normative protection gap' in the international system.
>
> The reason for this is that most human rights standards are individual in nature, and offer limited protection to the collective rights of indigenous peoples – such as to lands, territories and resources.
>
> The Declaration is of utmost importance to combat discrimination against indigenous peoples. It explicitly encourages harmonious and cooperative relations between States and indigenous peoples. Every provision of the Declaration has been designed to be interpreted consistent with the principles of justice, democracy, respect for human rights, non-discrimination and good faith.
>
> The Declaration does not create new rights. It elaborates upon existing international human rights norms and principles as they apply to indigenous peoples. . . .
>
> There exists substantial consensus on the vast majority of the provisions of the Declaration, with a small group of States maintaining objections.
>
> Notably, the Australian government was an active participant in the negotiations and was part of the consensus on the majority of the Declaration. The Australian government was also one of a handful of States that maintained objections to the proposed text of the provisions relating to self-determination, land and resource rights and the general provisions.
>
> The Australian government concerns have been poorly argued at the international level and are unjustified. They should be rejected outright as they do not interpret the Declaration according to principles of good faith, respect for human rights, equality and non-discrimination. The government's interpretation is not in accordance with principles of international law or consistent with Article 46 of the Declaration.
>
> In relation to these objections, the United Nations Special Rapporteur on Indigenous Issues has argued that no country has ever been diminished by supporting an international human rights instrument; rather the contrary is the case.[64]

XIII CONCLUSION

I have attempted to sketch at a very broad level the ways in which Australian law and International law have attempted to provide some recognition of the laws of Indigenous peoples in relation to lands, territories and resources.

Among the former British colonies, Australian law failed to provide the levels of recognition achieved in the USA, Canada and New Zealand. Belatedly, Australia made up for some lost ground with the development of statutory land rights and the recognition, 15 years ago, of native title in the common law, supplemented (or superseded) by legislation.

International law, too, has been moving to provide recognition for Indigenous peoples, initially through generally applicable human rights principles and processes, and more recently through standards and processes directed specifically to Indigenous peoples.

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[64] Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 49, 247-248.

In Australia we would not have achieved recognition of native title without the support of International law. And International law is now telling us, very clearly, that we need to do better.

XIV POSTSCRIPT – NOVEMBER 2008

The latter part of the Lecture indicated a number of quite recent developments at the level of International law. Such developments have continued.

In reference to footnote 52, the new Special Rapporteur is Native American Law Professor, S James Anaya. And the Working Group on Indigenous Populations went out of existence in 2007 to be replaced by a new Expert Mechanism on Indigenous Issues.

The Declaration on the Rights of Indigenous Peoples came before the UN General Assembly which voted on it on 13 September 2007.

The recorded vote was 143 in favour, 4 against and 11 abstentions. The 4 against were Canada, the USA, New Zealand and Australia. In November 2007 the Rudd Labor Government won the federal election. Prime Minister Rudd opened a process of consultation with State and Territory governments on whether to express Australia's support for the Declaration.

The Prime Minister also took the opportunity of the first opening of Parliament after the election to offer an Apology to Australia's Indigenous Peoples.[65] His motion, moved in the House of Representatives, was accepted unanimously. The Apology was very well received around Australia, and provided a boost for Reconciliation.

In reference to the account of the Full Federal Court decision in *Gumana v Northern Territory of Australia,* it is worth noting that a 5:2 majority of the High Court of Australia affirmed the result in *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 that:

> a fishing licence granted by the NT Director of Fisheries does not authorise the holder to enter waters within the boundaries of Aboriginal land. In coastal areas, grants of 'Aboriginal land' under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) are made to the low water mark. As such they encompass an intertidal area that, in northern Australia, can stretch over long distances and contains rich fishing grounds.[66]

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[65] Commonwealth, *Parliamentary Speech,* House of Representatives, Wednesday 13th February 2008, 167 (Kevin Rudd).

[66] S Brennan, 'Wet or Dry, It's Aboriginal Land: The Blue Mud Bay Decision on the Intertidal Zone' (2008) 7(7) *Indigenous Law Bulletin* 6.