INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

Bell & Howell Information and Learning
300 North Zeeb Road, Ann Arbor, MI 48106-1346 USA

UMI®
800-521-0600
TOWARDS AN AUSTRALIAN REPUBLIC:
CONSTITUTIONALISING INDIGENOUS LAND RIGHTS

By

Jane Catherine Fogarty

A thesis submitted in conformity with the requirements
for the degree of Master of Laws
Graduate Department of Law
University of Toronto

© Copyright by Jane Catherine Fogarty 1998
The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author’s permission.

L’auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L’auteur conserve la propriété du droit d’auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.
Abstract

Towards an Australian Republic: Constitutionalising Indigenous Land Rights

Master of Laws Degree 1998

Jane Catherine Fogarty

Graduate Department of Law

University of Toronto

Australia’s Indigenous people have been dispossessed of their ancestral lands since colonisation began in 1788. Most Australians were unprepared for the High Court’s decision in the 1992 *Mabo* case that established native title in Australia, despite the fact that such title had been recognised much earlier in other common law jurisdictions. However, the more that spiritual connection to the land is asserted by Aboriginal claimants, and requirements for the land’s protection and ownership, the less the legal system will acknowledge it, as illustrated in the ridiculing of “secret women’s business” in the Hindmarsh (Kumarangk) Island matter.

As Australia is contemplating becoming a republic, it is timely to consider whether a new constitution would better protect Indigenous land rights. If we consider Aboriginal rights in Canada’s constitution, the protection of individual rights in the United States constitution and developments of Indigenous peoples’ rights at the international level we may understand more clearly whether constitutional entrenchment would be a suitable solution for Australia.
Acknowledgements

I would like to acknowledge the academic support of the Faculty of Law at the University of Toronto, in particular my supervisor Professor Jennifer Nedelsky and Professors Patrick Macklem, Rebecca Cook and visiting Professor Martin Scheinen (University of Helsinki) for comments on previous drafts. I would like to thank Elena Thomas (Department of Sociology) for her support, insight and criticism which helped me to sharpen some of the ideas developed in this thesis. I have also benefited from discussions with Professors Peter Russell (Department of Political Science), Kent McNeil (Osgoode Hall Law School), and from the Faculty of Law, Professors Karen Knop, Craig Scott and Rosemary Coombe. I would also like to acknowledge the collegiate atmosphere of the Graduate Department of Law in particular my informative lunch breaks with Kerry Wilkins. From the University of Sydney Law School I would like to thank Professors Hilary Astor and Julie Stubbs for their encouragement and support of my vision and the many references they wrote at short notice. Also from Sydney, I would like to acknowledge Professor Ben Boer and Chris Cunneen who provided useful comments on my previous research into Australian law.

This research would not have been possible without the support of the Australian Federation of University Women, New South Wales Inc., in the form of the Tempe Mann Scholarship, for which I am extremely grateful.

I would also like to thank my family and friends who have supported me from far away, especially Nuala Fogarty, Zita Fogarty and Annette English. Thanks also to the administrative and library staff at the University of Toronto Faculty of Law, in particular Julia Hall, Ann Morrison and Shikha Sharma.
Dedication

Dedicated to:

Liam Fogarty Daly born 26 November 1997

And


Who, like other children, are our future leaders.
# Table of Contents

## CHAPTER 1: INTRODUCTION

1.1 The Australian Position

1.2 Incremental Changes in Perceptions

1.3 Legal Recognition of Spiritual Connection to Land

## CHAPTER 2: SPIRITUAL CONNECTION TO LAND

2.1 Introduction

2.2 Anthropological Analysis.

2.3 The Spiritualities of the Indigenous People of Australia

2.4 Gender Divisions Within Spiritual Practice

2.5 Secrets

2.6 Contemporary Indigenous People

2.7 Other Indigenous Groups in the World

2.8 Conclusion

## CHAPTER 3: STATUTORY PROVISIONS IN AUSTRALIA

3.1 Introduction

3.2 Native Title

3.2.1 The Gove Land Rights Case and Subsequent Legislation

3.2.2 Mabo

3.2.2.1 Content of Native Title

3.2.2.2 Proving Native Title

3.2.2.3 Extinguishment

3.2.2.4 Compensation

3.2.2.5 Fiduciary Obligations

3.2.2.6 The Political Aftermath

3.2.3 The Native Title Act

3.2.3.1 State Responses

3.2.4 Wik

3.3 The Aboriginal and Torres Strait Islander Heritage Protection Act

3.3.1 “Significant Aboriginal area”

3.3.2 An example of using the Act - Hindmarsh Island

3.3.3 Lessons from Hindmarsh

3.4 Conclusion

## CHAPTER 4: COMPARATIVE ISSUES - EMBEDDED CONSTITUTIONAL RIGHTS IN CANADA AND THE USA; INTERNATIONAL LAW

4.1 Introduction

4.2 Canada

4.1.1 The Historical Development of Aboriginal Title - Canada

4.1.1.1 The Marshall Decisions of the U.S. Supreme Court

4.1.1.2 The Privy Council

4.1.1.3 Supreme Court of Canada

4.1.2 The Supreme Court of Canada’s Interpretation of s. 35(1) of the Constitution Act, 1982

4.1.2.1 Sparrow

4.1.2.2 Culture-Based Rights: Van der Peet

4.1.3 Delgamuukw
Chapter 1: Introduction

In the old days, right after the white man take all the Indians' land for himself, and give back to the Indians these little reservations, a group of important white men come to a reserve, try to explain to the Indians why they can only hunt on the reservation, because the land all around them either belong to farmers or is what they call Crown Land. The idea of someone owning land is foreign to Indians, but Crown Land is even stranger. The interpreter tries the best he can but Crown Land is awful hard to translate. A crown translates as the Queen's hat. So the best interpreter can do is explain to the Indians that the land all around their reserve is owned by the Queen's Hat.

The Indians talk back and forth, shake their heads and laugh and laugh. They always knew the white men were crazy but to tell them that the great wilderness was now owned by the Queen's Hat was just too much.¹

This excerpt is from a collection of Canadian Indian stories and it captures the essence of two cultures trying to communicate but it highlights the differences in symbolic meaning that creates confusion between them. The translator in the story served as the bridge builder between the two disparate cultures, however, as we can see, since the Indians concluded that the Queen's Hat owned the land, the translator was unable to complete the bridge of understanding. The history of imperialistic colonising and the associated structures that were brought into a new colony imposed these challenges of different symbolic meanings to Indigenous cultures. Our interest in this thesis is primarily concerned with the legal structure brought in by colonisers and its ability to bridge this cultural divide. Since the occupation and ownership of land has been the dominant driving force for colonisers it is instructive for us to examine the historical context of land's relationship with Indigenous people and colonisers and the differences between these relationships. For Australia this is particularly pertinent because in the first half of 1998 a federal election loomed large on the horizon over Indigenous land rights.

¹ W. P. Kinsella The Moccasin Telegraph and Other Indian Tales (Boston: David R. Godine, 1983) at 136
It is imminent that Australia will continue to forge its independence as a distinct and separate nation in the world by a transition from being part of the British Commonwealth into becoming a republic. To do this a number of legal structures will be transformed and in particular the position of Indigenous Australians in the new republic will need to be negotiated. The past history of Australia as a colony then as a federation has shown that Indigenous Australians have been left on the fringe of political and legal reality. What should Australia do to ensure the position of its Indigenous inhabitants if it becomes a republic? Fortunately we have two examples from which to examine and learn: Canada with its Constitutional assurances of Aboriginal rights; and the United States with its Constitutional assurances of individual rights.

But first let us sojourn through a brief history of Australia since British settlement to introduce to the non-Australian reader some of the particular aspects specific to the Australian situation.

1.1 The Australian Position

Australia entered the colonial era when it was “settled” by the British in 1788 with the arrival of the First Fleet at Sydney, New South Wales. The First Fleet consisted of convicts and militia and it had the purpose of setting up a British outpost and penal colony close to the East Indies spice trade (currently Indonesia). At this point in time, the British colonisers thought that the Aborigines numbered less than a few thousand and

---

2 Throughout this thesis, I will refer to Indigenous Australians primarily as Aborigines, Indigenous Australians or Australia’s Indigenous people or inhabitants. My use of the term “Aborigines” is not meant to exclude the Torres Strait Islanders and other Islanders who may not necessarily identify as “Aborigines”.

3 There are many historical accounts of the settling of Australia. For a recent study that looks at the settling of Australia from the position of race, see D. Day Claiming a Continent: A History of Australia (Sydney: Angus & Robertson, 1996) and also H. Reynolds The Law of the Land (Ringwood, Vic.: Penguin, 1987)
were clustered around Sydney. Since the Aborigines were few and did not obviously exploit the land as Europeans did with agricultural and pastoral activities, the British considered them little threat and settled the land, dispossessing the Aborigines as they went.

As more and more of the interior of the continent was developed for pastoral and agricultural stations the land was taken by squatters, freed convicts and settlers intent on using the land for economic gain. The competition for land and resources between the new immigrants and the Indigenous inhabitants was fierce. Skirmishes were frequent between the guerilla-style retaliations of the Aborigines and European firepower. The battles were usually one-sided with spears and boomerangs no match for rifles and guns. The government generally turned a blind eye to these skirmishes as development of the interior helped support the new colony and over a period of time thousands of Aborigines were killed.\(^4\)

What is most remarkable about this earlier period of British colonisation of Australia is that the method of treaty making with the native population was not conducted as it was in other British settlements, such as Canada or New Zealand. Even after the British sovereign sent the First Fleet to New South Wales to begin a new colony “with the consent of the natives” the early colonisers did not follow these royal orders. Why this was the case is open to speculation: maybe it was the fact that the many Aboriginal tribes were not a cohesive force that could wage war on the settlers as the Maori had done in New Zealand? Or maybe it was that the Aborigines were considered too primitive to

\(^4\) one estimate is that pre-contact the Aborigines numbered about half a million but by 1900 this number had dwindled to 30,000. Reynolds *ibid.* at 8
have a concept of ownership of the land and their nomadic lifestyle did not indicate any kind of proprietorship over the land? Anthropologists in the past alluded to the hypothesis that the clan-like organisation of Aborigines demonstrated their primitiveness and their low level on the evolutionary scale. This kind of opinion primarily reinforced the view that the colonisers were far more evolved and it was their right and duty to establish the lands that they had found. Whatever the reason, the consequence was that the original Australian Indigenous inhabitants were dispossessed with no compensation or treaties made with them.

During the nineteenth century and into the twentieth century, social Darwinian theories dominated colonial discourse arguing that the Aborigines would naturally die out as the more “fit” British Australians would usurp them. In particular the “full blood” Aborigines would eventually disappear whereas “half-castes” would eventually be integrated into the white population. The passing of the Aborigines was regrettable to some but it was also accepted that it would happen. Many colonialists thought that the

---

5 This is still considered by some non-indigenous Australians to be the case. Labels of “stone-age” are still used to describe traditional Aboriginal lifestyles because they did not “develop” beyond using primitive tools. See, for example, T. Hewat Who Made the Mabo Mess (North Brighton: Wrightbooks, 1993). This is, of course, false: “Although the Australian Aborigines in their traditional setting used stone tools, had a minimum of material goods, did not live in houses, hunted and collected their food, this does not make them stone-age or primitive in the accepted archaeological sense of those terms. Apart from anything else, there is the emotional connotation of such words.” R.M. and C.H. Berndt The World of the First Australians (Sydney: Ure Smith, 1977) at 7

6 A treaty was made between John Batman and the traditional inhabitants of an area of land around modern-day Melbourne. This was made in a personal capacity and not on behalf of the government so it was ineffective.

7 For example the South Australian Protector of Aborigines said in 1909: “The white blood being the stronger must in the end prevail... from this it is evident that the ultimate end of the Australian Aboriginal is to be merged with the general population, consequently the sooner they are physically and morally improved the better for the white race.” Quoted in I. Watson “Law and Indigenous Peoples: the Impact of Colonialism on Indigenous Cultures” (1996) 44 Law in Context: Cross Currents 107 at 111
best they could do would be to make the natural death of the race as painless as possible.\(^8\)

Hence professional experts such as anthropologists were sent to record for posterity the lifestyles and patterns of Indigenous cultures. In the political realm this knowledge informed government officials on the best ways to assimilate Aborigines (for example, which ones could be educated to become “white” and which ones could not?), and develop policies to carry them out. Thus began the process of assimilation that was the focus of Indigenous and non-indigenous Australian relationships until government policy changes in the 1970s. Assimilationist policies focussed on the forced removal of Aboriginal children in order to raise the children in missions or adoptive families to become part of the white Christian majority. The short-sighted assimilationist policies did not take into account the racial discrimination that negated any attempt by an Indigenous person to become accepted by the mainstream culture. Indigenous people were therefore condemned because of their culture but when governments tried to wipe out that culture Indigenous people were still condemned for being different. The result was the creation of the “stolen generations”: Indigenous people uprooted from their homes and banished to the fringes of the white culture that was supposed to embrace the new additions to society.\(^9\)

---

\(^8\) Eg Daisy Bates, an English woman who worked with Aboriginal tribes, wrote in 1912: “So close had I been in contact with them, that it was now impossible for me to relinquish the work. I realized that they were passing from us. I must make their passing easier.” D. Bates, *The Passing of the Aborigines: A Lifetime Spent Among the Natives of Australia* (New York: G.P. Putnam’s Sons, 1939) at 115

\(^9\) The concept of Indigenous children becoming “white” appeared to be the purpose of governmental policies. Indigenous children who were taken from their families were raised in missions and schools to feel “white”. See some of the actual accounts given by the “stolen generation” in the Human Rights and Equal Opportunity Commission’s *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Sydney: AGPS, 1996), for example: “We were completely brainwashed to think only like a white person. When they went to mix in white society, they found they were not accepted [because] they were Aboriginal. When they went and mixed with Aborigines, some found they couldn’t identify with them either, because they had too much white ways in them. So that they were neither black nor white. They were simply a lost generation of children. I know. I was one of them.” *Bringing Them Home* part 3.
many interesting challenges to social values towards Aboriginal culture and it is this juncture that Chapter 2 will pursue. The crux of this argument is the shifting gaze of the white male anthropologists whose values defined the colonial knowledge about the Aborigines to more modern notions of "knowledge". In the 1970s this knowledge was usurped by knowledges generated by Indigenous people, particularly activists, artists and academics. These changes have been precipitated by specific political climates in Australia and it is this context that we also explore below and further in Chapter 3.

1.2 Incremental Changes in Perceptions

The 1960s lead to a number of human rights and civil rights movements across the world and a particular catalyst for Australia was the 1967 referendum to amend the Constitution to allow the federal government to make laws specifically for the benefit of Aborigines. The referendum was passed with an overwhelming majority of more than 90%. This indicated a shift in the average Australian perception of Aboriginal rights, albeit a small shift as the referendum did not increase the acceptance of Aborigines in Australian society. As a protest to focus further the public's attention to the Indigenous people's sense of alienation in their own country, an Aboriginal tent embassy was established on the federal legislature's lawns in Canberra. This act increased the visibility of Aboriginal claims to land rights which became a political platform for the Labor party in the 1972 federal election. Labor's victory was short lived as their radical economic policies allowed a technical coup to be pulled off by the conservative Liberal party with the accusation of mismanagement of loan schemes. Since the land rights agenda was not part of the Liberal party's political platform, the gains made during that three year hiatus were pulled away from being nationally effective and legislation only affecting the Northern
Territory survived. These events set a bench-mark for the legal system to begin seriously considering Indigenous land claims. To understand the formation of legislation and judicial values determining land claims we will examine more closely these historical legal events in Chapter 3.

In 1983 the Labor party was re-elected again using land rights as part of their political platform. As will be discussed in Chapter 3, land rights in Australia were debated but no tangible recognition was given by the legislature during this period except in the area of heritage protection. Informing this debate at the time were a number of precedents emerging at the international level, in particular the United Nations Working Group on Indigenous Populations began meeting to draft an International Declaration on the Rights of Indigenous Peoples. This international arena and the associated human rights progressions were becoming increasingly influential on the Australian judiciary. Chapter 4 looks at types of shifts of international judicial perceptions for Aboriginal land rights cases. However, the unique aspect of Australia as previously mentioned was that there were no treaties or negotiated land rights with the Indigenous people, which made pondering land rights nearly impossible for the Australian judicial system. Traditional Lockean and Blackstonian theories of property law (discussed further in Chapter 5), stating that unoccupied land could be claimed for economic gain, were the prevailing legal values dominating the ownership of land in Australian law. The Aboriginal argument defending their right to land was based upon their spiritual connection to land which integrated economic use within that connection. This is where the cultural bridge in respect of relationships to land divided.
This fundamental divide was finally addressed by the High Court in the 1992 *Mabo*\(^\text{10}\) case. The High Court held in *Mabo* that Australia was not “terra nullius” upon original British settlement and to continually assert this is a modern act of racism. This was a legal sticking point in the Lockean and Blackstonian ideal used by the Australian legal system and by denying this basis, it was incumbent upon the government to make amends. The ramifications of the case in the average Australian’s mind, which was reinforced by alarmist politicians, was that Aborigines could now come and take land away from non-indigenous Australians: suburban backyards were at risk. The solution divined by the government of the day, and further discussed in Chapter 3, was the *Native Title Act*. A specific challenge to the *Native Title Act* brought on a second precedent in 1996 with the High Court’s *Wik*\(^\text{11}\) decision. In this decision, the High Court ruled that Indigenous people could lay title claims to pastoral leasehold land. At present, approximately 40% of Australia is under pastoral leasehold and in Australia’s current population of 17 million, only about 2% are Indigenous. The nation gasped at the apparent preferential treatment by the High Court for such a tiny population minority. In particular the primary sector of Australia responded with fear that their pastoral leases would be revoked casting doubt over Australia’s economically strong rural sector. The Liberal government of the day whose major electorate is pastoral leaseholders had to respond with an amendment to the *Native Title Act* to protect their electorate’s interests. It is this political context that led to the potential federal election threat. The Liberal government determined that they should make the *Native Title Act* a toothless tiger by claiming to bring in amendments that would emphasise surety of land title (“the ten point

---

\(^{10}\) *Mabo v. Queensland (No 2)* (1992) 175 CLR 1, 107 ALR 1, 66 ALJR 408

\(^{11}\) *Wik and Thayorre Peoples v Queensland* (1996) 187 C.L.R. 1, 141 ALR 129, 71 ALJR 173
This in effect would potentially prohibit Aboriginal land claims to 40% of rural Australia. The political opposition to the Liberal government’s plan led to some modifications so that the *Native Title Bill* was eventually passed and an election was averted.

### 1.3 Legal Recognition of Spiritual Connection to Land

One of the essential Aboriginal values connected to land claim issues is the aspect of spiritual connection to land. Economic value, although important, is not dominant in this value system but rather it stems from the spiritual importance of land which is contrary to western common law property theories. This clash of values came to a head in the Hindmarsh (Kumarangk) Island matter in South Australia. The Ngarrindjeri claimants for the Hindmarsh matter tried to utilise the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) to prevent a road bridge being built to connect Hindmarsh Island to the mainland in South Australia. They argued that the bridge would denigrate the area as it was of importance to Ngarrindjeri secret women’s business. Chapter 3 traces the historical emergence of this case as it journeyed through the state courts, the federal courts, the High Court and, possibly in the future, the international courts.\(^\text{12}\) The Hindmarsh (Kumarangk) Island matter is instructive for teaching us how the legal system can manage the differences between conflicting cultural values, if we learn its lessons.

---

Since spiritual connection to land seems adverse to a view of land that is purely economic, Aboriginal title remains a legal and political conundrum in Australia. In order to deal with these disparate views, we can look further afield to determine how other countries have constitutionalised land rights. Political currents in Australia make legislative frameworks vulnerable to change and constitutional protections can reduce this vulnerability. Comparative cases with Indigenous land claims in Canada and the United States highlight the specific legal issues relating to how the bridge between cultural values can be built. If the law states that Indigenous people can have title to land then why do they not have much land in 1998? This question is answered when the streams of history, law and politics are examined. For Australia considering a republic and constitutional change, this research serves to define whether embedding land rights in the new constitution is a suitable solution.

For this thesis my focus will be to examine how Australia can provide legal recognition of Indigenous spiritual connection to land, but my larger concern is how can one legal system build bridges to a different culture? The possibilities I discuss in the final chapter are my own solutions to add to the current debate surrounding Australia’s republican push. I do not wish to proscribe how Indigenous Australians should progress on the path towards recognition of their legal rights. Rather it is my aim to show how the legal system is capable of affording this protection and shed some light into the debate as to how this can be done.
Chapter 2: Spiritual Connection to Land

2.1 Introduction

We the indigenous peoples walk to the future in the footprints of our ancestors.

From the smallest to the largest living being, from the four directions.

From the air, the land and the mountains, the creator has placed us, the indigenous peoples upon our mother the earth...

We cannot be removed from our lands. We, the indigenous peoples, are connected by the circle of life to our lands and environments.

We, the indigenous peoples, walk to the future in the footprints of our ancestors.¹

In the Earth Charter, above, we clearly see the importance of land to the indigenous peoples of the world. What is most clear is the spiritual reverence used to denote the importance of land. The spiritual nature of land will be explored in this chapter particularly in relation to the Indigenous people of Australia. In attempting to elucidate the nature of Aboriginal spiritual connection to land, I will be relying on the works of anthropologists as they have traditionally held the platform of expert when the law has sought assistance in understanding ways of life that are outside its confines of definitions.

Indigenous women's spirituality has historically been overlooked, an oversight that recently lead to the failure of the western legal system to comprehend Ngarrindjeri women's secret spiritual beliefs in the Hindmarsh Island matter.² For this reason, I will focus specifically on Australian Indigenous women's spirituality and the nature of secrecy in Aboriginal society. To consolidate the views gleaned from "expert" anthropological evidence, I will refer to the views of contemporary Australian Indigenous men and women. This comparison shows that the spirituality of "traditional" Aborigines recorded by earlier anthropologists is still a part of societal definitions of Indigenous

---

² The Hindmarsh (Kumarangk) Island matter will be discussed more fully in Chapter 3.
existence in Australia today. However, we must not forget that a number of other cultures have established definitions of spirituality which encompass a close relationship to land and will be discussed briefly here.

2.2 Anthropological Analysis.

I am mindful of attempting to speak for another culture outside of my own which can allow an incomplete understanding of what another culture believes by looking through the lens of my own.3 In relying on the work of non-indigenous academics I am utilising the work of researchers who have tried to bridge the divide between the dominant Anglo-Australian culture and Indigenous Australian culture. The work of these anthropologists and ethnographers has thus been instructive. Indicative of the problems associated with studying another culture is the cultural blindness that can possibly result when professional or scientific objectivity is the norm.

Indigenous peoples throughout the world have been scrutinised by scientists keen to understand human beings who are different.4 Studies of peoples who are not classed together with the colonising nations of Europe continue to inform western ideologies about “other” people.5 The fact that anthropological study of Indigenous Australians continues today accentuates current definitions of Aborigines as being “other than” European Australians. Studies of “traditional” Aboriginal lifestyles in the past did little to present Indigenous Australians to the cultural majority. Instead, selected parts of

---

3 See for example E. Probyn, Sexing the Self: Gendered Positions in Cultural Studies (New York: Routledge, 1993)
4 Some indigenous groups have noted that they have had enough of being objectified. Regardless of the amount of research, the plight of Indigenous peoples in the western world has remained mainly unchanged since colonisation. See, for example, V. Deloria Jr., Custer Died for your Sins: An Indian Manifesto (New York: Macmillan, 1969) c. 4.
Aboriginal culture were romanticised and considered "exotic". The fascination with Aboriginal society in the nineteenth and early twentieth century was borne out of social Darwinism so attempts were made to record the lifestyles of a dying race which would no doubt disappear with the advancing of European progress into the frontier. Anthropologists accepted this and proceeded to study disappearing races rather than the cause of their disappearance. Protectionist policies which attempted to "save" aboriginal peoples by ridding them of their aboriginality utilised the results of anthropological research to legitimise what today we consider as racist practices.

Anthropological works undertaken in the past are useful for highlighting difference but their use must be tempered with an understanding of the selective use that such research has been given by political groups. Anthropology, however, partially serves to broaden our understanding of Aboriginal culture's spiritual connection to land. In order to see how the western legal system might be able to protect this spiritual connection the legal system has to firstly be able to understand what spiritual connection is. Its primary source of explanation is anthropological research so we must first look at some of the leading anthropological descriptions of Aboriginal life.

---

5 See, for example, the data and methodologies used by M. Mauss The Gift (New York: Norton, 1990). In this text, Mauss examines anthropological accounts of tribal symbolic exchange of gifts in order to reflect back into western society an understanding of power relations and gift exchange.
7 This was similarly the case in Canada. See N. Dyck and J. B. Waldram "Anthropology, Public Policy, and Native Peoples: An Introduction" in N. Dyck and J. B. Waldram, eds. Anthropology, Public Policy and Native Peoples in Canada (Montreal & Kingston: McGill-Queen's University Press, 1993) 3 at 8.
8 for example the policy to remove Aboriginal children from their families to be adopted into white families or live in missionary schools was conducted in order to integrate Indigenous children into white society. This practice has created the "stolen generations" of Indigenous children raised outside of their families and homes. Today, these past practices are considered abhorrent: see Human Rights and Equal Opportunity Commission Bringing Them Home: Report into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Sydney: AGPS, 1996) [Hereinafter HREOC Report].
2.3 The Spiritualities of the Indigenous People of Australia

Australian Aboriginal religion has developed over tens of thousands of years with little input from other religions. The Dreaming, called various names by the many hundred of Indigenous tribes throughout Australia, is a story about creation. The Dreaming is spatial rather than temporal and, therefore, was not only something that occurred in the past but it is a phenomenon that is continuing. The place where Dreaming events occurred is more important than when Dreaming events occurred. Through a process of mythology, the Dreaming contains laws and rules by which to live. Australian Anthropologists have tried to capture how these processes of mythology act as laws and rules for which Aboriginal clans live. W.E.H. Stanner reported extensively about the importance of mythological beings to Aborigines. These beings could be human or animal-like in shape but with superior powers and were considered as tribal totems. Stanner classified five different levels of totemism: “personal” or “conceptual” associated with a child’s conception; “sex”, that is different totems for men and women; “clan” where all members of a clan or group are linked with a class of animals or natural entities; “moiety”; and “sub-section” or “skin” of which there are eight. Persons who have the same clan totem are said to be of one Dreaming. Thus through totems, Aboriginal groups are unified and the society is ordered. The function of totems for Stanner was essential for symbolising the clan’s existence.

9 "The Dreaming refers to a mythological period that had a beginning but has no foreseeable end." R.M. Berndt Australian Aboriginal Religion: The Four Fascicles in One (Leiden, Neth.: E.J.Brill, 1974) at 8


11 Ibid. at 251-252
Elkin\textsuperscript{12} further captured the creation myth by describing the significance of the "increase" site to the daily existence of the clan. The increase site for a clan is where the clan totem is said to have entered the ground after its journey during the creation period. For the clan this is a sacred site where rituals are performed to increase the abundance of the clan's totem. For example, if a clan has the kangaroo as a totem, a hunter can turn himself into a kangaroo and dance at the site for the increased abundance of kangaroo for hunting. This ceremonial area is not a place of rocks and earth but "[i]t is in a sense animated; life can go forth from it."\textsuperscript{13}

R.M. and C.H. Berndt captured kinship relations by describing how an Indigenous person has an affiliation with a certain "local descent groups"\textsuperscript{14} or clan and consequently has an affiliation with the land associated with that local descent group. Lineage may be matrilineal or patrilineal. The land was spiritually held by mythic beings and as the local descent group was the embodiment of the mythic beings, the group held the land collectively on trust for the whole group. Thus an Indigenous person has personal as well as social affiliation with the land: "the land possesses the Aborigine, the Aborigine possesses the land."\textsuperscript{15} Possession of the land is expressed by members of the group through the performance of land sustaining rites evoked through dances and songs. The knowledge of land possession is handed down through the local descent group's Dreaming, which is represented by ritual objects possessed by the tribe. Tribal land "is not transferable, but regarded as being held in trust by living men and women for past, present and future members of that unit. Their ownership, in this special sense of the

\textsuperscript{12} A. P. Elkin The Australian Aborigines 5\textsuperscript{th} edition (London: Angus & Robertson, 1979)
\textsuperscript{13} ibid. at 223
\textsuperscript{14} R.M. & C.H. Berndt The World of the First Australians (Sydney: Ure Smith, 1977) at 138-141
term, is supernaturally sanctioned."¹⁶ The local descent group, therefore, is a spiritual unit, held together through their common Dreaming and the rights and responsibilities associated with that. These anthropologists have all captured the centrality of spiritual connection to land as the primary source for Aboriginal clans or tribal organisations and interaction.

Within Aboriginal culture the Dreaming extended to include the wider geographical landscape not just particular totemic or increase sites. R.M and C.H Berndt referred to how the clans “humanised” the landscape through the mythology of the Dreaming creation period. The mythic beings of the Dreaming were responsible for the layout of the land and indeed in many cases they became the land. Where they walked, what they touched remains spiritually significant. “But more than this, [the mythic beings] are considered to be just as much alive, spiritually, as they were in the past.”¹⁷ The land, therefore, was and is something that was given to the local Aboriginal group: humanised by the mythic beings of the Dreaming for the group. The Dreaming beings also created all life that was found on that land. As an example, Cowan¹⁸ relates some of the Dreaming stories for one of Australia’s most famous landmarks, Uluru (Ayers Rock):

Most of the southern face of the Rock [Uluru]... was created during the battle between the Liru or poisonous-snake people, and the Kunia, or carpet-snake people. According to belief, the Kunia originally journeyed to a sandhill water-hole where Uluru now stands from their country in the east. Here they camped and ... found themselves transformed into natural features. As boulders or slabs or rock in the gorges, the individual members of the Kunia tribe of Sky Heroes (and First People, or ancestors of the Pitjandjara) can be recognized by their symbolic pubic hairs, the kitchen utensils they carry, or the way they sit on the ground.

¹⁶ R.M. & C.H. Berndt supra note 14 at 344
¹⁷ ibid. at 137
A battle, however, took place between these people and the Liru, poisonous-snake people, simply because the Liru were a troublesome group of Sky Heroes. Spears were thrown by the young warriors and to this day various desert oaks and sandhills are metamorphosed bodies of the invading Liru. An escaping Kunia woman ... gave birth to a child, thus creating a cave in which a smaller entrance to another cave symbolises the woman's vulva opening into Bulari's womb. Kneemarks of the women who assisted in the birth are seen on the ground nearby. Meanwhile the Liru continued to attack the Kunia, wreaking havoc. A single-handed combat between the Liru leader ... and a young Kunia warrior resulted in severe wounding to both Sky Heroes. The young Kunia warrior crawled away losing a great deal of blood as he did so, resulting in a track which is now a watercourse. When the mother of this man heard that her son had been killed, she attacked [the killer] with her digging stick and cut off his nose. This nose is now a huge slab of rock that has split off from the main mass of Uluru. His eyes and nasal passages remain on the rock face to this day. Under his severed nose are streaked water stains which are the transformed blood of the dying Liru warrior.\(^{19}\)

The specific sites themselves are not the only sacred areas, indeed “in the sense of Aboriginal belief, the whole land was sacred.”\(^{20}\) The whole landscape appeared to have a purpose and intent to it. “[T]he apparent evidence of design in the world; design in the sense of pattern, shape, form, structure”\(^{21}\) seemed to be signs of intent for the inhabitants. Spirits are believed to be in the land and a person returns to the land after death. The land, or more correctly the spirits in the land, is considered to be a giver of life, so children, for example, are not just conceived physically but they are created from spirits associated with a particular site. The child's spirit is a manifestation of the mythic being at the site, hence for an Indigenous person, the place of conception is also a very important site and determines the child's conceptual totem.\(^{22}\)

It is difficult to differentiate between the religious and the secular in Aboriginal existence but it is imperative to understand this in order to make sense of the integral part that land

\(^{19}\) ibid. at 33
\(^{20}\) R.M. & C.H. Berndt supra note 14 at 137
has to play in Aboriginal life. What may be peculiar to Australian Aboriginal religion is the notion that there is a connection between “their land (i.e., mystical geography), the mythical history of that land (i.e., the deeds of the Ancestors), and man’s [sic] responsibility for keeping the land ‘living’ and fertile.”

Even the word “land” is inadequate to express exactly what it means to an Indigenous person, as the following from Stanner clearly shows:

No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word “home”, warm and suggestive though it be, does not match the Aboriginal word that may mean “camp”, “hearth”, “country”, “everlasting home”, “totem place”, “life source”, “spirit centre” and much else all in one. Our word “land” is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The Aboriginal [sic] would speak of “earth” and used the word in a richly symbolic way to mean his [sic] “shoulder” or his “side”. I have seen an Aboriginal embrace the earth he walked on... A different tradition leaves us tongueless and earless towards this other world of meaning and significance.

The Aboriginal tribes of Australia were originally very nomadic peoples. The country upon which they lived by hunting and gathering, however, was not chosen haphazardly. As noted by R.M. and C.H. Berndt, a clan’s totemic Dreaming track would determine where they moved and the imprints of these tracks were handed down through songs:

Over much of Australia, sacred myths do not take the form of spoken narratives. They are told through songs, which provide key words, or references, not full descriptions... Because nearly all sacred myths and corresponding actions are connected with specific localities, sometimes with sacred objects as well, the songs help people to remember the appropriate details.

In summary, the earlier anthropological studies of Aboriginal groups indicate that all the land is sacred with significant sites of spiritual importance. The land is inalienable and

---

22 R.M. & C.H. Berndt supra note 14 at 138
25 R.M. & C.H. Berndt supra note 14 at 244-243
cannot be owned although the groups whose Dreaming traversed the land have an incontrovertible right of possession. There is also a significant spiritual linkage between a person and a specific site by virtue of birth. This connection cannot be removed “not even by death, since this concept is relevant to both past and present generations and the spiritual part of man/land [sic] is considered as being eternal, returning on death, for recycling, to the mythic being concerned or the sphere associated with such beings.”26 The Indigenous view of land is therefore extremely different to that defined by the western legal culture.

2.4 Gender Divisions Within Spiritual Practice

The sex segregation of Australian Aboriginal existence could not really be put into perspective until Diane Bell’s work which engendered new understandings, possible “when women are allowed to speak.”27 The anthropological studies noted so far focussed mainly on the ritual observances of Aboriginal men, for example R.M. Berndt indicated that: “the major religious rites were dominated by men...[and] the main role of women was to serve as passive cooperators or submissive supporters.”28 Were women really submissive supporters? Bell contests that Aboriginal women were very active in spiritual rituals, however, their spiritual acts were carried out separate from the men. How could the early male anthropologists report on something they had no access to? Bell’s research in the 1970s showed how sex segregation in Aboriginal society occurred, its reasons and its consequent impact on clan activities. For example, Bell notes that men could not make binding decisions about a society without an elder woman’s input.29

27 D. Bell, Daughters of the Dreaming (Minneapolis: University of Minnesota Press, 1993) at 230
28 R.M. Berndt supra note 9 at 11
29 Bell supra note 27 at 29
According to Bell in Aboriginal customary law “men and women have distinctive roles to play but each has recourse to certain checks and balances which ensure that neither sex can enjoy unrivalled supremacy over the other.” Bell notes that her ethnographic approach was different to that of previous anthropologists: not only in the sex of the researcher but in the way she learned to ask questions. She learned the appropriate way of addressing women and how to obtain information by asking indirect questions as this was the customary way to find out information with respect. In this way, Bell has shown that women were autonomous and not just passive co-operators or submissive supporters.

The process of gaining access to the Aboriginal women’s community also required a measure of difference of methodology not previously used by male anthropologists. Bell studied Kaytej and Warlpiri women in a settlement at Warrabri. It was only after the Aboriginal women understood that she was not married that she was included in the women’s spiritual life. Bell did not verify the women’s stories for confirmation from an Aboriginal man which had been a method employed by previous anthropologists. It was for these reasons that the women trusted Bell with observing their secret rites and customs.

In relation to land, Bell states that the women described their rights and responsibilities to land as *kirda* and *kurdungurlu*. As *kirda* a woman’s rights to country are validated by her sacred knowledge which is encoded in myths, designs, songs, gestures and various ritual objects. She is responsible for performing certain rituals that uphold trust and

---

30 Ibid. at 182  
31 Ibid. at 226  
32 Ibid. at 33
transmit that knowledge. As _kurdungurlu_ a woman is responsible for interpretations of the Dreaming as well as ritual objects, singing and painting. It is she who “wakes up” the _kirda_ and opens the dancing ground and who “lifts up” the country. She is the custodian of Dreaming knowledge and she participates in the maintenance of country. “_Kurdungurlu_ must be present at all ceremonies and visits to important sites because it is they who keep the _kirda_ ‘straight’ and punish them if they deviate from the business. In this role, _kurdungurlu_ are sometimes called ‘policemen’[sic].” The kinship amongst Indigenous people is such that important relationships with one’s patrilineal and matrilineal land exist. There are also relationships to particular country that must not be connected. Some land, for example the land of a son-in-law, must not be traversed by an Aboriginal woman. Bad things could happen to her if she does. But this relationship is also true in the converse: it is not just women who have to respect certain relationships. It is through the cooperation of these relationships that Indigenous communities flourish. Knowing only part of the sacred traditions makes one dependent on others for completion. It is almost impossible, therefore, for one person to be authoritative on all aspects of the Dreaming.

### 2.5 Secrets

In any discussion of Aboriginal spirituality, the place of secrecy needs to be noted. In Aboriginal tradition, often the most important information is kept secret and its very secrecy is tantamount to proof that it exists. In the Hindmarsh (Kumarangk) Island matter a Royal Commission was conducted to discern “whether the ‘[secret] women’s

---

33 _central desert words_. Similar words are present in other languages. The responsibilities noted in the words _kirda_ and _kurdungurlu_ are not limited to women but are shared with men of similar lineage.

34 Bell _supra_ note 27 at 139
business’ or any aspect of the ‘women’s business’ was a fabrication.” 35 In a most culturally insensitive way, the secret Ngarrindjeri women’s beliefs were expected to be exposed to intense legal scrutiny. Keeping information secret from non-Aborigines and Aborigines not intended to be privy to certain information is important:

All the restricted material is housed [in the Institute of Aboriginal Studies] in an area designed to safeguard men’s secrets. When I showed one Aboriginal woman friend around the library she was upset by this lack of recognition of women’s secrets but considered it consistent with other practices in ‘my culture’. ‘That’s your law’, she observed and with a shrug of her shoulders communicated the horror, despair and cynicism with which desert people regard ‘white fella law’. 36

Being a conduit of sex-segregated secret information brings with it particular hurdles. Bell has spoken of the problems she encountered when presenting evidence as an expert in trial. It is not enough to state that the anthropologist-expert has had first-hand account of specific rites and rituals, the court must be presented with all the facts so that the information can be appropriately tested by cross-examination. “This process is supposedly even-handed, but the extended hand is gendered,” Bell notes.

Should one require [all men to leave the court room when women’s secret business is being discussed, as is the case for men’s secret business] the court would be bereft of judge, most lawyers and most expert consultants. Women’s restricted submissions have been accepted, but it was a special case that had to be argued: it was not a mirror image; the locus of power was clear. 37

As much of the sacred knowledge is secret, there are problems for the western common law tradition in the scarcity of experts in customary Law. In order to show that a particular person or group is affiliated with a particular tract of land, an Aboriginal group that possesses the requisite knowledge of the Dreaming of the area has to be consulted. This is usually not easy to do as the affects of assimilation and years of colonial rule have

36 Bell supra note 27 at 30-31
alienated the land for many Aborigines. Trigger noted this problem when he was involved in the assessment of land claims in the Northern Territory:

Some individuals were widely regarded as among the few remaining people (at times the only person) with detailed knowledge of certain areas of country. As a scarce, highly valued resource, this knowledge was not flaunted, nor usually given to others haphazardly. To be told detailed information about an area of country to which one may only know that he or she is affiliated through ties to ancestors can in fact occasionally entail being publicly ridiculed. More commonly, it simply involved being manoeuvred into the socially junior position of the pupil in the presence of the knowledgeable expert. For this reason, few people actively sought information about 'law' matters from the experts, and instead listened when they chose to speak.

The western legal system already protects some information from being disseminated including legal professional privilege, commercial in confidence documents and public interest immunity privilege. In Australia, religious confessional information is also protected from disclosure. Given that the legal system already privileges certain types of secrecy or certain types of information, then the legal system should also accommodate Indigenous secrecy requirements.

### 2.6 Contemporary Indigenous People

As shown above, there is a wide expanse of anthropological explanation of Aboriginal culture and spiritual connection to land and although there are definitely gaps in this knowledge, the evidence of the values of spiritual connection to land are extremely convincing. In considering this, why do we not have any recognition in our legal system

---

37 *Ibid.* at 293
38 and thus has affected their customary law responsibilities towards the land: see HREOC report *supra* note 8 especially Part 3.
39 D. S. Trigger *Whitefella Comin*: *Aboriginal Responses to Colonialism in Northern Australia* (Cambridge: Cambridge University Press, 1992) at 114
40 s. 127 of *Evidence Act 1995* (Cth).
41 This was a recommendation by Justice Elizabeth Evatt in her review of the *Aboriginal and Torres Strait Islander Heritage Protection Act*. She maintained that "the Aboriginal person or authority seeking to withhold restricted information provided for the purposes of the Act should be able to argue that it is in the public interest not to give the information." *Justice E. Evatt Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Canberra: AGPS, 1996) at 105
of this cultural value or any recognition in our social system of spiritual connection to land? Are the anthropologists wrong? Why was selected information used in relation to determining policies for controlling Aboriginal life during the period of assimilation? As the following shows, when Indigenous people are allowed to speak, the anthropological research is supported.

Dodson applies a similar methodology for explaining Aboriginal connection to land to that used by anthropologists. For example, Dodson states that “[t]o understand our law, our culture and our relationship to the physical and spiritual world, you must begin with the land.”

The connection to the land through the Dreaming, and hence customary law, continues to this day despite many Aborigines being dispossessed of their ancestral land since the assertion of British sovereignty. Even through the years of the “stolen generations” where government policies throughout Australia saw the removal of Aboriginal children from their families, the connection to the land remained strong. In describing responsibilities for the land, Dodson reveals the kinship system similar amongst people living in northern Australia:

Under the Jawoyn system, one becomes an “owner” of Jawoyn land if either parent was an owner. If the Jawoyn parent is male, the responsibilities to lands are different than if the Jawoyn parent is female... males have the primary responsibility for looking after [specific family] country, yet they cannot make decisions without consulting the people whose relationship to that land comes through the mother... No person has authority regarding the land without consulting the others.

Similarly, the following from Magulagi Yarmirr shows recognition of the roles of men and women:

---

42 M. Dodson “Land Rights and Social Justice” in G. Yunupingu Our Land is Our Life: Land Rights - Past, Present and Future (St Lucia, Qld: University of Queensland Press, 1997) at 41
43 the name coined by the working group for the HREOC Report supra note 8.
44 Dodson supra note 42 at 80-81
Both men and women each had special responsibilities and Aboriginal women knew their place. Aboriginal men accepted and recognised women's rights to country and for indigenous women to hold responsibility to forbidden women's areas such as sacred sites and story places on land as well as sea.45

Many Indigenous people have had to stand by while their lands have been made "useful", by clearing land for pastoral activities, such as the running of sheep and cattle. Cutting down trees in sacred areas and ruining sacred sites elicit different reactions for Aboriginal people, for example Yunupingu describes his father's reaction:

In the early 1960s, I saw bulldozers rip through our Gumatj country in north-east Arnhem Land [north Northern Territory]. I watched my father stand in front of them to stop them clearing sacred trees and saw him chase away the drivers with an axe. I watched him cry when our sacred water hole was bulldozed. It was one of our Dreamings and a source of our water.

I saw a township wreck our beautiful homeland forever. I saw my father suffering physically when this was happening. I can never forget that.46

The equivalent breach of a sacred site in Anglo-Australian terms would be to run a motorway through a church.

Although the focus of the previous section of anthropological studies about the Australian Aborigines was on the traditional lifestyles, there are certain aspects that have correlations with the comments from contemporary Indigenous people. Certainly the spiritual connection to land is still extremely vital and a source of heritage for many Indigenous people. It is through the spiritual connections, through the Dreaming, that land is comprehended so this is how one comes to know one's responsibilities. There are similarities between different Aboriginal groups but the specific ways of knowing connections to land may change. Langton notes that assuming there is one uniform way

45 M. Magulagi Yarmirr "Women and Land Rights: Past, Present and Future" in Yunupingu supra note 42 at 81
46 G. Yunupingu "From the Bark Petition to Native Title" in Yunupingu supra note 42 at 2
to describe every Aboriginal relationship to land makes claiming land very difficult for those Indigenous people that do not have a "traditional" connection. Use of the word "traditional" suggests that only those Indigenous people who still live off the land as their ancestors did pre-European contact should be allowed to claim land. She blames the legislature for relying on the work of anthropologists such as the Berndts and Stanner in defining the "traditional Aboriginal owners" as having "a primary spiritual responsibility for [the site being claimed] and for the land". By relying on the work of these earlier anthropologists, administrators of the Land Rights Act privileged the evidence of men as it was believed that only men had "primary spiritual responsibility". Understanding that the Aboriginal spiritual connection to land is not limited to one type of relationship to land will avert such androcentric blindness. Similarly, the definition of "traditional" ties to land needs to be flexible enough to encompass the aspirations to land for those contemporary Indigenous people who have become dispossessed through assimilationist policies. In the wake of the Human Rights and Equal Opportunity Commission's report into the "stolen generations" it is clear that those children who were forcibly taken away from their families and land by government bodies are now at a disadvantage in trying to assert ownership rights to native title land. In most cases it will be left to the native titleholders to decide whether an Indigenous person who was originally forcibly removed can enjoy those rights with the rest of the "traditional" group. Those who were removed have expressed a strong desire to renew their cultural ties with the traditional group and

---

47 s3(1) of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)
48 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) enables Aboriginal groups in the Northern Territory to claim land and receive fee simple title to which they have a traditional link. This Act will be discussed further in Chapter 3.
49 as noted by M. Langton "Grandmother’s Law, Company Business and Succession in Changing Aboriginal Land Tenure Systems" in Yunupingu supra note 42 at 93
50 HREOC Report supra note 8
51 Native title will be discussed in Chapter 3
the land. The rights of Indigenous people who have been forcibly removed will be a difficult issue to resolve in the future with no easy solutions currently on the horizon.

2.7 Other Indigenous Groups in the World

Australian Aborigines are not alone in having strong connections to land. As the Earth Charter attests the indigenous groups of the world note the importance of their land for the maintenance of their cultural heritages. I am not proposing that the spiritual connection to land experienced by the Pitjantjatjara of central Australia is the same as that experienced by the Ojibwa speakers of Canada, although I am suggesting that the essence of the spiritual beliefs associated with the land has similarities.

One aspect of similarity is the notion of spatial rather than temporal importance of events. This is in contradistinction to Christian religious beliefs where the stories of creation signify something that happened in the past. North American tribal people are rooted in a particular place. Thus it is not important when a particular event occurred but where, as Deloria notes:

The Navajo, for example, have sacred mountains where they believe that they rose from the underworld. Now there is no doubt in any Navajo’s mind that these particular mountains are the exact mountains where it all took place.

Native American religions believe that human spirits never die. The land is known to hold the bodies of the tribal members who once lived there: “This country holds your father’s body. Never sell the bones of your father and your mother.” To leave the

---

52 See the reprinted submissions to the “Stolen Generation” report in the HREOC Report supra note 8 especially Part 3 “The effects of separation from the Indigenous community”
53 Earth Charter supra note 1.
54 V. Deloria Jr. God is Red (New York: Grosset & Dunlap, 1973) at 138
55 Ibid. at 175 quoting Young Chief Joseph, the Nez Percé leader.
ground of one’s forbears is not understood by people who believe that the land contains the spirit of their ancestors.

Similarly the Canadian native peoples have a deep respect for the land and consider the earth to be humanised:

As Earth is anthropomorphized [sic] so are the elements of the natural world. Water is Earth’s blood, the life-giving fluid. Rocks and minerals are her bones, Plants, particularly sacred plants, such as sweetgrass, are her hair.\(^{56}\)

The land is seen as completely sacred. But similarly for the Australian Aborigines, certain places have more significance that are signified by specific landscapes. For the Algonkian-speaking inhabitants of southeastern Ontario, landforms could only have occurred by reason:

Outstanding landscape phenomena... were considered to be the dwelling places of powerful spirits or ‘manitos’. The physical geography of the place was all-important: the mineral characteristics of the rock matrix; formal peculiarities such as crevices, seams, shapes; auditory effects such as echoes, winds, or hidden underground streams. These were all phenomenally manifested metaphors for native beliefs about a sanctified universe. Special places were singled out as ‘sacred’, where one could more readily communicate with the unseen spiritual powers of nature.\(^{57}\)

The Sto:lo of British Columbia are Coast Salish people whose life revolves around the Fraser River. The Sto:lo have many sacred sites along the river that are considered to be places of great power. These are spiritual residences, questing sites, mythological places, burial sites and traditional resource areas.\(^{58}\) The Sto:lo have incorporated some of the Christianity that came with British sovereignty into their religion. The legend of Xa:ls,
the son of the sun, pre-dates European presence but he is now equated with Christ\textsuperscript{59} and is an essential feature of Sto:lo creation stories. It was Xa:ls who created the salmon and other fish. To the Sto:lo the land is sacred. Their elders are not just buried but their spirits remain with the land. “My elders are buried here. According to our tradition, they are not just covered with dirt, put in the ground, and forgotten. Their feelings, their spiritual feelings, their spirits are with us for life... Their spirits are still here protecting us.”\textsuperscript{60}

As Deloria notes, comparisons with ancient western religions are instructive in showing different treatment for Indigenous people in western countries to the mainstream culture. The Old Testament notes the journeys of the Israelites to the “promised land”.\textsuperscript{61} But the importance of land to such religions has deteriorated over time. “It has transformed itself into patriotism on the one hand and religious nationalism on the other”\textsuperscript{62} so bloody battles are waged where this conflict occurs.\textsuperscript{63} Conflicts over the years have shown that clashes of culture actually emanate from religious fights over spiritually hallowed ground.\textsuperscript{64} In Judaism, for example, sacred space is defined as being where God actually resides.\textsuperscript{65} Structurally this is shown in the gradation from the most sacred space to profane space. For example, the temple in Jerusalem is the most holy of spaces, the land of Israel is also sacred but not as sacred as the Temple, and the land of other nations is not holy at all.\textsuperscript{66}

\textsuperscript{59} Ibid. at 189-190
\textsuperscript{60} Ibid. at 190
\textsuperscript{61} \textit{Exodus} 3:8
\textsuperscript{62} Deloria \textit{supra} note 54 at 163
\textsuperscript{63} for example the Palestinian resistance in Israel. Jerusalem has the distinction of being a sacred place not just in Judaism but in Islam as well. The Dome of the Rock in Jerusalem was built as a shrine to commemorate the prophet Mohammed’s journey to the third most sacred place for Moslems. See C. Bennett “Islam” in J. Holm and J. Bowker \textit{Sacred Place} (London: Pinter Publishers, 1994) at 103-107.
\textsuperscript{64} Deloria \textit{supra} note 54 at 166
\textsuperscript{65} S. Kunin “Judaism” in Holm and Bowker \textit{supra} note 63 at 128
\textsuperscript{66} Ibid. at 116
"In the rabbinic text sacred space is static; it is associated with a specific land and progressively more holy places within that land."\(^{67}\) Judaism, a religion that would seem to be completely at odds with indigenous religions, has similarities: sacred space and a connection to a particular space in the land.\(^{68}\) The difference, then, is that the State of Isreal does not question the sacred space of the Jewish temple in Jerusalem: in fact, the State of Isreal is founded on Jewish beliefs. Indigenous communities would argue that if they had self-government then laws respecting their sacred space would similarly be enforced.

### 2.8 Conclusion

An accurate perception of the significance of land to indigenous people offers a bridge of understanding. If land rights are to be correctly understood and protected, we must understand them as flowing from a traditional relationship to land in which spiritual, cultural and economic interests are integrated.\(^{69}\)

What non-Aborigines witness as "the most dreary landscape",\(^{70}\) the Australian Aborigines know as "country" full of the wealth of spiritual life. This completely opposite view of the land can be seen in the well-known Anglo-Australian word "outback". The imagery of outback as opposite to "inside" is set up as a "relational other" to the industrialised cities of Australia where any signs of Aboriginal Dreaming have been eradicated. To think of the Outback as being full of mythical heroes and

---

\(^{67}\) *Ibid.* at 121

\(^{68}\) although the temple in Jerusalem is not the only sacred space. Indeed, in biblical texts, sacred land is not static but it is still defined as the area in which Israelites live - the rest of the world and non-Israelite humanity live is defined as profane. *Ibid.* at 121.

\(^{69}\) M. Dodson in Yunupingu *supra* note 42 at 43

\(^{70}\) In referring to the land described by Spencer and Gillen in *The Northern Tribes of Central Australia* Eliade notes that one must read their work in full to understand how the desert regions of central Australia contains a vast wealth of information relating to stories of mythical times. *Eliade* *supra* note 23 at 57
totemic beings is unbelievable: “[t]o the untutored eye of ... ethnocentric Europeans, the Australian landscape was utterly 'empty', devoid of beauty, a living hell on earth.”

By not allowing or recognising Aboriginal spirituality it was possible for “European moral standards to atrophy by tacitly exempting from canons of right, law, and justice acts of dispossession, neglect, and violence at Aboriginal expense.” Ignoring the spirituality of Aborigines and consequently debasing them to a pre-evolution level of “primitive” or “stone-age”, early Anglo Australian culture was able to justify the racist treatment of the original inhabitants.

In order to understand what rights to land mean to Indigenous communities, there must be an attempt to comprehend what the land means to Indigenous peoples. There needs to be real understanding that comes from listening to Indigenous people explain what the land means to them and by inviting them to take part in decisions made about their ancestral lands. Not only is land important as an economic resource, there is a deeper, more spiritual connection that is present. This spiritual significance is the true difference with the western common law view of land being a commodity. Connection to land is not just to any land. It is to particular land that has significance to the group or tribe. Hence for the law to be able to give full recognition and respect to the spiritual connection to land experienced by Indigenous Australian and other indigenous peoples it must firstly understand the essential elements of this different view of land.

---

71 Cowan supra note 18 at 23
Land, in the western common law system, on the other hand is seen as a commodity to be owned and to be exploited.\textsuperscript{74} Following the theories of Locke,\textsuperscript{75} it is only through developing land for agricultural purposes, extracting minerals from the ground or dividing the land for residential lots that the value of land can be derived in such a system. This conception of land is at odds with the vision of the world’s indigenous peoples as evidenced by the Earth Charter.\textsuperscript{76} In “building a bridge of understanding” the legal system will have to take these issues into consideration. Importantly, the legal system will have to listen to Indigenous peoples to find out how they want their rights recognised. As we will see in Chapter 3 the legal system has struggled with this issue since colonisation.

\textsuperscript{74} See, for example, J. Singer Property Law: Rules, Policies and Practices (Boston: Little, Brown and Co, 1993) c. 1.1
\textsuperscript{75} J. Locke Second Treatise on Politics P. Laslett, ed., (Cambridge: Cambridge University Press, 1988)
\textsuperscript{76} Earth Charter supra note 1.
Chapter 3: Statutory Provisions in Australia

3.1 Introduction

In Australia there has been legislative recognition of Indigenous spiritual connections to land. Aboriginal heritage protection statutory schemes at the state,\(^1\) territory\(^2\) and federal levels,\(^3\) seek to protect Aboriginal cultural heritage including sacred sites.\(^4\) Also, environmental and planning legislation now include consideration of development effects on Aboriginal cultural heritage as it relates to land.\(^5\) More recently the common law in

\(^1\) In particular: National Parks and Wildlife Act 1974 (NSW); Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 (Qld); Aboriginal Heritage Act 1988 (SA); National Parks and Wildlife Act 1970 (Tas) and Aboriginal Relics Act 1975 (Tas); Archaeological and Aboriginal Relics Preservation Act 1972 (Vic), also cooperative scheme in Pt IIA of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) inserted in 1987; and Aboriginal Heritage Act 1972 (WA). B. Boer “Cultural Heritage” Laws of Australia Volume “Aborigines” (Sydney: Law Book Co, 1996) at 27 - 40.

\(^2\) For example the Northern Territory Sacred Sites Act 1989 (NT). For a brief description, see infra, text accompanying notes 21-27.

\(^3\) The Australian Heritage Commission Act 1975 (Cth), for example, creates the Australian Heritage Commission and sets out the requirements for a National Register of heritage sites to be maintained. The criteria for listing heritage areas on the National Register as set out in s4A of the Act are wide enough to encompass Aboriginal heritage areas. However, once on the National Register there is only an obligation on the Minister or Authority of the Commonwealth to refrain from taking adverse action without first ascertaining that there are no “prudent and feasible alternatives” to such action: s. 30.

\(^4\) Protection of areas of cultural heritage is also available at the international level. Under the 1972 World Heritage Convention sites of heritage importance are protected. Australia implemented the Convention into domestic law through the World Heritage Convention Protection Act 1983 (Cth) which enables the Commonwealth government to protect places that have been listed on the World Heritage List. This has proved a useful method in Australia for environmental protection of listed sites and has been the vehicle for preventing a state building a hydro-electric dam (Commonwealth v. Tasmania (1983) 158 CLR 1 (Aust. H.C.)) and preventing a state from logging an environmentally sensitive area (Richardson v. Forestry Commission (1987) 164 CLR 261 (Aust. H C.)). Two national parks containing Aboriginal sacred sites in the Northern Territory, Kakadu and Uluru-Kata Tjuta, are listed on the World Heritage List. As such they receive protection from the Commonwealth government under its international obligations. To get an area onto the list is, however, a time consuming and expensive task: Australia only has 11 sites on the list. It is doubtful that Kakadu and Uluru (Ayers Rock) would have made the list without most Australians considering the sites to be of national importance. Uluru in particular is considered a vital Australian landmark. Other places of spiritual importance to Australian’s indigenous inhabitants may not be as lucky and arguably the World Heritage Convention protection will be impossible to evoke. For a discussion on the World Heritage Convention and the listing procedure see K. Suter “The UNESCO World Heritage Convention” (1991) 8 Env. & Pl. L. J. 4. Protection of Aboriginal culture at the international level through human rights norms is discussed in Chapter 4.

\(^5\) For example under the Environmental Planning and Assessment Act 1979 (NSW) an environmental impact assessment statement must accompany certain public sector or private sector development applications. In making the assessment, the impact on the environment that must be shown
Australia recognised Aboriginal title to land through the case of *Mabo*. Since that case, Aboriginal, or “native”, title has been moved into the statutory realm with the passing of the *Native Title Act* (Cth) 1993.

In this chapter, I will firstly examine the legal and political instruments that facilitate the claiming of native title by Indigenous groups in Australia. This will include a discussion of the common law recognition of native title which was recently accepted in Australia in 1992, much later than other common law jurisdictions.

However, since that time, native title has become a divisive political conundrum. This is important because legislation is made by political parties and revoked by political parties. This dynamic has been instrumental in the forming of native title and heritage laws.

Secondly, I will consider cultural heritage protection afforded by the federal government. Indigenous heritage protection has also surfaced recently in the political landscape. The major test case for cultural heritage was the Hindmarsh (Kumarangk) Island matter which I will consider in detail in this chapter as it stands out as an important example of the legal and political systems in Australia trying to grapple with issues of Aboriginal spirituality and how it is related to land. The failure of the case through Australia’s court

---

6 *Mabo v. Queensland (No 2) (1992) 175 CLR 1, 107 ALR 1, 66 ALJR 408 (Aust. H.C.)*[Hereinafter *Mabo* cited to CLR]

7 For example in Canada and the United States of America where recognition of Aboriginal rights to land date from 1888 (in Canada) and 1823 (in the USA). The common law recognition of Aboriginal or native title in North America will be discussed in Chapter 4.
and political systems is testament to a failure of existing legal instruments to bridge understandings between different cultures in Australia today.

### 3.2 Native Title

#### 3.2.1 The Gove Land Rights Case and Subsequent Legislation

The Australian legal system has been considering the issue of Aboriginal title to land since 1971, after the *Gove Land Rights Case*.\(^8\) This was a case in which the Yolngu claimants brought an action against a mining company for transgressive behaviour and actions on their ancestral lands. In a long judgment considering the historical theories of colonisation by English imperial forces,\(^9\) Blackburn J. found against the claimants. Explaining that he was bound by precedent,\(^10\) Blackburn J. held that a doctrine of common law Aboriginal title did not form part of the settled law of Australia.\(^11\) In making his finding, however, he stated that

> [t]he evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.\(^12\)

Throughout his judgment Blackburn J. tried to understand the Aboriginal inhabitants' connection to the land within a legal setting. Vexed as he was to see the identification of specific parcels of land with particular claimants, he noted explicitly the intensely spiritual nature of the Aboriginal claimants' connection to land. In one passage in

---

\(^8\) *Milirrpum v. Nabirou* (1971) 17 F.L.R. 141 (N.T.S.C) [hereinafter Gove Land Rights Case]

\(^9\) Including cases from Canada, the United States, Africa, India and New Zealand. Historical precedent cases for the North American jurisdictions are considered in Chapter 4.

\(^10\) For example the High Court's ruling that at the moment when the Crown acquired sovereignty over land in Australia, that land became the property of the Crown in *demesne* (held in the Crown's own right and not for any other person or body) and remained so until alienated: *Williams v. Attorney-General for New South Wales* (1913) 16 C.L.R. 404 and *Randwick Corporation v. Rutledge* (1959) 102 CLR 54 (Aust. H. Ct.). *Gove Land Rights Case supra* note 8 at 245-247.
particular, he noted that he was “privileged” to have been shown religious objects used by the claimants in spiritual rituals.\textsuperscript{13} Even though the evidence showed to Blackburn J. the intense spiritual connection to land, he was not convinced that the claimants had shown a proprietary interest in the land. At best, their interest was a spiritual and religious relationship to the land and the claimants felt an obligation towards it.\textsuperscript{14} This was not, in Blackburn J.’s view, enough to convey ownership of the land.

In response to the \textit{Gove Land Rights Case} and other critical events in the late 1960s and early 1970s,\textsuperscript{15} the incoming Whitlam Labor government pledged to give legislative support to Aboriginal aspirations for land rights. In 1973, Woodward J.\textsuperscript{16} was commissioned to undertake a report into how the Government could recognise traditional

\begin{flushright}
\textsuperscript{11} \textit{Ibid} at 262.
\textsuperscript{12} \textit{Ibid} at 267.
\textsuperscript{13} \textit{Ibid} at 167
\textsuperscript{14} “As I understand it, the fundamental truth about the aboriginals’ relationship to the land is that whatever else it is, it is a religious relationship ... There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of the indissoluble whole ... It is not in dispute that each clan regards itself as a spiritual entity having a spiritual relationship to particular places or areas, and having a duty to care for and tend that land by means of ritual observances.” \textit{Ibid} at 167
\textsuperscript{15} In particular the Wave Hill walkout in 1967 when Gurindji stockmen walked off the Wave Hill cattle station which was mostly on traditional Gurindji land in the Northern Territory. The walkout was a strike against the cattle station owners who had leased the land from the Crown, allowing the traditional Indigenous owners to continue camping on the land in return for services on the cattle station. The Aboriginal stockmen were treated poorly by the owners and so in retaliation they refused to continue working. The strike attracted nationwide attention. Also in 1967 the Australian population voted overwhelmingly to have the Commonwealth parliament empowered to make laws for the Aborigines by amending s51(xxvi) of the Constitution. The “Yes” vote campaign was to include Aborigines in the “race” power (s. 51(xxvi) allows the federal parliament to make laws for “the people of any race for whom it is deemed necessary to make special laws”). Originally, this section precluded the “aboriginal race”) and include Aborigines as part of the Australian census (repeal of s127 of the Constitution). This referendum had the highest percentage support (90.77% of all voters) of 42 constitutional referenda in Australia - Australians are notoriously loathe to amend the Constitution as out of those 42 only 8 were successful. See Appendix 1 and Table 3 of M. Warby \textit{Past Wrongs, Future Rights} (Melbourne: Tasman Institute, 1997). There was also the establishment of an Aboriginal tent embassy on the lawns of Parliament House in Canberra in 1972 that increased public awareness of Australia’s Indigenous people. Since the outcome of the \textit{Gove Land Rights Case} the Aboriginal occupants of the Tent Embassy claimed that they were treated as foreigners in their own land. See K. McConnochie, D. Hollinsworth and J. Pettman \textit{Race and Racism in Australia} (Wentworth Falls, NSW: Social Science Press, 1988) c. 5.
\textsuperscript{16} who was counsel for the Yolngu claimants in the \textit{Gove Land Rights Case} and his assistant on the Commission was Gerard Brennan Q.C. who later became Chief Justice of the High Court.
\end{flushright}
Aboriginal ownership of land in the Northern Territory. The legislative response to Woodward's final report was the *Aboriginal Land Rights (Northern Territory) Act* (Cth) 1976. The constitutional crisis of 1975\(^{17}\) occurred before Whitlam could put the legislation before Parliament. In deference to the political will of the time, the incoming conservative Prime Minister, Fraser, oversaw the passing of the resultant Act.

The Act reflected the views of Woodward and his findings about the relationship between an Indigenous group and land. The spiritual responsibility that an Indigenous person has for a tract of land is the determining factor for their ability to make a claim for land under the Act. A “traditional Aboriginal owner” is able to claim and that person is defined as having “spiritual affiliations to a site on the land” and as having “primary responsibility for that site of land.”\(^{18}\) If the claimed land falls within Schedule 1 of the Act which included Aboriginal reservation land, the Act facilitates the granting of secure title over the land to the traditional owners’ land trust. Otherwise a land claim hearing proceeds. Only vacant Crown land can be claimed under the Act and the fee simple title that results is held by an Aboriginal land trust. The trust cannot sell the land but can only alienate it back to the Crown. The Act enabled Aboriginal groups in the Northern Territory\(^{19}\) to claim freehold title to land and it has been the vehicle for returning sacred sites such as Uluru (Ayers Rock) to the traditional Aboriginal custodians.\(^ {20}\)

---

\(^{17}\) The Governor-General discharged Whitlam from the office of Prime Minister for blocking the Supply Bill in Parliament on 11 November 1975. This event is indelibly stamped in the minds of contemporary Australians and serves as a reminder of the Monarchy's power over the Australian State.

\(^{18}\) Section 4

\(^{19}\) As a response to the *Gove Land Rights Case*, the legislation was aimed at the Northern Territory and was passed using the Federal Parliament’s plenary legislative power over the Territory, s.122 of the Constitution.

\(^{20}\) See G. Neate *Aboriginal Land Rights Law in the Northern Territory (Volume 1)* (Chippendale, NSW: Alternative Publishing Co-op., 1989) for a description of the Act and how it has been used in the Northern Territory.
Section 73 of the Act allowed for the Northern Territory government to make "laws providing for the protection of, and the prevention of the desecration of sacred sites in the Northern Territory." The Northern Territory did so in 1978\textsuperscript{21} passing into law its Sacred Sites Act.\textsuperscript{22} The reaction of the Northern Territory government was not borne out of enthusiasm for protecting Indigenous heritage. Instead, as Goldflam notes, the Act is "consistent with the traditional role of Territorian politicians in a protracted and at times bitter contest between the cowboys from the bush and the suits from the city."\textsuperscript{23} As a fledgling government desperately wanting to achieve full statehood, the Northern Territory takes every opportunity it can to prove its self-government ability.\textsuperscript{24} The resultant Sacred Sites Act is therefore not very effective as it notes that a developer "may" obtain a certificate from the Aboriginal Areas Protection Authority to undertake work on a site. If a developer does not obtain a certificate, it is a defence that "the defendant had no reasonable grounds for suspecting that the sacred site was a sacred site."\textsuperscript{25} Therefore it is better for the developer to remain ignorant and not seek permission in the first place. The Act has been generally ineffective in providing any protection for sacred sites in the Northern Territory\textsuperscript{26} and Aboriginal groups have

\begin{itemize}
\item \textsuperscript{21} when the Territory gained general plenary power through the Northern Territory (Self Government) Act 1978 (Cth)
\item \textsuperscript{22} Aboriginal Sacred Sites Act 1978 (NT) which was later replaced by the Northern Territory Aboriginal Sacred Sites Act 1989 (NT). The replacement Act was substantially the same as the former except it was binding on the Crown.
\item \textsuperscript{24} A recent example of the frustrations of Northern Territorians against the overriding plenary power of the Commonwealth (set out in s122 of the Constitution) is the Euthanasia Laws Act 1997 (Cth) which outlaws voluntary euthanasia after the Northern Territory had legislated to allow it.
\item \textsuperscript{25} s. 36(1) of the Northern Territory Aboriginal Sacred Sites Act 1989 (NT)
\item \textsuperscript{26} For example to date there has been one effective case in the Alice Springs area against a developer who contravened a Certificate. In Aboriginal Areas Protection Authority v Multicorp International Pty Ltd and Colcon Pty Ltd (unreported) Alice Springs Magistrates Court, 16 May 1995, the Managing Director of Multicorp was found guilty of harming a sacred tree contrary to the provisions in the Certificate issued by
\end{itemize}
resorted to seeking protection under the *Aboriginal and Torres Strait Islander Heritage Protection Act* (Cth) 1984 instead.\textsuperscript{27}

Aboriginal land rights remained on the Labor Party’s political agenda so when Hawke was elected Prime Minister in 1983, he set about formulating national land rights legislation. In the interim, the *Aboriginal and Torres Strait Islander Heritage Protection Act* (Cth) 1984 ("the Heritage Protection Act") was passed to enable protection of sites of significance to Aboriginal people for a specified period of time.\textsuperscript{28} But the political tide was against Hawke, particularly from the mining sector\textsuperscript{29} whose access to land would be diminished if Aboriginal ownership rights were acknowledged.\textsuperscript{30} Consequently land rights legislation was not forthcoming. It was then left to the judiciary to determine the matter.

### 3.2.2 Mabo

In 1992, the concept of Aboriginal title to land was recognised in Australia in the landmark case of *Mabo v Queensland (No. 2)*.\textsuperscript{31} At issue in the case was whether the Meriam peoples, inhabitants of the Murray Islands,\textsuperscript{32} had their own form of title to the Islands, an area comprising nine square kilometres. Queensland argued that the Islanders had no title to the land as the Islands were annexed by the state in 1879. *Mabo* was...
factually distinct from the *Gove Land Rights Case,* as the Murray Islanders had their own laws and regulations in relation to land ownership that recognised individual ownership of plots of land. In the trial case of *Mabo,* Moynihan J. focussed on the economic aspects of the Meriam people’s connection to land. It was the similarities of the Meriam land tenure system to the European system that allowed Moynihan J. at trial to get a perspective on the Meriam land-holders claim. Sharp notes that:

> The Meriam's land tenure system has qualities which bear a recognisable resemblance to English property rights. Severed from its source in sacred endowment and religious certitude, their land tenure was perceived by Justice Moynihan as qualitatively different to Aboriginal interests in land which Justice Blackburn [in the Gove Land Rights Case] had designated as non-proprietary 20 years earlier.  

Moynihan J.’s view, however, did not take into consideration the relationship of spiritual doctrine and practice. In Meriam culture the god Malo prescribed that the Meriam people sow seeds indicating that agriculture was a part of Meriam economic and religious life. Hence as Sharp notes, “for the Meriam as for the Yolngu the ‘religious’, ‘historic’ and ‘economic’ are not mutually exclusive categories; they are complementary and indivisible.” Hence it was only when the specific land tenure system of the Meriam presented itself to the Australian court system could Aboriginal title to land be found. To

---

33 In the *Gove Land Rights Case* the position of Blackburn J. as to the weight of authority showing that native title was not present in Australia, there appeared to be no grounds for appeal. In *Coe v Commonwealth* (1979) 24 A.L.R. 118, 53 ALJR 403 (Aust. H.C.), Gibbs J. for the majority noted that the rights of the Aboriginal inhabitants of Australia were a controversial issue that needed to be resolved. “If there are serious legal questions [on Indigenous rights] to be decided as to the existence or nature of such rights, no doubt the sooner they are decided the better, but the resolution of such questions by the courts will not be assisted by imprecise, emotional or intertemperate claims.” Gibbs J. at 131 (ALR). Hence the High Court seemed to suggest that it was ready to deal with the issue of Aboriginal rights, but in the *Coe* case, the ambit, spurious claims made by the plaintiffs as to the validity of Australian sovereignty was not the right way to go about it, according to the Court.

34 Determination of Issues of Fact, 16 November 1990. The hearing of facts and examination of witnesses was remitted to the Supreme Court of Queensland in *Mabo v Queensland (No I)* (1988)166 CLR 186, 83 ALR 14, 63 ALJR 84 (Aust. H.C.).

find against the Meriam people, with their system of land tenure so familiar to the
western common law system, would have constituted an act of dispossession by the High
Court in 1992. Thus, as one writer has noted, the Mabo judgment connotes a
"jurisprudence of regret", an opportunity to right past wrongs and import into Australian
common law a sense of equality in property law.  

In finding for the Murray Islanders, the High Court held that it was racially
discriminatory to continually assert the doctrine of terra nullius as a justification of racist
policies against Australia’s indigenous peoples:

the common law should neither be nor be seen to be frozen in an age of
racial discrimination. The fiction by which the rights and interests of
indigenous inhabitants in land were treated as non-existent was justified
by a policy which has no place in the contemporary law of this country.
... Whatever the justification advanced in earlier days for refusing to
recognize 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.

In making this statement, Brennan J. relied on international jurisprudence to support his
argument. In particular, the Advisory Opinion on Western Sahara by the International
Court of Justice where the concept of terra nullius applying to land where indigenous
inhabitants were present was condemned. In earlier British colonial cases the indigenous
inhabitants of settled lands were seen to be “so low on the scale of social organisation” that
they needed the incoming colonisers to impute legal structure in the country. Hence,

---

36 Ibid at 164 quoting N. Williams The Yolngu and Their Land: A System of Land Tenure and the
17 Sydney L. Rev. 5 at 25.
38 Brennan J. in Mabo supra note 6 at 41-42. Mason C.J. and McHugh J. agreed with Brennan.
Deane and Gaudron JJ wrote a joint judgment and with Toohey J made up the rest of the majority. Dawson
was the only dissenter: he believed that the Court was being asked to do something that was too radical.
Instead, formulating Aboriginal title “is the responsibility, both legal and moral, [of the] legislature, not
the courts” at 175. Brennan J.’s judgment is considered to be the majority judgment.
for the Australian High Court to be seen as not being "frozen in an age of racial
discrimination" a finding that Australia was terra nullius cannot be maintained. Giving
international precedent weight in an Australian court will similarly pave the way for
Australian common law to look outwards for support in following legal principles not yet
incorporated into domestic law.42

3.2.2.1 Content of Native Title

Brennan J. set out the basic findings in relation to the common law recognition of
Aboriginal title in Australia.43 He noted that despite his rejection of the doctrine of terra
nullius, at the assertion of sovereignty the Crown acquired radical (underlying) title to the
whole of Australia but the radical title was taken subject to the beneficial ownership of
the original indigenous inhabitants that survived this acquisition.

40 Sumner L.C. in In Re Southern Rhodesia, [1919] A.C. 211 (P.C.) at 233. This case is discussed in
Chapter 4.
41 As Australia was settled under the doctrine of terra nullius it would seem that the whole basis of
British and then Australian sovereignty utilising international law and norms is now suspect. Brennan J.
would have us believe otherwise. In his judgment, he is at pains to make it clear that the doctrine of terra
nullius is only incorrect in the consideration of Australia being "empty land" when the First Fleet arrived in
1788. According to Brennan J., the doctrine of tenure and underlying title being invested in the Crown at
the assertion of sovereignty is still good law, however, as the land was not "empty land" and as the
Aborigines and Torres Strait Islanders had been living on the land under their own system of land title, the
underlying Crown title still existed, but it was subject to this native title. Hence, Brennan J. is at pains to
make his judgment seen as not endorsing a complete re-visitiation of the assertion of British sovereignty
over Australia. To this end, it may be assumed that Coe v. Commonwealth (1979) (supra note 33) is still
good law and that the High Court’s insistence that a municipal court is not the proper forum to challenge
British and Australian sovereignty is still maintained.
42 In Minister for Immigration and Ethnic Affairs v. Teoh (1995) 183 CLR 273, 128 ALR 353, 69 ALJR
423 (Aust. H.C.) the High Court similarly relied on international judgments and the ICCPR to assist in
applying the law in Australia. The 1990s appear to have heralded in a new age of Australian law being
influenced by international law which is good news for indigenous groups considering their increasing
recognition in international law. See further in Chapter 4. As Kirby J noted in a recent article responding
to calls of the High Court being judicially active "In the age of nuclear fission, the Human Genome Project,
global telecommunications, jumbo jets, international problems such as HIV/AIDS, and so on, do we not
need a legal system - and legal weapons in our judicial armoury - which, in appropriate cases, can bring out
Australian law into harmony with the advancing law of the community of nations? I suggest that we do.
Mabo advances this necessary and beneficial legal development which is apt for the coming century." M.
Kirby "In Defence of Mabo" in M. Goot and T. Rowse (eds.) Make a Better Offer: The Politics of Mabo
(Leichhardt, NSW: Pluto Press, 1994) 67 at 76
43 The following is from Mabo supra note 6 at 69-70.
The content of native title was defined differently by the majority judges. Brennan J thought that in some cases it is proprietary in nature. Toohey J as well as Deane and Gaudron JJ saw native title as being personal and therefore not constituting a legal or beneficial estate or interest in the actual land. For Deane and Gaudron JJ, the Aboriginal interest in land is *sui generis*. The majority agreed, however, that it cannot be alienated outside the native title group but it can be surrendered voluntarily to the Crown. Alienation within a group depends on the tribal laws governing it, such as death.

3.2.2.2 Proving Native Title

Traditional Aboriginal laws and customs determine Aboriginal title so long as the Aboriginal claimants have a connection to the land which still remains, despite changes to customary laws. Hence there must be some connection between the Indigenous claimants and the land itself. Toohey J. put this as a “physical presence” that would amount to occupancy but not necessarily to possession at common law. This physical presence must be from a time in the indefinite past, at least from the assertion of sovereignty, to the present. This would hamper the claims of those Aborigines who have been dispossessed of their lands: thus it could be seen as a legal sanction for past acts of dispossession. The other justices did not emphasise the importance of the physical connection as much and in a more recent decision of the National Native Title Tribunal, the connection could amount to a group’s entitlement to country despite physical

---

45 Brennan J. spoke of the need for a “traditional connection” whereas Deane and Gaudron JJ, referred to “occupation or use”.
absence. Toohey J. also held that the quality of the presence is governed by the society and it may be based on food collection such as hunting. There may also be more than one native title to a particular tract of land as traditionally Aboriginal tribes on mainland Australia lived a nomadic existence so various tracts of land may have been used by different tribes at different times. This lifestyle also lead to the different relationships to land as noted in Chapter 2 to which native title can be mapped.

3.2.2.3 Extinguishment

If a "clear and plain intention" is present when the Crown seeks to extinguish native title then it is extinguished. This is because the Crown still holds the underlying, or radical, title to the land. Brennan J. held that Aboriginal title may be extinguished if it is inconsistent with a Crown grant. Aboriginal title is extinguished if the physical connection is lost, the last member of a group or clan dies, or the traditional Aboriginal laws are no longer followed. Aboriginal title can be voluntarily surrendered to the Crown and if there is extinguishment, beneficial ownership reverts to the Crown.

One commentator suggests that Mabo set out the common law recognition of native title hence "extinguishment" merely refers to the extinguishing of the recognition of native title.

46 "It is ... a question of mixed law and fact to be answered in part by reference to Aboriginal traditional law and custom particularly where and to the extent that it deals with movement, relocation and dispossession. There is no basis to form a concluded view that there were no indigenous conventions in pre-colonial times regulating the recognition of one group's entitlement to country even in its physical absence." Re Waanyi People's Native Title Application (1995) 129 ALR 118 (F.C.) at 134. Unfortunately in this case, the native title claimants were nevertheless held not to have a prima facie case as the land claimed was subject to pastoral leases. No doubt, this case will be revisited after the Wik decision held that native title and pastoral leases could co-exist over the same land.

47 If it is not inconsistent, both will co-exist up to the extent of any inconsistency when the Crown grant, such as a pastoral lease or mining exploration license, will prevail. Wik and Thayorre Peoples v Queensland (1996) 187 C.L.R. 1, 141 ALR 129, 71 ALJR 173 (Aust. H.C.) [hereinafter Wik cited to CLR].
title, not the native title itself. Under this premise, “native title” is a title to land that is a hybrid of Australian common law seeking to recognise Aboriginal law.

3.2.2.4 Compensation

Further to the issue of extinguishment, the majority judges held that Aboriginal title that had been extinguished by the Crown since the enactment of the Federal *Racial Discrimination Act* in 1975 may be invalid. The *Racial Discrimination Act* (Cth) 1975 was enacted by the Commonwealth Parliament to fulfil Australia’s obligations under the United Nations Convention on the Elimination of All Forms of Racial Discrimination through the external affairs power under the Constitution. The importance of the *Racial Discrimination Act* was revealed in *Mabo (No 1)*. In that case, the validity of the Queensland parliament’s *Queensland Coast Islands Declaratory Act* 1985 was at issue. The purpose of the Act was to eliminate retrospectively any native title that may have existed at the time the Murray Islands were annexed to Queensland in 1879. According to Hocking, “the legislation was disgraceful. It purported to destroy a legal claim when the High Court was in the process of hearing that claim.” The High Court held that the Queensland Act was inconsistent with the *Racial Discrimination Act* and therefore unconstitutional by s.109 of the Constitution. The inconsistency was because the Act discriminated on the basis of race: if any other Queenslander had a similar interest in land they would be compensated if their title was removed. The *Queensland Coast Islands*
Declaratory Act did not allow for compensation, it merely declared any possible native title to be non-existent. Hocking notes that it is ironic that the Queensland parliament helped to pave the way for establishing a system of compensation through Mabo, although only Deane and Gaudron JJ thought that compensation should be paid subject only to statutes of limitations.

3.2.2.5 Fiduciary Obligations

Toohey J. was the only judge to consider the issue of whether there was a fiduciary relationship present between the Crown and the Indigenous inhabitants. He came to this conclusion after considering the North American cases on the issue. In their joint judgment, Deane and Gaudron JJ. stated that native title can be protected by imposing a constructive trust on the Crown but this could not be seen as endorsing a view that there are fiduciary obligations present. There has been some academic interest in this aspect of the Mabo decision but it is not a ground for holding that the fiduciary trust-like relationship that has been found to be present in Canada and the United States exists in Australia.

---

52 ibid at 181
53 Following the acquisitions power of the Federal government under s51(xxxi) of the Constitution
54 This is because if a fiduciary relationship exists then there would be a greater responsibility on the federal government to protect Aboriginal interests. See for example C. Hughes “The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada” (1993) 16 UNSW L. J. 70, D. Tan “The Fiduciary as an Accordian Term: Can the Crown Play a Different Tune?” (1995) 69 Aust. L. J. 440
55 See Chapter 4
3.2.2.6  The Political Aftermath

The High Court's decision in *Mabo* took Australia by surprise. The Prime Minister, Keating, saw the decision as a step in the direction of assuring reconciliation between Indigenous and non-indigenous Australians. He even suggested that *Mabo* could be the basis of a treaty with Aboriginal Australians.\(^56\) There were factions of Australian society who did not greet the judgment with the same amount of enthusiasm. The Liberal (Conservative) party in Western Australia fueled the fire of debate with claims that the "activist" High Court had made suburban backyards available to native title claims.\(^57\)

The Federal government's discussion paper presented a year after the judgment spelled out that the Court made it clear only Crown grants after the *Racial Discrimination Act* came into force (31 October 1975) could be subject to a claim.\(^58\) Freehold title would be secure.\(^59\) Ultimately a national response was considered the best step and so federal legislation making a land claims tribunal available for native title claims was drafted. After consultation with Aboriginal, mining and farming groups\(^60\) a draft bill was presented to parliament in October 1993. On 23 December 1993 (two months later and considered to be the longest Senate debate in Australian political history\(^61\)) the *Native Title Act* (Cth) 1993 was passed.

\(^{56}\) See G. Meyers and S. Muller "Through the Eyes of the Media (Part 1): A Brief History of the Political and Social Responses to *Mabo v. Queensland*" ELPC Contemporary Issues Paper No 01/95, Murdoch University Environmental Law & Policy Centre, 1995 especially at 21-27

\(^{57}\) *ibid* at 36-37

\(^{58}\) As Bartlett has noted, barring acts of extinguishment prior to the *Racial Discrimination Act* came into force has the effect of validating and endorsing previous act of dispossession. R. Bartlett "Dispossession by the National Native Title Tribunal" (1996) 26 UWA Rev. 108

\(^{59}\) "the *Mabo* (No. 2) decision does not affect private interests in land held under valid grants of freehold title." *Mabo: The High Court Decision on Native Title Discussion Paper* (Canberra: AGPS, June 1993) at 20

\(^{60}\) *ibid* at 10-11

\(^{61}\) including 120 amendments. M. Bachelard *The Great Land Grab: What Every Australian Should Know About Wik, Mabo and the 10 point Plan* (South Melbourne: Hyland House, 1997) at 15
3.2.3 The Native Title Act

The High Court’s *Mabo* decision did leave many issues unresolved, not least of which was the extent to which lesser Crown grants such as pastoral and mining leaseholds extinguished native title. Also, the statement of claim beginning the *Mabo* case was filed in May 1981 and it was not resolved until June 1992, so many believed that claims made by Aboriginal groups would hold up the judicial systems in Australia for years. A specialised tribunal appeared to be necessary. The resulting legislation, Butt notes, “while exhibiting some outward manifestations of ‘plain English’, is ineluctably obscure.”

The main objects of the Act as set out in s.3 are to recognise and protect native title, to set up the National Native Title Tribunal (“the NNIT”) to hear claims for Aboriginal title and to validate past acts that native title invalidated. But “Native Title” is not defined until s223 of the Act as being the rights and interests that Aboriginal peoples and Torres Strait Islanders have in land or waters in accordance with their traditional laws and customs as recognised by the common law. Section 223 also notes that the claimants must have a sufficient “connection” to the land in question, whether that is a physical connection as the High Court seemed to suggest or a spiritual connection is yet to be determined. The NNIT must carry out its functions in a way

---

62 Sharp *supra* note 35 at xi
63 during which time the first plaintiff, Eddie Mabo, passed away. Ironically, Eddie Mabo’s claim was not sustained by the High Court - out of the 5 plaintiffs claiming recognition of their title to land, only 2 of the Murray Islanders were actually successful.
64 These fears would have been realised as there have been more than 500 claims made for recognition of native title to the National Native Title Tribunal since it began hearings in 1994. There were 367 claims made from 1 January 1994 to 30 June 1994. See National Native Title Tribunal Report 1995-1996, extracts reprinted in (1998) 3 Aust. Indig. L. Rep. 80 at 85
67 This has not, as yet, been determined.
that is “fair, just, economical, informal and prompt” and in doing so is not restricted by “technicalities, legal forms or rules of evidence.” Hence the NNTT is a forum that expressly allows oral evidence of Indigenous laws and customs. Once a claim is made to the NNTT, if it is not disputed, the NNTT can make a determination that native title exists. If it is contested, the NNTT is to mediate between the disputing parties. If an agreement cannot be reached this way, the case is sent to the Federal Court for a hearing.

Once native title is conferred on the claimants, as holders of native title, they have the right to be consulted on any future Crown activity affecting the land, a right that any other landholder would enjoy. If Crown activity would severely hamper the native title, the holders must be compensated. If the Crown does not resume the land, the native title is not extinguished so it will survive the Crown disposition and will be revived at the end of the Crown’s use. Under ss26, 28 and 31 the native title holders also have certain rights to negotiate the terms on which the Crown can grant rights over their title lands. In particular, this includes the granting of mining activities over the land giving rise in some circumstances to the native title holders receiving mining royalties.

From this discussion, we could conclude that the NNTT was established for considering native title claims and would be beneficial to the claimants. However, the NNTT has not facilitated any claims and as Bartlett noted in July 1996, “after 2 1/2 years of operation there has been not a single determination of native title in favour of claimants... [but

---

68 Native Title Act 1993 (Cth) s. 109
69 s. 74
70 s. 23
71 s. 33
there have been several non-claimant applications which have succeeded in securing a determination of the non-existence of native title."\textsuperscript{72}

3.2.3.1 State Responses

Part of the government's package of native title legislation and formulation of the NNTT also left room for the states to implement their own legislation. The states were encouraged to establish their own tribunals to sort out native title issues in their own jurisdictions.\textsuperscript{73} Most states did establishing their own procedures to hear native title applications.\textsuperscript{74} The most radical of state responses was the initiative by Western Australia. The \textit{Land (Titles and Traditional Usage) Act 1993} (WA) which allowed for the validating of Crown grants since 31 October 1975. This Act virtually wiped out native title, replacing it with a statutory right of "traditional usage" which gave no rights of ownership to the traditional owners and their rights to occupation of land were subject to state activities and all other land interests. Western Australia also mounted a High Court challenge to the validity of the \textit{Native Title Act}. The High Court's judgment in

\textsuperscript{72} Bartlett \textit{supra} note 58 at 117
\textsuperscript{73} s.19 \textit{Native Title Act} 1993 (Cth) allows for the states to establish their own criteria for validating native title.
\textsuperscript{74} The New South Wales Land and Environment Court is able to hear native title claims in a tribunal-like setting under the \textit{Native Title (New South Wales) Act} 1994 (NSW); Queensland has established a Native Title Tribunal under the \textit{Native Title (Queensland) Act} 1993 (Qld); the Northern Territory's mining warden's courts and the Land Acquisition Tribunal have been modified to hear Mabo-style claims through the \textit{Validation of Titles and Actions Act} 1994 (NT), \textit{Native Title (Consequential Amendments) Act} 1994 (NT), \textit{Lands Acquisition Amendments Act} 1994 (NT) and \textit{Mining Amendment Act} 1994 (NT); Victoria and the ACT have not set up their own tribunals. See F. Brennan \textit{One Land, One Nation: Mabo - Towards 2001} (St. Lucia: University of Queensland Press, 1995) at 109-112. South Australia has enacted the \textit{Native Title (South Australia) Act} 1994 (SA) which is similar to the NSW scheme: the Environment Resources and Development Court has jurisdiction to hear native title claims in a tribunal-like setting. See A. Moore "Aboriginal Land Rights in South Australia" in E. Johnston, M. Hinton, D. Rigney, eds., \textit{Indigenous Australians and the Law} (Sydney: Cavendish Publishing, 1997) 133 at 143-44
favour of the Commonwealth noted that the *Native Title Act* was constitutionally valid\(^7\) and that the Western Australian statute was inconsistent with the *Racial Discrimination Act* as it purported to make native title less than other property rights and was thus discriminatory. By s. 109 of the Constitution, if there is an inconsistency between a state and Commonwealth law, the Commonwealth law will prevail. The High Court held that the whole of the Western Australian statute was thus constitutionally invalid.

### 3.2.4 *Wik*

From the *Mabo* decision it was not clear whether a native title claim could be made on pastoral leasehold land. About 40 per cent of Australia is currently under pastoral lease and so the possibility that these leases do not automatically extinguish native title could have large ramifications. The pastoral lease became part of Australian law mainly as a political response to the number of colonial squatters who took to the land beyond the original colonial and penal settlements.\(^7\) Instead of making squatting illegal, the colonial governments came up with the pastoral lease scheme that enabled the government to charge fees for the land the squatters claimed. The decision in *Wik & Thayorre Peoples v Queensland*,\(^7\) which was handed down in December 1996, clarified that native title and leasehold interests could co-exist. Determining whose interests prevailed was the focus of the *Wik* decision. The Wik and Thayorre people were able to show that they were on

---

\(^7\) As it was a “special law” and the Commonwealth parliament had authority to make such a law under the “race” power of the constitution: s51(xxvi). The High Court did find s.12 to be invalid as it purported to give the common law of Australia in respect of native title the force of a law of the Commonwealth. This is in contravention of the “separation of powers” doctrine of the Constitution as it tries to make judicially determined law the same as legislative law. However, the invalidity of s12 did not make the whole of the *Native Title Act* invalid. *Western Australia v Commonwealth (the Native Title Act Case)* (1995) 69 ALJR 309; 128 ALR 1 (Aust. H.C.).

\(^7\) In fact the term “squatocracy” has grown in Australian vernacular as a term for the families of the original squatters who became extremely wealthy from this initial government sanctioned land grab, the
the land during the whole existence of the lease therefore the Court’s decision was to allow the native title claim to succeed. This is significant as most people thought that the decision would go against the native title claimants.

Similarly to the Mabo decision, the Wik decision took Australia by surprise. The dominant lobbying interests of mining and farming campaigned to alarm Australians by stating that Aborigines now had the right to take away farmers’ lands. The incoming Prime Minister Howard whose electorate is primarily farmers and miners made it clear that he was going to roll back the gains that had been made. In response to the Wik decision he introduced amendments to the Native Title Act that would validate past grants of leasehold title. This move was commonly known as the “10 point plan” which became a sticking point in Parliament. This Act was successfully passed on 13 July 1998 after months of negotiations and deliberations.

3.3 The Aboriginal and Torres Strait Islander Heritage Protection Act

In this section of this chapter, I will examine the Hindmarsh (Kumarangk) Island matter. It is an interesting case study on the protection of Aboriginal cultural heritage, heritage that includes sacred sites and places of spiritual importance. The Hindmarsh matter is illustrative of the dominant western legal system trying to understand concepts of Indigenous spirituality. As will be shown the legal system failed in this case to afford any protection to the women’s spirituality involved.

The Aboriginal and Torres Strait Islander Heritage Protection Act (Cth) 1984 is an enactment of one legal system which is yet to formally recognise the existence of another, parallel legal system in this country. And until that recognition is attained,

---

first wave of dispossession of the Aboriginal native title holders. See D. Day Claiming a Continent: A History of Australia (Sydney: Angus & Robertson, 1996)

Wik supra note 47.
the Act can never guarantee the right of Indigenous Australians to protect and preserve their cultural property according to their traditional laws.78

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the Heritage Protection Act) was drafted to facilitate the protection of Aboriginal and Torres Strait Islander heritage as previous state legislation did not provide suitable measures to protect Aboriginal heritage from desecration or destruction.79 The Heritage Protection Act was considered to be an avenue of last resort for Indigenous groups who were unsuccessful at the state level.80 A sunset clause was included as the Heritage Protection Act was considered to be an interim measure81 during which time the Hawke Labor Federal Government envisaged land rights legislation would be put in place.82 However, after the 2 years “sunset” had passed, it was clear that land rights legislation was far from completion and so an Act, which was only meant to be an interim measure, was made permanent.83

---

79 Second reading speech by Senator Susan Ryan on 6 June 1984 extracted in E. Evatt *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Canberra: AGPS, 1996) [hereinafter “the Evatt Report”] at 241. For example protection was sought under ss23 and 24 of the *Aboriginal Heritage Protection Act 1988* (SA) in the Hindmarsh (Kumarangk) Island matter but no protection was afforded by the state government.
80 s7 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) specifically allows state and territory legislation to co-exist where the other legislation can effectively act concurrently with the Federal Heritage Protection Act. This is to discourage any application of s109 of the Constitution which gives force to Commonwealth legislation if there is an inconsistency with state legislation. Politically, this aspect of the Act made good sense at a time when the states and territories were concerned over the federal government’s ever increasing legislative power, for example the decision of the High Court in the Tasmanian Dams Case (*Commonwealth v Tasmania* (1983) 158 C.L.R. 1) created furore in political circles where the federal government’s green agenda saw the halting of development of a dam which had already been sanctioned by the Tasmanian government.
81 s33 of *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984* (Cth)
82 B. Boer “Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act” (1984) 1 Env. & Pl. L. J. 285 at 290.
83 the *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1986* (Cth) repealed s33 and removed “Interim” from the title of the Heritage Protection Act.
3.3.1. "Significant Aboriginal area"

The Heritage Protection Act enables areas and objects\textsuperscript{84} to be given protection by the Federal Minister of Aboriginal and Torres Strait Islander Affairs. Protection is available for "significant Aboriginal areas"\textsuperscript{85} under s. 10 of the Act through the discretion of the federal Minister for Aboriginal and Torres Strait Islander Affairs. The Minister cannot make a s10 declaration without a report commissioned by a person nominated by the Minister. The s. 10 report is undertaken by an "expert", typically an anthropologist or legal scholar, and usually non-indigenous, despite the fact that the report must deal with the particular significance of the area to Aborigines.\textsuperscript{86} The message sent to Aboriginal communities is that their evidence will not be recognised by the Minister without a non-indigenous filter added to the process. Regardless of this, a s10 declaration may be for an indefinite period of time so it has the potential to be a powerful tool in affording real protection to sites of Aboriginal heritage. The reality of applying the Act, however, is that the full potential of such a powerful piece of legislation has not been realised. Of the 99 applications made for protection of Aboriginal heritage sites under s.10 of the

\textsuperscript{84} Objects are noted in s12 of the Heritage Protection Act. Objects are also protected from being traded on the world market under international law through conventions that Australia is a signatory to. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property has been implemented into Australian law through the \textit{Protection of Movable Cultural Heritage Act} 1986 (Cth). The Convention did not stem the flow of illegally removed cultural items from Australia and as the major countries that are the recipients of stolen Aboriginal heritage objects are not signatories to the 1970 UNESCO Convention, in 1995 the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was adopted. The UNIDROIT Convention requires the possessor of any stolen cultural item to return it to the proper country of origin. Although it protects all items of cultural heritage, it will be useful in protecting items of Aboriginal heritage in particular. See P. O'Keefe "Developments in Cultural Heritage Law: What is Australia's Role?" [1996] \textit{Aust. Int. L. J.} 36. Objects will not be considered further in this essay.

\textsuperscript{85} as defined in s3 as being an area of land or water or submerged land which is of "particular significance to Aboriginals [sic] in accordance with Aboriginal tradition".

\textsuperscript{86} s10(4)(a) to (h)
Heritage Protection Act only one remains successful. A recent and controversial example of the applications under the Heritage Protection Act was made by a group of Ngarrindjeri women in relation to the heritage area at Hindmarsh (Kumarangk) Island in South Australia. After two government reports, a royal commission, federal legislation and litigation at the South Australian Supreme Court, Federal Court and High Court level, a declaration of protection for the area was finally refused. As a result the Ngarrindjeri claimants have said that they will take their complaint to the United Nations Human Rights Committee.

3.3.2. An example of using the Act - Hindmarsh Island

Hindmarsh (Kumarangk) Island is situated at the mouth of the Murray River in South Australia. A development proposal for a marina and residential complex on the Island was approved in 1989 under the South Australian planning laws and authority was given for a bridge to be built linking the Island to the mainland to replace a car ferry. There was strong dissent in the local community and most inhabitants (Indigenous and non-

---

87 at Junction Waterhole (Niltye/Tnyere-Akerte) Alice Springs. The s.10 declaration at Junction Waterhole remains in force as the developers have been able to work with the declaration and subsequently the declaration has not been subject to judicial examination. See R. Goldflam “Between a Rock and a Hard Place” (1995) 3 (74) Aboriginal L. Bull. 13 at 13. Other declarations under the Heritage Protection Act have not withstood judicial scrutiny, for example: Tickner v Bropho (1993) 114 ALR 409; Douglas v Minister for Aboriginal & Torres Strait Islander Affairs and WA v Minister for Aboriginal & Torres Strait Islander Affairs (1994) 54 FCR 144, 34 ALD 192 (noted in 3 (69) Aboriginal L. Bull. 17).

88 by making an application for review under the Optional Protocol of the International Covenant on Civil and Political Rights. “‘Worrying Precedent’ Threatens all Aboriginal Claims” The Sydney Morning Herald April 2, 1998 (from internet address www.smh.com.au visited 2 April 1998). Refusing protection for an area of significant Aboriginal heritage could be seen to be a violation of Article 27 of the ICCPR. For more discussion on the ICCPR and how it has been utilised by indigenous groups internationally, see Chapter 4.

89 A joint venture between the South Australian government and Binalong Pty Ltd, the developers. It is interesting to note that one of the developers, Wendy Chapman, was once the Lord Mayor of Adelaide. When the developers were almost in liquidation, the South Australian government stepped in with an offer to fund the whole bridge development, when originally it was to fund only half. This was at a time when South Australia was under a dark economic cloud as the State Bank had collapsed. From D. Fergie, “Whose sacred sites? Privilege in the Hindmarsh Island Bridge Debate” (1995) 72(2) Current Affairs Bull. 14 at 15.
indigenous people) were against the bridge being built. Among the local Aboriginal community there were fears about the Aboriginal remains and burial middens on the Island and in the development area. Permission was provided by the state Aboriginal Minister under the *Aboriginal Heritage Act 1988* (SA) to excavate the area, despite evidence of Aboriginal remains, so it became increasingly clear that the full development would go ahead. At this point, in April 1994, a group of Ngarrindjeri women headed by Doreen Kartinyeri made an application to the Federal Labor Government’s Minister for Aboriginal and Torres Strait Islander Affairs, Mr. Tickner, to make a s.10 declaration. It transpired that the bridge would destroy the significance of the area for Ngarrindjeri women’s business. It was the late application by the Ngarrindjeri women that later boosted claims of fabrication. As noted in Wooten’s report for a different heritage claim, late applications under the Heritage Protection Act are common for Aboriginal sacred sites:

The cultural gulf between European and Aboriginal attitudes to the acquisition and spreading of knowledge often makes it difficult for Europeans to appreciate why Aborigines appear loath to discuss a site until a development proposal appears to be well under way. Aborigines, working under long inherited laws of protection through secrecy prefer not to mention the existence of a sacred site, until it is almost on the point of being destroyed. Europeans find this approach to be very frustrating and, because they do not understand it, will claim that Aboriginal people find sites only after development proposals have been announced. From the Aboriginal point of view this appears to be a surprising attitude since Aborigines know that they must maintain secrecy unless ... the release of that knowledge is perceived, ultimately, to be the only way to protect an area.

---

90 see, for example, “The Hindmarsh Island Bridge: The Continuing Saga” website of the *Friends of Kumarangk and Goolwa* at www.on.net/foe/Kumarangk/index.html (visited on 15 June 1998)
91 archaeological reports commissioned by the developers indicated there were burial sites and middens: Edmonds report for Binalong Pty Ltd quoted in J. Mathews *Commonwealth Hindmarsh Island Report* (Canberra: AGPS, 1996) at 138 - 140. [Hereinafter the Mathews Report.]
Tickner provided immediate protection\(^93\) and requested Professor Saunders, an anthropologist, to provide a s.10 report.

Professor Saunders' report was submitted in July 1994 with information relating to the Ngarrindjeri women's business annexed in sealed envelopes that could not be read by men. Tickner did not open the envelopes but relied on one of his women staff members to read the documents and digest the information in them. Based on the staff member's recommendation, Tickner made a declaration under s10 that effectively halted the development of the bridge for 25 years.\(^94\)

A legal battle ensued between the Minister and the developers as to the authenticity of the declarations.\(^95\) The report was found to be defective\(^96\) and it was held by the full court of the Federal Court that the Minister did not personally "consider" the report as required by s10(1)(c) of the Heritage Protection Act.\(^97\) Hence for technical reasons, not for the authenticity of the Ngarrindjeri women's beliefs the s10 declaration was void.

As well as the legal challenge that was being fought in the Federal Court there was a Royal Commission headed by Iris Stevens of the District Court of South Australia

\(^93\) as provided in s.9 of the Heritage Protection Act

\(^94\) Relevant facts are set out in the judgment of O'Loughlin J in *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 55 F.C.R. 316, 89 LGERA 1 (F.C.)

\(^95\) during the latter half of 1994 and all of 1995: *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs v Chapman* (1995) 133 A.L.R. 226 (F.C.)

\(^96\) per O'Loughlin J in *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 133 ALR 74 at 127 (F.C.)

\(^97\) Decision handed down on 8 December 1995 *Tickner v Chapman* (1995) 133 ALR 226 (F.C.). The Court also held that the notice required under the Heritage Protection Act was not specific enough so it was for this reason and the Minister not personally "considering" the report, as required by s.10, that the declaration was found to be invalid.
conducted into the authenticity of the "secret women's business."\textsuperscript{98} The Royal Commission was endorsed by the South Australian government but it could not be binding on the Federal Minister. The reason for the Commission therefore seemed to be confirmation of the legitimacy of the South Australian Government's involvement in the whole affair. There were other Ngarrindjeri women who claimed they had never heard of this particular spiritualism connected with Hindmarsh (Kumarangk) Island and their testimonies formed part of the Commission (known as the "dissident" women). So too did the testimony of several media reporters who claimed to have "broken" the story that the secret women's business was a hoax.\textsuperscript{99} The Commissioner concluded that the secret women's business was indeed fabricated.\textsuperscript{100} The Commissioner made this finding without any evidence before her from the proponent women.\textsuperscript{101}

After the rejection by the Federal Court of the Federal Minister's previous declaration, in January 1996 Tickner requested Justice Jane Mathews, a Federal Court judge, to provide a new report under s10(4). As Mathews strongly supported the Ngarrindjeri proponent women in their request for secrecy to be maintained over the information they could give, and as Tickner indicated that the secrecy would be maintained, the proponent women


"[w]hether the 'women's business', or any aspect of the 'women's business', was a fabrication and if so:

(a) the circumstances relating to such a fabrication;

(b) the extent of such fabrication; and

(c) the purpose of such a fabrication." Stevens Report at 312.

\textsuperscript{99} in particular Chris Kenny whose interview with an obviously drunk Ngarrindjeri man (Doug Milera) which was later retracted by Milera, allegedly spurred the South Australian government to set up the Royal Commission: G. Mead \textit{A Royal Omission} (Adelaide: Greg Mead, 1995) at 35

\textsuperscript{100} "to prevent the construction of a bridge between Goolwa and Hindmarsh Island." See "Key Findings" in Chapter 7 of the Stevens Report \textit{supra} note 98
decided to cooperate with Justice Mathews. It was at this stage that Tickner requested Justice Elizabeth Evatt to undertake a review of the Heritage Protection Act.\textsuperscript{102} During the period of both Mathews and Evatt's reports, there was a change of government. In March 1996 the new Coalition Federal Minister, Senator Herron, would not give the same guarantees of secrecy as Tickner had so the proponent women withdrew their support to Mathews. While the Mathews Report was being concluded another legal challenge to Tickner's actions under the Act had commenced. The High Court held in this litigation that since Justice Mathews is a federal judge, she cannot be asked to provide a function for the executive government that is outside her powers as a judge.\textsuperscript{103} As a consequence the Mathews Report could not be relied upon to fulfill the requirements under s10 of the Act so the Federal Minister could not make the declaration applied for by the Ngarrindjeri women. In the end there was no surviving s.10 report and so under the Heritage Protection Act the Minister could not act.

Evatt's Review of the Heritage Protection Act was tabled in Parliament on 17 September 1996 but it has been shelved and her recommendations have not been put into effect. In an effort to close the whole issue, the Howard Coalition federal government passed the \textit{Hindmarsh Island Bridge Act 1997} (Cth) ("the Bridge Act") in October 1996 to enable

\begin{footnotesize}
\textsuperscript{101} The proponent women refused to appear as they had no guarantee that their evidence would be treated with confidentiality: Submission put to the Commission by the proponent women's lawyer: Mead \textit{supra} note 99

\textsuperscript{102} The resultant Evatt Report makes 116 recommendations into how the Heritage Protection Act could become more sensitive towards the heritage it is meant to protect. She recommends in particular that an Aboriginal Heritage Agency be set up: if would be a gender-balanced agency that would assist the Minister in determining whether a claim is vexatious and how to treat the information required in making a declaration of protection. The Agency would therefore remove the Minister from most of the administrative decisions under the Act which would ultimately reduce the number of judicial determinations on the Minister's procedural fairness. See Evatt Report \textit{supra} note 79

\textsuperscript{103} the "separation of powers" doctrine: \textit{Wilson v Minister for Aboriginal and Torres Strait Islander Affairs} (1996) 138 ALR 220 (Aust. H.C.)
\end{footnotesize}
the bridge at Hindmarsh Island to be built.\textsuperscript{104} The Bridge Act suspends operation of the Heritage Protection Act so that the bridge can be built without further interruption from local Aborigines trying to protect their cultural heritage in the vicinity. In the recent High Court decision of \textit{Kartinyeri v Commonwealth},\textsuperscript{105} the opponents of the bridge, including conservation as well as Aboriginal groups, mounted a High Court challenge to the validity of the Bridge Act. The challengers advocated that the Bridge Act was unconstitutional as s. 51(xxvi)\textsuperscript{106} of the Constitution was only to be used to make legislation for the benefit of the Aborigines and Torres Strait Islanders.\textsuperscript{107} The applicants in \textit{Kartinyeri} also claimed that the Bridge Act was in contravention of the \textit{Racial Discrimination Act (Cth)} 1975, which has become a very important piece of legislation in judicial discussions on native title.\textsuperscript{108}

In \textit{Kartinyeri} the High Court decided the issue by referring to parliamentary sovereignty.\textsuperscript{109} As there was no dispute in the case that the Heritage Protection Act was a valid use of the parliament’s “race” power under s. 51(xxvi) of the Constitution, the Bridge Act was then seen as partially repealing the Heritage Protection Act, albeit for

\begin{footnotesize}
\begin{enumerate}
\item[104] In apparent exasperation the new leader of the Opposition, Kim Beazley, gave support to the Act despite his party’s concern for protecting the Ngarrindjeri women’s business while in government. This may be due in part to the landslide victory of the Coalition party at the recent federal election where Labor, under Keating, ran an election campaign showing, among other things, his party’s advances in Indigenous policy with the implementation of the \textit{Native Title Act}.
\item[106] “s. 51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.” Also discussed supra note 15
\item[107] This was because the case put for the “yes” vote in the referendum that enabled s51(xxvi) to include Aborigines and Torres Strait Islanders was voted for overwhelmingly in support of the power being used only beneficially. See discussion supra at note 15. \textit{Kartinyeri} would have been instrumental in the current discussions over changes to the \textit{Native Title Act} if the High Court had found that the “race power” could only be used beneficially for the Aborigines and Torres Strait Islanders.
\item[108] See discussions on the \textit{Racial Discrimination Act} and native title at notes 49-53 supra.
\item[109] Kirby J. was the only dissenter.
\end{enumerate}
\end{footnotesize}
specific land development. Hence since the original act was constitutionally valid it follows that the Act that partially repeals the original Act is also valid. On the issue of whether the "race" power in s. 51(xxvi) of the Constitution can only be used for the benefit of Aborigines and Torres Strait Islanders the High Court was indeterminate, being split on the issue 2 by 2 by 2. Only Gaudron and Kirby JJ stated that the race power could only be used beneficially for Aborigines. This issue, however, crosses into the realm of the Australian government's attempts to develop legislatively the law of native title. Similar political forces have operated in this realm and affected the outcome of legal recognition of spiritual connection to land.

However, the aftermath of the Hindmarsh Island affair is that the current Commonwealth government is keen to rid the federal level of having to deal with issues of Aboriginal heritage in the future. On 4 June 1998, the Government pushed a bill through the House of Representatives that would put the Aboriginal heritage ball back into state governments' court. The federal Government's own parliamentary native title committee warned the Government that protecting Australia's Indigenous heritage is "in the interests of indigenous and non-indigenous Australians alike." The Government, however, sees

---

10 The seventh judge, Callinan J., excused himself from hearing the case as he had given advice to the Government on the Hindmarsh Island Bill while still a silk before his appointment to the High Court. "Justice be Gone" The Sydney Morning Herald February 28, 1998.

11 Kirby J referred to the discriminatory laws of Nazi Germany and Apartheid South Africa, warning that allowing the Bridge Act to be valid will pave the way for encroaching racial discrimination against Aborigines. "[I]n my view, the maxim [what Parliament may enact it may repeal] cannot be sustained in the face of a constitutional provision that does not permit laws made to the detriment of, or which discriminate against, a people by reference to their race." Kirby J in Karrinyeri supra note 105 at para 175. Gaudron J also found that the race power does not encompass enacting legislation that does not benefit Aborigines but in this case found for the Commonwealth. Gummow and Hayne JJ held that racially discriminatory laws under the race power will be valid unless there is a "manifest abuse" of the power. Brennan C.J. and McHugh J in a joint judgment did not make any comments on whether the race power is only to be used beneficially.

heritage as being interwoven with planning laws which are the domain of state
governments, and not valid to be considered a special measure for protection by the
federal government.

3.3.3. Lessons from Hindmarsh

There is no doubt that the most enduring aspect of the Hindmarsh (Kumarangk) Island
matter has been the introduction to Australia of the idea of “secret women’s business”.
As previously discussed, anthropological discourse was historically conducted by men
and primarily reported men’s business. The result being that when women’s business
comes to light, its significance in being considered as a reason to stop the building of a
bridge in the minds of most Australians was ludicrous. Men’s business had been the
subject of previous Heritage Protection Act claims but they did not arouse the same
media fascination that the Hindmarsh (Kumarangk) Island claim did. Understanding
and allowing for the sex-segregated nature of Aboriginal knowledge is allowed in some
forums and it could have been provided for in the Hindmarsh matter. Indeed the Act
as it presently stands makes allowance for evidence to be held in camera which could

---

113 see Chapter 2
114 For an analysis of the different treatment of women’s and men’s secret business claims see J.
at 343-345.
115 A report into Aboriginal customary laws by the Australian Law Reform Commission (ALRC)
noted that in some land claim hearings in the Northern Territory, innovative means were used for hearing
secret evidence where it would be against customary law to disclose such information. For example, the
Daly River Land Claim where female counsel and anthropologists were allowed to observe secret women’s
rituals and report back to the judge hearing the claim. This evidence was allowed in the hearing of the
claim as the material was not absolutely denied to other parties: ALRC Report No 31 The Recognition of
Aboriginal Customary Laws (Canberra: AGPS, 1986) at 485
116 s27 of the Heritage Protection Act
arguably be used to support a request to provide the confidentiality required by the Ngarrindjeri women claimants.\textsuperscript{117}

Such stereotypical views surround Indigenous women whenever they come into contact with the legal system.\textsuperscript{118} Compounding these views is the stereotype of Aboriginal society as being “frozen in space and time.”\textsuperscript{119} Hence claims by urban Aborigines, who no longer live off the land,\textsuperscript{120} to spirituality and connection to land based on beliefs currently held must be fake. Such people who have been-dispossessed and integrated into non-Aboriginal life cannot expect the protection of the law that is provided for “traditional” inhabitants.\textsuperscript{121}

Protection for Aboriginal spiritual land under the Heritage Protection Act has been elusive. This is because any decision made by ministerial discretion has to survive scrutiny where “the rules of natural justice and requirements that ‘the heritage’ be tested according to the rules of the dominant system in order to establish its ‘truth’.”\textsuperscript{122} Any confidential information forming the basis of any declaration under the Act had to be made available for scrutiny by the affected party under the doctrine of “Natural

\textsuperscript{117} s154(4) of the Native Title Act 1993 (Cth) also makes provision for the hearing of evidence in a way that would have “due regard to the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders”. A recent Federal Court of Australia decision has held that it is not unconstitutional to require a court to have gender restrictions even if that means excluding certain legal counsel, so long as a party is still represented. \textit{W.A. v Ben Ward (On Behalf of the Mirrawong Gajerrang Peoples)} Hill, Branson. Sundberg JJ, unreported 8 July 1997 585/97. Extracts are printed in (1997) 2 Aust. Indig. L. Rep. 499

\textsuperscript{118} J. Stubbs and J. Tolmie “Race, Gender and the Battered Women Syndrome: An Australian Case Study” (1995) 8 Can. J. of Women and the Law 122

\textsuperscript{119} C. Cunneen “Judicial Racism” (1992) 2 (59) Aboriginal L. Bull. 9 at 10

\textsuperscript{120} Doreen Kartinyeri, as many Aborigines, was taken from her homeland and raised in a missionary school. She is currently an academic living and working in Adelaide.

\textsuperscript{121} “We are often considered by outsiders to have lost our culture and to be completely integrated into non-Aboriginal life.” L. Behrendt “Aboriginal Urban Identity: Preserving the Spirit, Protecting the Traditional in Non-Traditional Settings” (1995) 4 Aust. Feminist L. J. 55 at 56. This issue is further highlighted above with discussion of the Native Title Act and claimants having to show a “traditional connection” to the land they are claiming.
Justice. In circumstances where large investments have been made for development of areas affected by Aboriginal heritage, it can be argued that justice demands that those investors and developers should have an opportunity to know the reasons why their development cannot go ahead. The setting for such an investigation is the dominant legal system with reliance on the principles of procedural fairness. Such principles allow the scrutiny of information by all parties concerned. "This approach indicates that if indigenous people wish to protect their cultural heritage under heritage legislation, they impliedly accept the ‘rules’ of such protection demanded by the dominant system."

The Stevens Royal Commission into the secret women’s business purported to do this albeit in a manner that was not conducive to respect of the proponent women’s claims.

Hence, the Hindmarsh (Kumarangk) Island case shows disparate views of the notion of information being powerful: how certain parts of Indigenous heritage remain powerful only when dissemination is restricted.

While the law has tended to insist upon disclosure of secret knowledge as a guarantee of natural justice to all affected parties, the real concern of the ruling hegemony is in fact the control of knowledge and, by implication, power.

Australian law already makes provision for confidentiality of information to be maintained even in litigation where evidentiary issues need to be substantiated. In the

---

123 after the Broome Crocodile (Yawuru) Case: Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia (1995) 37 ALD 633 (F.C.)
125 M. Harris “The Narrative of Law in the Hindmarsh Island Royal Commission” (1996) 14(2) Law in Context 115 at 132. There is also the notion that knowledge being open to all means in reality to be the domain of the most privileged class in society: white Anglo-Australian men. By insisting on proving the fabrication of the secret women’s business, and getting to the “truth” of the matter, the instigators of the Royal Commission were in fact trying to gain access to knowledge they were not allowed to share. The question is never asked as to whose definition of “truth” is being sought.
126 for example legal professional privilege at common law with decisions such as Grant v Downs (1976) 135 CLR 674 and in legislation in the Evidence Act 1995 (Cth)
Hindmarsh (Kumarangk) Island matter, the information associated with the developers of the bridge was protected by the doctrine of “commercial in confidence”. Similarly the report commissioned by the South Australian government into its financial liability in relation to building the bridge was protected by legal professional privilege.\textsuperscript{127}

The greatest failing of the Heritage Protection Act was its inability to prevent the Royal Commission into the “fabrication” of the secret women’s business. It was the holding of the inquiry into secret women’s beliefs and the findings which did so much damage and revealed the inability of current Australian law to truly acknowledge the importance of Indigenous spiritual belief. How would the general public react if a bridge was built through a Christian cemetery or a Christian place of worship? The legal system currently affords protection against disclosure to judeo-christian style religious confessions.\textsuperscript{128}

This legal system, one would think, should be able to accommodate matters of spiritual significance and as such offer similar benefits to Aboriginal “truth” as it does to Christian “truth”.

\subsection*{3.4 Conclusion}

The main vehicles in Australia for recognising and protecting Aboriginal spiritual connection to land are legislative schemes created by ordinary acts of parliament. As shown these legal instruments are vulnerable to political pressures rather than ensuring justice for Aboriginal rights. The \textit{Kartinyeri} case in particular shows the susceptibility to a change in Government of any legislation whereby Indigenous rights are recognised. In \textit{Kartinyeri} the High Court held that the supremacy of parliament is entrenched in the

\textsuperscript{127} The Premier noted his support of keeping that report confidential so as to prevent possible legal suits over the information contained in the report: Fergie \textit{supra} note 103 at 20
Australian political system. The political party that controls parliament, therefore, can also control legislation.

It is clear from the history of native title in Australia that successive governments have not had the will to protect any Aboriginal interests in land. By the time *Mabo* was decided, other common law systems had recognised Aboriginal title to land in one form or another. Mabo in effect brought Australian law up to the level of accepted international recognition of Aboriginal interests in land. I believe that *Mabo* was too significant and has highlighted the inadequacies of the Australian legal and political systems to a point where we can no longer go back. My argument is that now Australia has a system of recognising Aboriginal rights to land, through native title and through heritage protection, the legal system should also recognise the fundamental basis of those rights: that Aboriginal interests in land stem from the very spiritual aspect of Aboriginal connection to land. The Hindmarsh (Kumarangk) Island matter showed that the legal system does not really understand this connection to land. However, for the legal system to give recognition to Aboriginal land rights, this connection must be understood.

Australia is the only western common law country not to have implemented a human rights code at the constitutional level. Although this is not a reason in itself to bring a Bill of Rights into Australia, cases such as *Kartinyeri* show the importance of protecting Aboriginal rights from the transience of political change. At this stage, an investigation into how other common law countries (Canada and the United States) have entrenched

---

128 s127 of the *Evidence Act* 1995 (Cth)
129 for example, Canada and the United States. These countries will be discussed in Chapter 4.
130 As noted in J. Allan and R. Cullen “A Bill of Rights Odyssey for Australia: The Sirens are Calling” (1997) 19 Uni. of Qld L. J. 171 at 171
rights into their constitutions will be instructional for an Australian audience anticipating becoming a republic in the 21st century, and consequently writing a new constitution.
Chapter 4: Comparative Issues - Embedded Constitutional Rights in Canada and the USA; International Law

4.1 Introduction

In countries where the Indigenous inhabitants have come into contact with settling Europeans, different relationships between the incoming European power and the Aboriginal peoples have occurred. In this chapter, how two North American countries, Canada and the United States of America, have recognised Aboriginal title to land and respect for the religious significance of land to the original inhabitants will be considered. As the international community is growing in awareness of the plight of Indigenous peoples in colonised countries, the rights of Indigenous peoples to land in international law will also be investigated. These three jurisdictions create an interesting comparison and instruction for Australia contemplating being becoming a republic on the eve of the new millennium.

Canada has constitutional recognition of Aboriginal rights. Through the Constitution, the spiritual connection to land of Canadian Aborigines has been affirmed\(^1\) and forms part of the evidential process of proving Aboriginal title to land. Would a similar constitutional amendment guarantee Aboriginal rights to land in Australia? The United States of America established its Bill of Rights when it became independent. Part of the Bill of Rights is the First Amendment to the Constitution that protects, among other rights, the free exercise of religion. In the United States, the First Amendment has recognised Aboriginal spiritual connection to land however the protection it can afford has been

\(^1\) Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, s. 35(1) provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
constrained as will be shown in this chapter. Will a similarly worded general constitutional guarantee aid in protecting the Australian Indigenous spiritual connection to land? Is there any recourse for Indigenous Australians to the international forum if the Australian parliament reduces the rights that have only recently been recognised and granted to them?

These questions are complex. This chapter will track some historically important cases to show how legal systems have defined the issue of Aboriginal spirituality, religion and connection with their ancestral lands. I will show how the judicial system has been unable in the past to bridge the cultural divide in the importance of land for different cultures. There is hope, however, that current developments in the international community will pull domestic law up to a level where indigenous access to land is considered a right and not just a benefit that a government can choose to recognise or not.

4.2 Canada

The recent case of Delgamuukw is the latest case where the Supreme Court of Canada has re-defined the concept of Aboriginal title and the implications of s.35 of the Constitution Act 1982 on that title. Aboriginal title is a constitutional concept that is different to treaty rights to land as determined through interpretations of the various treaties between Canada and its Aboriginal peoples. Delgamuukw has similarities with

---

3 "Aboriginal title" is title to land. In Canada, after Delgamuukw it is considered to be different to Aboriginal rights, such as the right to fish for food. "Aboriginal title" will be used in this chapter when title to land is discussed whereas "Aboriginal rights" will be used to refer to other rights that are not title based.
4 Supra note 1.
the Mabo\textsuperscript{5} case delivered by the High Court of Australia in 1992 that introduced the concept of “native title”\textsuperscript{6} into Australian law. Even though Canadian and Australian law differ in respect of Indigenous rights, the similar approach in the two cases, although one common law the other constitutional, deserve comparison. There have been no treaties negotiated between Australia and its Indigenous inhabitants. Thus for a comparison, judicial definitions of Aboriginal title will be the focus of this section. The majority of cases in relation to Aboriginal title in Canada have been heard in British Columbia. British Columbia’s unique judicial explorations of Aboriginal title are similar to those of Australia and will serve as the primary comparison in this section.

4.1.1 The Historical Development of Aboriginal Title - Canada

In order to understand fully the issues in Delgamuukw, a brief history of how different countries have contemplated Aboriginal rights to land will be useful, as these other jurisdictions have been influential on the Supreme Court of Canada. Aboriginal title has been contemplated by the United States Supreme Court, the imperial Privy Council of Britain, and the Supreme Court of Canada.

4.1.1.1 The Marshall Decisions of the U.S. Supreme Court

The trilogy of cases heard by the United States Supreme Court headed by Marshall C.J.\textsuperscript{7} during 1823 to 1832 are generally regarded as establishing the method of interpreting colonial laws as they relate to Indigenous inhabitants. Due to Marshall’s interpretations,

\begin{footnotesize}
\begin{itemize}
\item [Hereinafter Mabo]
\item \textsuperscript{6} Although focussed on land, the concept of “native title” in Australia also encompasses other Aboriginal rights such as hunting and gathering rights.
\end{itemize}
\end{footnotesize}
the issue of Aboriginal title was bound together with Aboriginal sovereignty. In the 1823 case of *Johnson v. M'Intosh*, Marshall C.J. held that only the United States government could grant lands that were originally Indian lands and not private citizens. He came to this conclusion after considering the effect of European conquest on the Indian lands in the United States. Through conquest, the incoming Europeans gained unequivocal title to the land subject only to the occupation of the Indian tribes. As the United States government was the successor to the various European colonising powers, the United States had the power to extinguish or allow the Indian right to occupancy.\(^8\) Marshall also held that the Indians were too savage to be allowed to continue their lifestyles on the land.\(^9\) In making this comment he utilised a theory of racial superiority of the Europeans over the native Indians to justify taking their lands.

The 1831 case of *Cherokee Nation v. Georgia* set out the position of the legal and political status of Indian tribes in the United States. On the question of whether the court had jurisdiction to hear a case involving an Indian tribe, Marshall decided that the tribe is a "domestic dependent nation"\(^{10}\) and in so finding, set out the departure of federal Indian law in the United States from other common law countries. This finding that an Indian tribe is defined as a dependent state (but still subject to Federal laws) had an escape clause: Indian tribes have an unquestioned right to their territory until that right is extinguished by a voluntary cession to the United States government. This appears to be a shift from the decision in *Johnson v. M'Intosh*.

\(^8\) *Ibid.* at 594

\(^9\) "the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness." *Johnson v M'intosh supra* note 7 at 590

\(^{10}\) *Cherokee Nation v. Georgia supra* note 7 at 17
This position was further solidified in the 1832 case of *Worcester v Georgia*. The issue in the case was whether Georgian citizens could enter the land of the Cherokee without permission or treaty. For Marshall, "[t]he very term ‘nation’, so generally applied to [the Indians], means ‘a people distinct from others’."¹¹ The Cherokee were defined as a distinct community with its own territory so non-Cherokee people had to seek the Cherokees’ permission to enter the land. Marshall also held that the laws of the state surrounding Cherokee territory, in this case Georgia, had no force on the Cherokees’ land. Henceforth, only the federal government had the power to make legally binding arrangements with regard to the Indians and Indian tribal law governed the territory except where it conflicted with federal law. Hence a right of Aboriginal sovereignty existed. This right has not been recognised in Canadian nor Australian courts.

### 4.1.1.2 The Privy Council

Canadian case law on Aboriginal title begins with the imperial Privy Council’s 1888 decision of *St. Catherine’s Milling*.¹² In this case the Privy Council determined that the Royal Proclamation¹³ "gave" the Indians lands to use.¹⁴ Upon assertion of sovereignty, following British imperial constitutional law,¹⁵ the Crown retained underlying title to the land. By the Crown’s good will, the Indians in Canada were given “personal and

---
¹¹ *Worcester v Georgia* supra note 7 at 559
¹² *St. Catherine’s Milling and Lumber Co. v. The Queen*, (1888) 14 A.C. 46 (P.C) [hereinafter *St. Catherine’s Milling*]
¹³ *The Royal Proclamation of 1763*, reprinted in R.S.C. 1985, App. II, No 1 [hereinafter Royal Proclamation]. The Royal Proclamation states in part: “And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.”
¹⁴ *St. Catherine’s Milling* supra note 12 at 54.
usufructory" rights to use the land. These rights were not proprietary but instead were a burden on the Crown's title. Hence the Indian right to the land could be extinguished by the will of the sovereign. Aborigina title, at the end of the nineteenth century, had thus been determined by an imperial court in Britain to be non-proprietary and at the will of the sovereign.

The Privy Council also considered the effect of the British North America Act which gave the Federal government legislative power over "Indians and Lands reserved for the Indians." However, by s. 109 prior colonial land became provincially owned subject to any existing interests or trusts. Section 109 then enforced the view that the title to the land was vested in the Provincial government. This view was fundamentally changed in Delgamuukw, which will be discussed later.

Other decisions by the Privy Council over indigenous rights to land in British African colonies determined similar outcomes without the benefit of a document like the Royal

---

16 St. Catherine’s Milling supra note 12 at 54
17 The perception of the Royal Proclamation as a unilateral document denies the voice of the Aboriginal people who were involved in negotiating its terms. Borrows notes that the Royal Proclamation should be seen for what it is: a document or treaty between nations. Through this vision, the Aboriginal right of self-government has been recognised since the date of the Royal Proclamation. Barring positive extinguishment (after Sparrow: see notes 31-40 infra and accompanying text) the right of self-government survives to this day and according to Burrows should be given constitutional protection by s35(1):

"Contextualization [sic] of the Proclamation reveals that one cannot interpret its meaning using the written words of the document alone.
To interpret the principles of the Proclamation using this procedure would conceal First Nations perspectives and inappropriately privilege one culture’s practice over another."

Borrows also asserts that the evidence for the First Nation perspective of the Royal Proclamation can be seen from the position of First Nations peoples eighty years after the Royal Proclamation. In an 1847 Colonial Report Indian Commissioners of the Government noted how the Indians considered the document as a royal pledge, that they could rely on the King for protection. They did not, however, consider the document as taking their land from them or impinging on their rights. It illustrates "the fact that First Nations had a perspective of the document that contradicts 'claims' to British sovereignty found in the Proclamation." J. Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U. B. C. L. Rev. 1 at 10-11.
18 St. Catherine’s Milling supra note 12 at 58-59
Proclamation. In the 1919 case of *In Re Southern Rhodesia* the Privy Council had to decide who had the right to be on unannexed land. The Privy Council held that the indigenous Bantu nation was dispossessed of its land when the British conquered the nation. Obiter comments by Sumner L.C. for the Court noted that even if the doctrine of discovery was relied upon to show that the British Crown held the underlying title the outcome would be the same. The lands were not vacant, which is the basis of "discovery", but nevertheless, the Indigenous tribes needed the protection of a superior power:

Some tribes are so low in the scale of social organisation that their usage and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.21

Thus Aboriginal title in Rhodesia was non-existent. Three years later, the Privy Council did find Indigenous property rights to exist in the 1921 case of *Amodu Tijani*.22 In this case, the Privy Council had to determine whether a tribe should be compensated for their lands being taken for public purposes. In determining this, the Privy Council made some comments about how title is conceptualised. In particular, Viscount Haldane, for the Court, noted that concepts of "land ownership" that may be foreign to the Indigenous tribes should only be cautiously applied.23 The tribe in this case had communal interest in land, an interest that could be legally construed even though it did not arise from a Crown grant. Contrary to its finding in *St. Catherine's Milling*, the Privy Council held

---

19 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 s. 91(24)
20 *In Re Southern Rhodesia*, [1919] A.C. 211 (P.C)
22 *Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 A.C. 399 (P.C)
that Aboriginal title in Nigeria did not come from the Crown but came from the fact that the tribes owned their land in some way before British sovereignty was asserted. Viscount Haldane noted that a "mere change in sovereignty is not to be presumed as meant to disturb rights of private owners." 24

### 4.1.1.3 Supreme Court of Canada

It was not until 1973 with the case of Calder 25 that Aboriginal rights and title were held by the Supreme Court of Canada not to rely on the Royal Proclamation, thereby overturning the Privy Council's position in St. Catherine's Milling. The issue of the case was whether Aboriginal title could be declared on land in British Columbia that was not the subject of a treaty. 26 The Nishga, the Aboriginal group claiming the right, had been on the land since "time immemorial" 27 and so the title to land was perceived by the Nishga at the time to arise out the fact of occupancy before the assertion of sovereignty. British Columbia argued that any Aboriginal title to land had been extinguished prior to the Province joining the Confederation in 1871. The Court viewed title as a bundle of common law rights stemming from the use and enjoyment of land. Although the Nishga lost the case, the judgments established the concept of common law Aboriginal title in Canada.

Aboriginal title arose, the Court held, because the Nishga were in possession of the land prior to the assertion of sovereignty:

---

23 "in interpreting native title to land [in the British Empire] ... much caution is essential. [In native jurisprudence] there is no such full division between property and possession as English lawyers are familiar with." Ibid. Viscount Haldane at 404

24 Ibid. at 407


26 In fact most of the area of British Columbia is not subject to treaties.
the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means.28

Judson J. thus held for the majority that the existence of Aboriginal title did not solely depend on the Royal Proclamation, but it was still at the mercy of the good will of the sovereign. He held that the requirement for extinguishment was intention, which was met in Calder as the sovereign authority exercised dominion over the Nishga land by legislating for the land’s development. The sovereign’s settlement plans were thus contrary to the Nishga tribe’s right of occupancy.29 Hall J. for the minority asserted that extinguishment required statutory passage. In other words, there had to be more than just an executive intention to extinguish. He also raised the issue of compensation, which he believed should always be available when Aboriginal title had been extinguished.30 Following Calder it was generally considered that in British Columbia all Aboriginal title had been extinguished. The common law of Aboriginal title was thus held in abeyance in that province until 1997.

4.1.2 The Supreme Court of Canada’s Interpretation of s. 35(1) of the Constitution Act, 1982

4.1.2.1 Sparrow

The 1990 Sparrow31 decision was the first case in which the Supreme Court of Canada seriously considered the protection afforded to Aboriginal people in Canada by s. 35 of

---

27 Per Hall J. in Calder supra note 25 at 174.
28 Per Judson J. Ibid. at 328
29 Judson J. in Calder supra note 25 at 344
30 In this case there was no compensation paid as the case was decided in favour of British Columbia because Pigeon J. held the balance and found for the defendants on a technical issue of whether the Nishga had a right to sue the Crown, which he held they did not.
the Constitution Act 1982.\textsuperscript{32} Although it was a case concerning an Aboriginal right to fish and not Aboriginal title to land, the case is nevertheless instructive to see the Supreme Court’s dicta on s.35. At issue in the case was whether federal fishing regulations which limited the length of fishing nets infringed on the Musqueam band’s Aboriginal right to fish for food. The Court had to determine what was the exact nature of the Aboriginal right in question and whether the fishing regulations had extinguished the Aboriginal right prior to 1982. This involved the Court looking into Musqueam culture to see if certain practices in relation to fishing were inherently Aboriginal and whether these practices continued at the time. In determining how to ascertain whether a practice is still “existing” the Court relied on Slattery’s warning not to restrict Aboriginal rights only to “ancient practices”.\textsuperscript{33} By noting that “freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations”\textsuperscript{34} the Court held that existing rights need not be conducted in the specific manner in which the Aboriginal group had practiced them since time immemorial. The Court nevertheless still relied on traditional Aboriginal lifestyles to locate the importance of fishing to the Musqueam band and in doing so the Court established to some extent the idea of rights frozen after British sovereignty.

The Court found an Aboriginal right to fish. In determining whether the right had been infringed contrary to the protection in s.35(1), the Court investigated when the Aboriginal right might have been extinguished. The Court was swayed by its previous judgment in

\textsuperscript{32} Constitution Act, 1982 supra note 1 where s.35(1) states that “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.”

\textsuperscript{33} “Native people are not waxes figures on display for tourists, but living people who depend on the land for their livelihood. Any rule that would hold them in permanent bondage to ancient practices must be regarded with skepticism.” B. Slattery “Understanding Aboriginal Rights” (1986) 66 Can. Bar. Rev. 727 at 746.
in particular in holding that Parliament is under an obligation to take the Aboriginal groups' rights "seriously". The fiduciary duty that the Crown owes Aboriginal peoples, coupled with the wording in s.35(1) that the existing Aboriginal rights are "recognised and affirmed," lead the Court to the conclusion that Parliament may legislate to extinguish those rights so long as such action is justifiable:

"The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power ... The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s35(1)."

Holding that the fiduciary relationship exists between the Crown and Aboriginal peoples puts a heavy burden on the Crown. The justificatory test of Sparrow has been the enduring element of s.35 interpretation. Firstly an Aboriginal right must be found to exist. If that right is limited by government regulation, the following questions must be considered: is the limitation unreasonable; does the regulation impose undue hardship; and does the regulation deny the Aboriginal right holders their preferred means of exercising that right? If this interference is found then the question becomes whether the interference is justified. The Court considered mere public interest too vague. The Court held that justification on the basis of conservation and resource management,

---

34 Dickson C.J. and La Forest J for the Court in Sparrow supra note 31 at 1091
36 Sparrow supra note 31 at 1114
37 Ibid. at 1110
38 Ibid.
however, was reasonable.\textsuperscript{39} Hence after \textit{Sparrow} the right to fish was considered to be an Aboriginal right.\textsuperscript{40}

\subsection{Culture-Based Rights: \textit{Van der Peet}}

In the more recent case of \textit{Van der Peet}\textsuperscript{41} the Court limited s.35 rights by imposing a test on the basis of the cultural practice alleged to be an Aboriginal right. At issue in the case was whether selling fish was an Aboriginal right of the Sto:lo peoples. Again, this case is about Aboriginal rights as opposed to Aboriginal title but it shows the evolution of the Supreme Court’s interpretation of s.35 of the Constitution. The court held that if an Aboriginal right is to gain constitutional protection it must be “integral” to the Aboriginal culture of that particular group.\textsuperscript{42} Hence a practice that is found to be merely incidental to the Aboriginal group will not attract s.35 protection. To be an Aboriginal right, it must also pre-date first contact with Europeans:

\begin{quote}
In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land and participating in distinctive cultures as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority
\end{quote}

\textsuperscript{39} Referring to the Court's decision in \textit{Jack v. R.} [1980] 1 S.C.R. 294 (at 313), Dickson C.J. and La Forest J. noted that in relation to fishing the order of priority for justification purposes would be conservation, Indian fishing, non-Indian commercial fishing then non-Indian sport fishing. \textit{Sparrow} supra note 31 at 1115.

\textsuperscript{40} Later the Supreme Court considered the issue of commercial fishing and also found that such fishing, if connected to a "pre-contact" practice of fishing for economic reasons, has the status of an Aboriginal right. \textit{R. v. Gladstone}, [1996] 2 S.C.R. 507, [1996] 9 W.W.R. 149, 23 B.C.L.R. (3d) 155, 50 C.R. (4th) 111, 137 D.L.R. (4th) 648, 109 C.C.C.(3d) 193, [1996] 4 C.N.L.R. 65 was a case on whether there was an Aboriginal right to commercial fishing. Again the Supreme Court of Canada referred to the justification test and came up with a further test of whether a right has internal limitations, such as a right to fish for food, and those rights without internal limitations, such as a commercial fishing right. Rights without an internal limitation are not given priority but once the legislative purpose such as conservation is met, then Aboriginal use will be exclusive use.


\textsuperscript{41} The “integral” or “central” test is, according to Barsh and Henderson, paternal as the test assumes that centrality can be objectified, that the search for centrality presumes the independence of cultural elements and that centrality itself is not static. See R. Barsh and J. Henderson “The Supreme Court’s \textit{Van der Peet} trilogy: Naïve Imperialism and Ropes of Sand” (1997) 42 McGill L. J. 993 at 1000-1002.
groups in Canadian society and which mandates their special legal, and now constitutional, status.43

The Court arrives at the date of contact as a definitive date when it sets out the requirements for finding an Aboriginal right to be in existence.44 Lamer C.J. notes that the essential date should reflect that the Aboriginal societies and their distinct cultures existed prior to contact with Europeans, not merely that Aboriginal societies existed prior to the assertion of sovereignty.45 Pre-dating European arrival is quite arbitrary as it may be difficult to determine exactly when a native group or tribe came into contact with Europeans. For a cultural practice to attract constitutional protection the court was determined to find some connection between today’s practice and cultural practices that existed before contact. This view, however, opens a Pandora’s box of conflicting problems. For example, strict adherence to the prior occupancy requirement as a basis for determining an Aboriginal right would deny Métis peoples from Van der Peet style Aboriginal rights.46 Since the Métis are descended from Aboriginal peoples and Europeans then surely they would not have existed “pre-contact” as their very definition excludes such possibility. This surely goes against the spirit and intent of s.35 as the definition of “Aboriginal peoples” includes the Métis is s.35(2).

The focus of Van der Peet on culture as a basis for determining Aboriginal rights also creates problems. The Charter47 already protects rights that are borne out of different

---

43 Lamer C.J. for the majority in Van der Peet supra note 41 at 538-539. Emphasis in the original.
44 Ibid. at 550 - 571
45 Ibid. at 555
46 L’Heureux-Dubé J. raises this issue in dissent. She asserts that by permitting the Métis people to claim Aboriginal rights protection the legislature did not envisage confining rights to a time that was pre-contact or pre-sovereignty. L’Heureux-Dubé J. in Van der Peet supra note 41 at 598
cultures\(^{48}\) so it is not clear why Aboriginal rights should gain separate constitutional status if the reason for their existence is the fact of a different and unique culture. In determining whether an Aboriginal right exists, the “integral to the culture” test forces the Court to assess the identity of an Aboriginal group without input from that group. Is the court the best forum to determine what is integral to Aboriginal culture? For example, is it possible under the \textit{Van der Peet} test that all customs can be constitutionally protected Aboriginal rights? Customs that borrow from other cultures surely could not be given the same constitutional guarantees as “legitimate” pre-contact customs and so the Court is still enforcing a frozen rights approach.\(^{49}\)

In dissent, L’Heureux-Dubé J. noted that Aboriginal rights come out of the fact of prior occupation and use of ancestral lands hence finding an Aboriginal right can lead to a “recognition of a \textit{sui generis} proprietary interest to occupy and use the land.”\(^{50}\) For L’Heureux-Dubé J. what s.35(1) purports to protect is not individual Aboriginal practices but the “distinctive culture of which aboriginal activities are manifestations.”\(^{51}\) Hence significance of the activities to native people is more important rather than the activities themselves. This is in contradistinction to the Chief Justice’s findings. Hence the real test, for L’Heureux-Dubé J., for the activities which would attract s.35(1) protection are that the “practices, traditions and customs which are connected enough to the self-identity

\(^{48}\) This is noted in McLahlin J.’s dissenting judgment where she accuses the Chief Justice for keeping the Sto:lo in pre-contact lifestyles. Since Lamer C.J. could not see any evidence of selling fish in pre-contact Sto:lo culture, he held that selling fish is not an aboriginal right. McLachlin J. disagrees: “By insisting that Mrs. Van der Peet’s modern practice of selling fish be replicated in pre-contact Sto:lo practices, he effectively condemns the Sto:lo to exercise their right precisely as they exercised it hundreds of years ago and precludes a finding that the sale constitutes the exercise of an aboriginal right.” McLachlin J. in \textit{Van der Peet supra} note 41 at 632.

\(^{49}\) Ibid. at 593

\(^{50}\) L’Heureux-Dubé J. in \textit{Van der Peet supra} note 41 at 580

\(^{51}\)
and self-preservation of organized aboriginal societies."\textsuperscript{52} What constitutes a practice, tradition and custom must be examined through native people's eyes, "not through those of the non-native majority or the distorting lens of existing regulations."\textsuperscript{53} Similarly for McLachlin J. in dissent, the use of a particular time period is troubling:

I cannot agree ... that a practice be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question.\textsuperscript{54}

Aboriginal title under \textit{Van der Peet} becomes a right to use land only for the culture-based customs that have been proved to be Aboriginal rights. Hence a tract of land could have site-specific Aboriginal rights over it and a spiritual area would have protection only if an Aboriginal right to spiritual practices at that particular site could be established. Such land could not be used for anything else, such as hunting and fishing, when such activities themselves constitute Aboriginal rights. The test after \textit{Van der Peet} "form[s] a formidable and intimidating barrier"\textsuperscript{55} for any Aboriginal group trying to assert their rights under s. 35(1). In summary, the test for establishing an Aboriginal right after \textit{Van der Peet} and \textit{Sparrow} involves showing that

- the Aboriginal practice is central to the culture and existed prior to contact with Europeans;

- it was not extinguished prior to 1982, and it must have been infringed by Government action after 1982;

\textsuperscript{52} \textit{Ibid.} at 595
\textsuperscript{53} \textit{Ibid.} at 595
\textsuperscript{54} McLachlin J. \textit{ibid.} at 634
\textsuperscript{55} Barsh and Henderson \textit{supra} note 42 at 1004
- the government action must lack the adequate justification and it must be outside the general scope of the Crown’s position of “fiduciary”.

Thus in order to show that an Aboriginal right exists, there is a heavy burden on an Aboriginal group trying to assert such rights and they are restricted to historically frozen definitions.

4.1.3 Delgamuukw

Delgamuukw\textsuperscript{56} involved a claim by the Gitskan and We’tsuwet’un for the recognition of their Aboriginal title to 58,000 square kilometres of land in British Columbia.\textsuperscript{57} The claim also included a right of self-government for which the Supreme Court ordered a new trial citing inappropriate treatment of evidence at trial. The case is significant for many reasons, not least of which the comments made by the Court\textsuperscript{58} in relation to evidence. In the British Columbia Supreme Court, evidence was delivered by way of sacred dances, songs and oral traditions\textsuperscript{59} over many days and yet McEachern C.J. of the British Columbia Supreme Court at trial gave this evidence little weight.\textsuperscript{60} Lamer C.J.’s overruling of McEachern’s decision, noted that “the ordinary rules of evidence must be approached and adapted in light of the evidentiary difficulties inherent in adjudicating

\begin{itemize}
\item Delgamuukw supra note 2
\item \textit{Ibid.} at 22
\item Lamer C.J. for the majority of Cory, McLachlin and Major J.J. La Forest J wrote the minority judgment with which L’Heureux-Dubé J. concurred but this judgment agreed in substance with the Chief Justice.
\item The Gitskan have an “adaawk” which is a collection of oral tradition about their ancestors, traditions and lands. The Wet’suwet’en have a “kungx” which is a spiritual song and dance performance, tying them to their land. The feast hall is important in both traditions as it is a place where stories are told and re-told to remind them of their spiritual connection to the land. The Hall is also used for making important decisions. See judgment of Lamer C.J. in \textit{Delgamuukw supra} note 2 at 24 [also in McEachern’s judgment at [1991] 3 WWR 97, [1991] 5 CNLR 1]
\item as noted in Lamer’s judgment in \textit{Delgamuukw supra} note 2 at 18.
\end{itemize}
Aboriginal claims.\textsuperscript{61} Hence the Supreme Court of Canada has noted that evidence in the form of oral traditions and sacred dances will have a significant place in Aboriginal litigation especially if such evidence shows a connection between current members of a group and their pre-contact lifestyles\textsuperscript{62} or pre-sovereignty land holdings.\textsuperscript{63}

4.1.3.1 Content of Aboriginal Title

\textit{Delgamuukw} is the most definitive case on s.35(1) and Aboriginal title where the Court clarified the position it took in \textit{Van der Peet} and created a different test. Lamer C.J. held that Aboriginal title does not come from the Royal Proclamation,\textsuperscript{64} hence laying to rest the Privy Council’s original assertion in \textit{St Catherine’s Milling} that Aboriginal rights arise from a Crown grant, instead the source of Aboriginal title is in the prior occupation of land by Aboriginal groups.\textsuperscript{65} The \textit{sui generis} or uniqueness of Aboriginal title therefore stems from the fact of Aboriginal occupation prior to the assertion of Crown sovereignty over Canada. By definition, other interests, or estates, in land can only eventuate from a Crown grant.\textsuperscript{66} As this is the basis of \textit{sui generis} title, the obvious temporal frame is thus the assertion of sovereignty.

Title is more than just a bundle of rights, as asserted by British Columbia in the case,\textsuperscript{67} but Lamer C.J. restricts the title just before it becomes similar to a fee simple estate. Aboriginal title is different from fee simple for three reasons. Firstly, the title is

\textsuperscript{61} \textit{Ibid.} at 55
\textsuperscript{62} for culture based rights as required by the test in \textit{Van der Peet supra} note 41
\textsuperscript{63} for Aboriginal title following the Supreme Court’s \textit{Delgamuukw} decision. See discussion infra.
\textsuperscript{64} \textit{Supra} note 13
\textsuperscript{65} Lamer C.J. in \textit{Delgamuukw supra} note 2 at 58. This position was taken by the Court in \textit{Van der Peet} and further emphasised here.
\textsuperscript{66} The feudal theory of “tenure” in which the radical or ultimate title to the land resides in the Crown. See, for example, K. Gray “Property in Common Law Systems” in G. van Maanen and A. van der Walt \textit{Property Law on the Threshold of the 21st Century} (Antwerp: Maklu, 1996) 235at 236-237
inalienable and cannot be sold to private third parties. Secondly, the source is different: it is not a grant from the Crown, as discussed above, its source is the prior occupancy of Aboriginal groups and Aboriginal customary law. Although Lamer C.J. does not elaborate on this point, it is clear that he is suggesting the existence of a system of law that existed prior to the introduction of common law with British sovereignty. It is not a great leap from this suggestion to recognition of prior sovereignty of Aboriginal nations. If the Supreme Court is able to ground Aboriginal title as a s.35(1) protected constitutional right, then the same conclusion could equally be made for a right of self-government. The third reason of difference of Aboriginal title takes us along similar reasoning. Lamer C.J. holds that Aboriginal title is communal in nature: “it is a collective right to land held by all members of an Aboriginal nation.” A single person, therefore, cannot negotiate the title rights of an Aboriginal nation. A representative may negotiate on behalf of the group but choosing the representative suggests collective discussions and decision making. Similarly the day-to-day use of communal lands requires communal decision making and allocation of resources. This decision-making power of the group is surely a basis of self-government.

The content of Aboriginal title is summarised by the Chief Justice:

\[67\] Delgamuukw supra note 2 at 57
\[69\] Ibid. at 59
\[70\] The issue of the introduction of French civil law into Québec will not be discussed here. As Delgamuukw deals with land that is only in the part of Canada to which Britain asserted sovereignty it is only necessary to discuss British sovereignty. On this argument, however, Aboriginal customary law would also pre-exist civil law.
\[71\] Delgamuukw supra note 2 at 59
\[72\] This argument is similar to that put forward by Asch and Macklem in relation to Aboriginal fishing rights: if the state could regulate Musqueam fishing without extinguishing the Aboriginal right to fish, then surely the Musqueam’s decisions on “how, when and by whom fishing is to occur” has not been affected, hence the Musqueam’s self-government has survived intact and should be a constitutionally
first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.\textsuperscript{73}

Hence, once an Aboriginal group can prove Aboriginal title to land, they do not have to restrict what they are allowed to do on the land. They are not restricted to only using the land as they would have traditionally which is a result of the \textit{Van der Peet} decision. In determining uses of Aboriginal title, Lamer C.J. relies on prior common law Aboriginal title cases and analogies with Reserve lands. By following Dickson C.J. in \textit{Guerin},\textsuperscript{74} Lamer C.J. notes that Aboriginal title is "a legal right to occupy and possess certain lands"\textsuperscript{75} and the interest in land is the same whether under common law Aboriginal title or title to Reserve lands set aside by treaties.\textsuperscript{76} Lamer C.J. consulted the \textit{Indian Act}\textsuperscript{77} and the \textit{Indian Oil and Gas Act}\textsuperscript{78} and concluded that Reserve land does not have restrictions on uses and includes rights to minerals found on the land.\textsuperscript{79} By corollary, one would conclude that Aboriginal title lands should have the same unrestricted uses by its inhabitants.

However, Lamer C.J. issued one caveat to his judgment: Aboriginal title land cannot be used contrary to the basis of the claims. Lamer does not want this aspect of his ruling to be construed as putting a "legal straitjacket"\textsuperscript{80} on the groups that have Aboriginal title.

\textsuperscript{74} Lamer C.J. in \textit{Delgamuukw supra} note 2 at 59
\textsuperscript{75} \textit{supra} note 35
\textsuperscript{76} \textit{Delgamuukw supra} note 2 at 60 quoting Dickson C.J. in \textit{Guerin supra} note 32 at 382
\textsuperscript{77} \textit{Ibid.} quoting Dickson C.J. in \textit{Guerin supra} note 32 at 379
\textsuperscript{78} s18: Reserves are to be held for the use and benefit of Indians. \textit{Indian Act} R.S.C. 1985, c. I-5
\textsuperscript{79} R.S.C. 1985, c. I-7
\textsuperscript{80} confirmed by the Supreme Court in \textit{Blueberry River Indian Band v. Canada} [1995] 4 S.C.R. 344
\textsuperscript{80} Lamer C.J. in \textit{Delgamuukw supra} note 2 at 65
Instead he sees that Aboriginal title allows full use of the land subject to the "overarching limit" he describes. According to Lamer, the source of Aboriginal title is the fact of prior occupation and also Aboriginal law. If in proving the prior occupation\textsuperscript{81} or the existence of title in Aboriginal law as a reason for existing Aboriginal title today, the Aboriginal group cannot then put the land to a use that is inconsistent with the basis of the title:

\begin{quote}
if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land is such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).\textsuperscript{82}
\end{quote}

Similarly land claimed to be a traditional hunting ground cannot be strip mined.\textsuperscript{83} This is, in essence, another form of the "frozen rights" approach that the Supreme Court was so keen to avoid in \textit{Sparrow}. Following Lamer’s judgment, to be able to benefit from rights to minerals the Aboriginal claimants should be advised not to claim hunting practices on the particular tract of land. To use the Aboriginal title land in a manner that conflicts with the basis of the title, Lamer C.J. states that the land should be converted to non-title lands to do so. Prescription of land usage appears to contradict the Acts consulted to make the judgment. In essence the Court is saying that Aboriginal people can have the land but only for what it is claimed for. Although general use of Aboriginal title land is not limited to pre-sovereignty use, use of particular land is constrained by traditional use. This is still a "strait jacket" as it denies the possibility of change in Aboriginal values in a contemporary capitalist society or their ties to land. Why should

\begin{footnotes}
\item[81] Macklem has analysed the position of self-government of Aboriginal peoples in Canada. Similar to his analysis it can be seen that there are several bases for the recognition of Aboriginal title. The most obvious reason for recognising Aboriginal rights is the fact of prior occupancy. Basing Aboriginal rights to land in this doctrine makes sense and has resonance for some Indigenous people "insofar as Aboriginal use and enjoyment of land is often spoken of by Aboriginal people as possessing a profound spiritual dimension." P. Macklem "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen’s L. J. 173
\item[82] Lamer C.J. in \textit{Delgamuukw supra} note 2 at 63-64
\end{footnotes}
land be left fallow if there are no animals left to hunt? What if someone else (for example the provincial government) had built a parking lot or leased the land for a mine? Decisions as to use in this case have not been left to the communal decision making powers of the Aboriginal nation.

4.1.3.2 Proving Aboriginal Title

In proving Aboriginal title, the Court changed its approach in Van der Peet. Most notably, the first requirement is that of historical occupation: Aboriginal claimants must prove that they were in occupation prior to sovereignty. Hence there is a different temporal component to the test than in Van der Peet which relied on proof of Aboriginal cultural practices prior to contact with Europeans. The "magic moment" of sovereignty is easier to pinpoint and has a greater legal bearing on establishing Aboriginal rights. The pre-contact requirement in Van der Peet was created as a marker for when a culture would have changed. Such a date, however, overly emphasises the affect of Europeans on Aboriginal society and creates evidentiary problems: determining such a date assumes that all European contact was documented. What about pre-Columbus merchants or the Vikings? What about the affect of contact with other Aboriginal groups? Does such contact taint Aboriginal culture so as to make the culture less deserving of constitutional recognition as well? The pre-sovereignty time stamp makes more sense than pre-contact and I believe that the Supreme Court will have to redress its Van der Peet test in relation to this in the future. As Slattery has commented, the Supreme Court will have to consider

---

83 Ibid.
84 This encapsulates the common law doctrine of possession: occupation is prima facie tantamount to possession unless others can prove a better title. See, for example, C. Rose "Possession as the Origin of Property" (1985) 52 Uni. of Chicago Law Rev. 73.
85 per McLachlin J. in Van der Peet supra note 41
whether "the criterion for proving the lesser [culture-based] right [should] be more onerous than that for the greater [land-based] right."\(^{86}\)

The second requirement of proving Aboriginal title is continuity of occupation by the Aboriginal group. If present occupation is evidence of prior occupation, continuity is crucial to show. This requirement should not be too strict but there must be "substantial maintenance of the connection."\(^{87}\) Imposing the continuity aspect more on those who are in present occupation than those who can rely on historical records and documents does not appear to be equitable especially considering those people illegally dispossessed or taken from their lands.\(^{88}\)

The third requirement is exclusive possession.\(^{89}\) Proof of this requires showing exclusive control over the land. Two or more Aboriginal groups may have joint exclusive occupancy and therefore may share title. This issue, although raised by the Chief Justice, was not an issue of the case at bar and was left for another time.

### 4.1.3.3 Federal Jurisdiction

One of the most striking aspects of the Supreme Court's decision is the effect of s. 91(24) of the 1867 Constitution Act which effectively removes the provincial government from the Aboriginal title equation. After Confederation, the Court held, the provinces lacked

---

86 B. Slattery "The Definition and Proof of Aboriginal Title" 1997 Osgoode Hall Constitutional Cases Lecture Series, April 17 1998 at 11
87 *Delgamuukw* *supra* note 2 at 72-73 quoting *Mabo* *supra* note 5
88 and sent to residential schools: "The tragic legacy of residential education began in the late nineteenth century with a three-part vision of education in the service of assimilation. It included, first, a justification for removing children from their communities and disrupting Aboriginal families; second, a precise pedagogy for re-socializing children in the schools; and third, schemes for integrating graduates into the non-Aboriginal world." Canada, Royal Commission on Aboriginal Peoples *Report of the Royal Commission on Aboriginal Peoples* Volume 1, "Looking Forward, Looking Back" (Ottawa: Canada Communication Group, 1996) at 337
the legislative authority to extinguish Aboriginal title. Lamer C.J. argued that this was the case as s. 91(24) protects a “core” of Indian-ness from provincial jurisdiction. Due to s.35(1), Aboriginal title is at the “core” of Indian-ness, and so the British Columbia government has not had the legislative power to extinguish Aboriginal title. This is a complete about face from Calder after which Aboriginal title in British Columbia was considered to have been extinguished. Granting fee simple title to a third party therefore does not extinguish Aboriginal title; similarly so for other interests in land. Treaty rights are protected from provincial legislation in s.88 of the Indian Act and by the analogous relationship between treaty rights and Aboriginal rights, Lamer C.J. held that provincial acts of extinguishment are ultra vires. Since the province cannot act to restrict Aboriginal title, it follows that negotiations over Aboriginal title land can be bi-partisan: between the Federal government and Aborigines, however, most land regulations and allocation of resources are in the provincial domain. This would indicate that the governing institutions (Federal and Provincial) are in conflict over administering Aboriginal title to land. For political and economic reasons, however, it would be unlikely for the Federal government to continue any negotiations or consultations with Aborigines without provincial representatives present.

4.1.3.4 Extinguishment

Notwithstanding the caveat on potential uses of Aboriginal title land, the Court affords the same protection to such land as fee simple, but by s.35(1) of the Constitution,

---

89 Delgamuukw supra note 2 at 73
90 Lamer C.J. *ibid.* at 83
92 as discussed previously. See notes 77-79 *supra* and accompanying text.
93 Delgamuukw supra note 2 at 86
Aboriginal title is also given constitutional protection so Aboriginal title appears to be elevated to a higher level. This, however, is not the case as governments feel compelled to measure constitutional protection of Aboriginal title against other resource and land management issues. The Court tempered the higher legal constitutional protection with modifications to the strict justification test imposed on the government wishing to infringe Aboriginal rights as annunciated in *Sparrow*. In *Sparrow*, the Court held that the Government must be able to justify extinguishing an Aboriginal right. Doing so in the name of the public interest, the Court said in *Sparrow*, was insufficient.⁹⁴ Reasons for extinguishing an Aboriginal right after *Sparrow* must be far greater than doing merely for the public interest. This follows because the Aboriginal rights in question have constitutional protection and are accordingly given high importance over other uses of land. In *Delgamuukw* the Court relaxed the justification test of extinguishment imposed on governments. The change to the test in the Supreme Court began to surface in its 1996 decision of *Gladstone*.⁹⁵ *Gladstone* involved Aboriginal commercial fishing and whether Aboriginal fishing for commercial purposes was a constitutional right. In *Gladstone* the Supreme Court held that governments are able to set conservation standards before Aboriginal fishing rights have to be considered. The justification test laid down in *Sparrow* was relaxed in favour of governments.

The reconciliation of the prior occupation of North America by Aboriginal peoples with the assertion of Crown sovereignty works towards the notion that Aboriginal societies, while distinct, are within the Canadian sovereign boundary. Lamer C.J. points to the two pronged justification test of *Sparrow* and how that changes with respect to Aboriginal

---

⁹⁴ Dickson C.J. in *Sparrow* supra note 31 at 1113
Firstly the legislative objective must be "compelling and substantial." Secondly, in fulfilling those objectives the legislature must keep in consideration the fiduciary duty to Aboriginal peoples. The test is substantially relaxed in the Crown's favour when an "inescapable economic component" is identified. Lamer C.J. states that in his opinion:

the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are just the kinds of objectives that are consistent with this purpose and, in principle, can justify infringement of aboriginal title.

From Lamer's list of legitimate extraneous infringements on Aboriginal title, it seems that the "public interest" principle rejected in Sparrow has been reinstated. Aboriginal title ensures that the holders of the title will be consulted when the legislative objectives outlined above are contemplated. There does not seem to be much difference here between a constitutionalised right to land and ordinary fee simple interest. The list of Lamer's, above, includes areas in the provincial domain which contradicts his findings in relation to s.91(24) and, as McNeil notes, many agriculture, forestry and mining companies are foreign owned, therefore a constitutional right favouring Aborigines will be eroded to benefit outside investors.

Overall, however, Delgamuukw is a landmark decision and confirms the rights of Aborigines in Canada to their land. The hints at self-government may be appealing, but it is clear that the Court insists that ultimate resource and land management must remain

95 Gladstone supra note 40
96 Delgamuukw supra note 2 at 75
97 as held in Guerin supra note 35
98 Delgamuukw supra note 2 at 78
99 Ibid
100 K. McNeil "Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got it Right?" Robarts Lecture, Robarts Centre for Canadian Studies, York University March 25, 1998.
with the Government. Full Aboriginal sovereignty over Aboriginal title lands is yet to be found.

4.1.4 Canadian Courts and First Nations\textsuperscript{101} Religions

In \textit{Delgamuukw} discussed previously the religious practices of the Gitskan and We'tsuwet'un were evidence of the Aboriginal title to land claimed by them but at trial this evidence was not given much weight. To glean an understanding of how Canadian courts may react to spirituality and land connections generally, I will look at other cases which have involved Aboriginal spirituality and religious practices. In this section I will examine definitions of religion within treaty rights cases to get an indication as to how the Courts will address spirituality in land title claims. This is important in following the constitutional protection of Aboriginal rights as treaty rights are also recognised in s. 35(1) of the Constitution. Hence for comparative purposes, looking at judicial interpretations of treaty rights in these few cases give insights that will also be beneficial for an Australian audience.

In cases where a treaty exists between the Crown and the First Nation asserting a right to practice religion over certain territory, the Supreme Court has held that the treaty will be interpreted expansively in the First Nation’s favour. In \textit{R v. Sioui},\textsuperscript{102} the Court had to determine whether a treaty allowed for a group of Huron people to cut trees and make fires in contravention of the Jacques-Cartier park regulations.\textsuperscript{103} The Court held that the treaty’s terms guaranteeing the Huron’s “free exercise of religion, customs and trade”

\textsuperscript{101} Typically, treaties have been formed between a “First Nation” and the Crown, hence in this section the words “First Nations” will be used to refer to a group of Canadian Aborigines who have formulated a treaty with the Crown.

\textsuperscript{102} [1990] 1 S.C.R. 1025
were enough to protect the Huron’s right to act contrary to the regulations. In making the decision, Lamer J. (as he then was) for the court noted that this finding was possible because the use by the Hurons was not incompatible with the area in which they were practising their religion: “The Hurons, for their part, were protecting their customs wherever their exercise would not be prejudicial to the use to which the territory concerned would be put.”104 It is clear that the Court would be more reluctant to find a “free exercise of religion” treaty right on Crown land that was being put to other use, such as mining or logging. While First Nations want to assert their treaty rights to practice their religion in a manner not inconsistent with general public use, such as in a park, then the Court will find that right.

When there is no treaty covering the disputed practice, defending a religious practice is more difficult. In *Jack and Charlie v. R*105 the Supreme Court of Canada had to determine whether the killing of a deer out of season was an offence of the Wildlife Act106 despite the reason for killing the deer being to conduct a religious ceremony. Beetz J. for the court noted that there was no evidence to suggest that the hunting and killing of the deer was part of the religious activity and that deer meat “retained in storage” could have been used. Using this analysis, the Court found that the Wildlife Act did not infringe on the religious practice in question. Beetz J. noted the parallel analogy posited by the Crown to a clergyman: “obtaining of wine for sacramental purposes is not part of the sacrament of Holy Communion, and regulation of the sale of wine does not,

---

104 [1990] 1 S.C.R. 1025 at 1071
105 [1986] 1 W.W.R. 21
106 Wildlife Act, 1966 (B.C.), c. 55 [now R.S.B.C. 1979, c. 433, s3(1)(c)]
therefore, prohibit the exercise of that religious ceremony. Such a regulation cannot, therefore, be said to affect religious freedom. Direct analogies to Christian religious ceremonies constrain Aboriginal religious practices to what can be reasonably seen by the dominantly judeo-christian imagination of the judiciary. Such definitions needlessly limit Aboriginal religion and therefore Aboriginal rights to practice their religion.

The British Columbia Supreme Court stated in *Thomas v. Norris* that if any Aboriginal religion includes activities where the common law rights of a person subjected to the religion are infringed, the religion cannot be said to constitute an Aboriginal right.

In my opinion, conduct amounting to civil wrongs (rights from the point of view of the person wronged) should stand on the same footing as criminal conduct. If such conduct cannot be separated from the spirit dancing, and this is an integral part of it, then in my opinion spirit dancing is not an Aboriginal right recognized or protected by the law.

The case involved the ritual known as “spirit dancing” where a person is subjected to treatment including forced confinement, restriction of food and being hit by a “guardian” until the person’s spirit begins to sing. This ritual may take a few days and consent for the practice is given by an older member of the person’s family as the person is usually unaware of the necessary treatment. Hence the Coast Salish people’s practice of spiritual cleansing cannot gain the protection of s. 35(1) of the Constitution as it was held not to constitute an Aboriginal right.

---

107 [1986] 1 W.W.R. 21 at 33
109 *ibid.* at 156
4.1.5 Canada’s Lesson for Australia

Although there are many differences between Canada and Australia in the relationship between the Indigenous inhabitants and colonial settlers, the similarities of the history of the two countries still makes comparison worthwhile. Both countries were settled by the British Crown assuming radical or underlying title to the land under the doctrine of discovery. In Delgamuukw and Mabo we can see the result of these similarities: Aboriginal or native title withstood this assertion of sovereignty. Aboriginal title was able to survive, albeit unrecognised until 1888 (in Canada) and 1992 (in Australia), because of the fact of prior occupancy by the indigenous inhabitants. Extinguishment of Aboriginal title can occur if in doing so there is clear intention shown by the Crown, although it may be argued that the Sparrow justification test has survived Lamer C.J.’s legitimate legislation treatment in Canada. The Supreme Court of Canada has not made a strong statement vis a vis compensation like the Australian High Court’s reliance on the Racial Discrimination Act to determine a date for the requirement of compensation.

However, since Aboriginal title has constitutional protection in Canada, there will undoubtedly be issues of constitutional remedies to be entertained. Similarly, the Supreme Court’s contraction of legislative power over Aboriginal title to the Federal Parliament was not matched by the High Court. The Australian Parliament’s passage of the Native Title Act effectively takes Native Title out of the state realm if there is an

---

110 Webber asserts that the need for “peace and security” between the Native Americans and trading settlers helped to produce a normative inter-community relationship that helped to establish particular legal norms such as those propounded by Marshall in the cases of Worcester, Johnson v. M’Intosh and Cherokee Nation. J. Webber “Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples” (1995) 33 Osgoode Hall L.J. 623. Such a situation did not occur in Australia where the Indigenous inhabitants were fewer in number and in the main were less competition for the incoming settlers in utilising resources.

111 For a detailed analysis of the Australian cases including Mabo, refer to Chapter 3

112 A discussion of constitutional remedies is beyond the scope of this thesis.
inconsistency. The two countries have taken different routes: in the case of Canada, the Supreme Court used constitutional analysis; in the case of Australia, the High Court used international and human rights norms. Both came to similar descriptions of Aboriginal title.

Canada is better placed legally to acknowledge different religious values: it is only lacking more judicial sensitivity in the scrutiny of religious claims. As with Australia, spirituality is a strong part of Aboriginal life and connection to land so a protection similar to Canada’s s. 35(1) would broaden the Australian legal apparatus’ ability to bridge the cultural divide.

The discussion of whether Australia should incorporate a similar s. 35(1) guarantee into its constitution is timely. Following the case of Kartinyeri v. Commonwealth it is clear that the Commonwealth parliament can legislate to remove gains that have been made previously by Australian Aborigines in the legislature.

4.2 United States of America

Many Americans take religious freedom for granted - after all it’s explicitly guaranteed by the First Amendment. The Pilgrims came to this continent seeking the freedom to worship as they pleased and that fundamental right was one of the pillars upon which this country was built.

Legal recognition of Aboriginal spiritual connection to land has followed a different route in the United States of America. It has still progressed along a path of constitutional

---

113 By s109 of the Australian Constitution (The Constitution, 1900 (U.K.) 63 & 64 Victoria, c. 12) which allows for the supremacy of Federal legislation if there is an inconsistency with state legislation in an area of non-exclusive jurisdiction.

114 This, one would consider to be a question of whose prevailing value systems are predominating in these definitions.

115 As discussed in Chapter 2

protection but in a different way to Canada. The First Amendment right of free exercise of religion is a constitutional guarantee for all Americans and the jurisprudential definitions contained in the cases brought by Native Americans give clues as to the perceptions of a predominantly western, judeo-christian judiciary about Native spirituality. Constitutional guarantees in the Bill of Rights, such as the free exercise of religion, should be available across the board. This section will show how a constitutional guarantee available to all is not enough to afford protection to Native American spirituality. A contrast can be made here to Canada where specific protection is given to “Aboriginal and treaty rights” in the Constitution and to answer the question: which country’s constitution has been able to give better protection?

Aboriginal title to land based on Aboriginal possession has been recognised in the United States since the Marshall C.J. Supreme Court handed down its decision in 1823.\(^{118}\) Since that time, Native Americans have enjoyed some autonomy over their own lands.\(^{119}\) As with the situation in Canada, reservation or tribal land and Native American title to it will not be discussed in this section:\(^{120}\) for a comparison with Australia, this is not necessary.\(^{121}\) Native Americans can therefore protect their tribal lands from government

\(^{117}\) J. Hontz “Sacred Sites, Disputed Rights” (1992) 19 Human Rights 26 at 26

\(^{118}\) Johnson v M’Intosh further confirmed in Worcester v Georgia. See supra notes 7-11 and accompanying text

\(^{119}\) For an historical account of the setting up of "Indian Country", where tribal sovereignty is recognised along with the application of Federal laws, see F. S. Cohen Handbook of Federal Indian Law (Alberquerque: University of New Mexico Press, 1971) especially c. 15 “Tribal Property”

\(^{120}\) For further discussion on Native Americans and title to reservation land see N. Spaeth, J. Wrend, C. Smith (eds.) American Indian Deskbook: Conference of Western Attorneys General (Niwot: University of Colorado Press, 1993) c. 3

\(^{121}\) As in Australia, Native Americans do have recourse to environmental legislation to try and obtain protection for sacred sites. Under the National Environmental Policy Act (NEPA) 42 U.S.C.A. §§ 4321-4370d (1994) Native Americans can become involved in the Environmental Impact Assessment (EIA) process for any development for which an EIA is required. Also under the National Historic Preservation Act (NHPA), 16 U.S.C.A. §§ 470-470w-6 (West. Supp. 1997) in particular s. 106, agencies must take into account the effect of their actions on properties that are eligible for listing or are listed on the National
intervention. Federal or public lands pose a different problem. Recent cases have shown how some Native Americans have resorted to their constitutional right of free exercise of religion to gain protection for sacred sites on federal or public land. The court challenges by Native Americans under the free exercise clause discussed in this section began after the 1972 case of Yoder. In Yoder the U.S. Supreme Court recognised the importance of religion to Amish culture and expanded the definition of the First Amendment right of free exercise of religion. The importance of spirituality to Native American life is analogous to Amish culture so it appeared that Native American spiritual beliefs would similarly gain constitutional protection. Coupled with the Yoder decision was the
passing of the American Indian Religious Freedoms Act\textsuperscript{124} in 1978 that warned government agencies to allow Native Americans access to sacred sites. As will be seen in this section, federal courts were reluctant to find religious significance in Native American sacred sites regardless of the Act or the precedent in \textit{Yoder}. Finally, as will be shown in this section, the Supreme Court case of \textit{Lyng}\textsuperscript{125} in 1988 closed the door for Native American use of the First Amendment right of free exercise of religion for sacred sites. There have been some legislative moves after \textit{Lyng} to provide protection to Native American sacred sites including the passing of the Religious Freedom Restoration Act\textsuperscript{126} in 1993. As will be shown, these initiatives have, however, failed and today Native Americans have to rely on the special relationship between Congress and Native American tribes to provide protection to sites on a case by case basis. Hence as this section will show, constitutional guarantees provided to all Americans have failed to give specific protection to Native American religious practices.

4.2.1 The United States Constitution Recognition of Religion: The \textit{Yoder} Test

The United States constitution provides, inter alia: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..."\textsuperscript{127} This First Amendment protection provides two clauses in relation to religion: the "establishment" clause and the "free exercise" clause. These clauses have been interpreted in ways that restrict the method that laws can infringe religious practice: although there is a guarantee of "free exercise" the prohibition of "establishment" acts as a cap on what Congress can do to facilitate that free exercise. Defendants in free exercise

\textsuperscript{124} 42 U.S.C. § 1996
\textsuperscript{125} \textit{Lyng v Northwest Indian Cemetery Protection Association}, 485 U.S. 439 (1988) [hereinafter \textit{Lyng}]
cases often raise the "establishment" clause to show how special legislation enhancing free exercise of religion is unconstitutional. The free exercise clause is available to all Americans and it has been utilised by some Native American groups to assert their rights that determine access to their sacred sites.\textsuperscript{128}

The U.S. Native groups attempt to use First Amendment rights followed on the heels of the 1972 case of \textit{Wisconsin v Yoder}.\textsuperscript{129} This case involved recognition by the Supreme Court of the significant place religion occupied in the Amish way of life. Combined with the \textit{Sherbert v. Verner}\textsuperscript{130} test which requires the state to show a "compelling interest" to justify infringing free exercise of religion, \textit{Yoder} presented the high water mark of free exercise of religion analysis by the Supreme Court. In \textit{Yoder} the Court held that the Amish lifestyle would be hampered by Wisconsin's legal requirement of compulsory attendance at school beyond grade 8. Amish children, therefore, were allowed to complete their compulsory state schooling at Grade 8. In reaching this conclusion the Court held that religion could not be separated from the everyday lifestyle for the Amish, that religion was integral to the Amish culture.

The court set out the test that must be met before a first amendment right of free exercise of religion will be found. Firstly practice of the religion must further a bona fide religious belief not merely a philosophical belief. A practice must be "rooted in religious

\textsuperscript{127} U.S. Const. Amend. I
\textsuperscript{129} supra note 122
\textsuperscript{130} 374 U.S. 398 (1963)
belief"\textsuperscript{131} to cross this first hurdle. Secondly the individual asserting the belief must sincerely hold the belief. Thirdly the claimant must show that the required observance of the practice is important to the claimant’s religious ideology. Taken together, these three factors are known as the "centrality" test: the practice for which constitutional protection is claimed must be "central" to the religion. Once these factors are satisfied it is incumbent on the state to show that there is a compelling interest in the state’s behaviour to infringe religious belief.\textsuperscript{132} This is seen as a balancing test in which the competing government interest is compared to the religious beliefs possessed by the plaintiff. The \textit{Yoder} court stated that for a government purpose to justify infringing a religious right “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”\textsuperscript{133} Hence because spirituality and culture are similarly inextricably linked for Native Americans, the \textit{Yoder} analysis by the Court provided possibilities for Native American aspirations to assert their religious beliefs. Following \textit{Yoder} courts must apply the test as set out by the Supreme Court to determine whether religious freedoms have been curtailed by government action.

\subsection*{4.2.2 The American Indian Religious Freedoms Act}

As well as the finding in \textit{Yoder}, the passing of the American Indian Religious Freedoms Act (“the AIRFA”)\textsuperscript{134} in 1978 provided Native Americans with more optimism in protecting their sacred sites. In a period of neo-liberalism, Congress passed the AIRFA in an attempt to rectify past “lack of awareness” about Native American religious

\begin{footnotesize}
\textsuperscript{132} Following the test in \textit{Sherbert v. Verner} supra note 130
\textsuperscript{133} Yoder supra note 122 at 215
\end{footnotesize}
needs. It is an Act that attempts to set out policy guidelines for administrative agencies and directs these agencies to make any changes necessary to avoid government interference with the practice of Native American religions. The Act states in full:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.

However, the Act is worded so as to circumvent any attack under the establishment clause of the First Amendment and as a result it is a toothless tiger. The Act does not establish any governmental agencies or programs to fulfill the context of the Act and it does not contain any enforcement provisions nor confer a right of action on Native Americans. The AIRFA therefore delivered less than it promised and although pleaded by Native Americans in first amendment cases, the AIRFA did not assist in protecting Native American spiritual lands and practices.

---

"Despite the [First Amendment and 1968 Indian Civil Rights Act which asserted the free exercise of American Indian religion] a lack of U.S. governmental policy has allowed infringement in the practice of Native traditional religions. These infringements came about through the enforcement of policies and regulations based on laws which are basically sound and which the large majority of Indians strongly support. These laws often embody principles such as the preservation of wilderness areas and the preservation of endangered species for which Indians have actively fought, literally generations before the non-Indian became convinced of their importance.
"But because such laws were not intended to relate to religion and because there was a lack of awareness of their effect on religion, Congress neglected to fully consider the impact of such laws on the Indians' religious practices." At 1262-1263.

136 "Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights." O'Connor J. for the court in Lyng supra note 125 at 455

4.2.3 Native Americans and the First Amendment in Federal Courts

Despite the Yoder case providing a window of opportunity for Native Americans and the fact of non-judeo-christian religions gaining recognition under the First Amendment right to free exercise of religion, Courts have been reluctant to provide any protection to Native Americans for access to public land for religious purposes. In the District court and Circuit court cases during the 1970s and 1980s where Native Americans sought to have their sacred sites protected, the Yoder test was applied in ways that made Native American spiritual connection to land invisible. Finally, the Lyng case presented the Supreme Court with an opportunity to set precedent for interpreting Yoder for lower courts to follow. Before getting to that point, an analysis of the lower courts' decisions of Native American First Amendment cases will help to illustrate the importance of Lyng.

4.2.3.1 The Tellico Dam Case: Sequoyah

In the 1979 case of Sequoyah v. Tennessee Valley Authority the Cherokee claimants sought an injunction against the Tennessee Valley Authority from closing the floodgates of Tellico Dam in Tennessee. The Cherokee claimed that the floodwaters that would build up behind the dam would cover burial sites, sacred areas and would severely destroy the source of the medicine for the Cherokee medicine men. The Court was not convinced that the floodwaters would irrevocably destroy the area for the Cherokee to

---

138 Founding Church of Scientology v. United States, 409 F. 2d 1146 (D.C. Cir. 1969) cert. Denied, 396 U.S. 463 (1969) (Scientology held to be a religion); Mainok v. Yogi, 440 F. Supp. 1284 (D.N.J. 1977) (Court compared "creative intelligence" with Christian, Buddhist and Hindu concepts of God), aff'd, 592 F. 2d 197 (3d Cir. 1977). Also objection of war on religious grounds found to be supported by the First Amendment: Court held that the relationship between an individual to a Supreme Being, superior to any human relationships, is religious. See United States v. Seeger 380 U.S. 163 (1963) and Welsh v. United States, 398 U.S. 233 (1970). But, to be seen as legitimate, religions had to be viewed as "civilised" by Western standards, but it must be broad enough to encompass to recognise the increasing number and diversity of faiths. See, generally, L.H. Tribe American Constitutional Law (2nd Edition) (Mineola, N.Y.: The Foundation Press, 1988) § 14-6 "Defining 'Religion" in the First Amendment".
continue practising their religion but also held that the Cherokee had no property rights over the public lands in question, therefore there was no legal interest to sue. Stambor has argued that “[t]he court’s reliance on this lack of a property interest [was] an insensitive, inequitable, and irresponsible evasion of the more difficult constitutional claim that the Indians raised.”

The case was appealed to the Sixth Circuit. In upholding the District Court’s findings, the Sixth Circuit court found that the Cherokee’s affiliations with the land were not central to their religious beliefs:

[The Cherokee claimants’] affidavits appear to demonstrate “personal preference” rather than convictions “shared by an organized group.”… The overwhelming concern of the affiants appears to be related to the historical beginnings of the Cherokees and their cultural development. It is damage to tribal and family folklore and traditions, rather than particular religious observances, which appear to be at stake.

According to the Court, as the Cherokee claimants had not shown the centrality of the site to their religious beliefs, their First Amendment claim had to fail. The court noted that the Amish requirement of guiding their children through adolescence was of higher religious importance to the Amish than that of the Cherokee accessing sacred sites but when considering the Amish claim, the Court took notice of the “well known history” of Amish lifestyles. The Supreme Court in Yoder also referred to the biblical underpinnings of the Amish belief which indicated how beliefs with a judeo-christian
base would be better understood by the Court.\textsuperscript{144} This preference for finding spiritual overtones in the Amish way of life but not the Cherokee is a misunderstanding of the inter-linking aspect of Native American religion with everyday life. Such comments deny the history of infringements by governments on Native American free exercise of their religion:

Surely the \textit{Yoder} claims are more “cultural” than those presented in \textit{Sequoyah}. Moreover, if the Cherokee practices are no longer “intimately related to daily living” except for a few devoted believers, it is only because the government, which now seeks to reject the Cherokee claims as not sufficiently central to the Cherokee faith to qualify for First Amendment protection, had in the past systematically worked to deprive the Cherokees of their connection with the land and their sacred religion, which has always been tied to the land. It is remarkable that the Cherokee religion has survived at all, given the powerful forces historically arrayed against it.\textsuperscript{145}

The centrality test put forward by the Supreme Court in \textit{Yoder} was applied more strictly in \textit{Sequoyah}. Emphasising centrality of actions, sites or practices to a Native American religion ignores the very connection between Native American spirituality and all aspects of life: it is all central to the religion. In applying the centrality test the Court has to look into Native American religion to see whether certain actions, sites or practices are truly central. The Sixth Circuit Court and the District Court of Tennessee commented on the late application of the Cherokee claimants under the First Amendment free exercise of religion clause.\textsuperscript{146} These Courts did not consider Native American distrust of governments that would have prevented action by the Cherokee until it was clear that the project would definitely go ahead. Are these Courts then capable of examining Native

\textsuperscript{144} \textit{Yoder supra} note 122 at 216: “That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans.” Emphasis added.

\textsuperscript{145} \textit{Stambor supra} note 142 at 69 quoting text from \textit{Yoder}

\textsuperscript{146} 480 F. Supp 608 at 610 and 620 F. 2d 1159 at 1162
American beliefs to see whether a practice or site is “central” to the religion? In fact, the Supreme Court has previously held that “courts are not arbiters of scriptural interpretation”\(^{147}\) and yet that is what the Courts in this case are advocating.

### 4.2.3.2 The Rainbow Bridge Case: *Badoni*

In the 1977 Rainbow Bridge Case, *Badoni*,\(^ {148}\) the Utah District Court had to determine whether the rock formation known as “Rainbow Bridge” had significant religious value to the claimant Navajo and whether access to the site was necessary for the free exercise of their religion. The Court rejected the claim on two bases: firstly that the Navajo had no property rights to the Rainbow Bridge area and therefore did not have a legal right to sue;\(^ {149}\) and secondly that the Navajo spiritual beliefs could not be classed as a “religion” as there was no consistency in Navajo visits to the site.\(^ {150}\)

On appeal to the Tenth Circuit,\(^ {151}\) the Court relied on a balancing test between the spiritual interest of the Navajo to protection of their sacred sites and the government’s interest in maintaining the water levels to manage scarce water resources. The Court was convinced that the Rainbow Bridge monument was of religious significance to the Navajo claimants so then applied the balancing test to see if the government’s compelling

---

\(^ {147}\) Thomas v Review Board 450 U.S. 707 (1981) at 707. See also United States v. Ballard 322 U.S. 78 (1944)
\(^ {148}\) Badoni v Higginson 455 F. Supp. 641 (D. Utah 1977)
\(^ {149}\) The court made its decision in this regard after considering a submission from the defendants’. In their submission, the defendants’ suggested that the Navajo’s case alleging a spiritual and religious connection to the Rainbow Bridge site was similar to a person claiming a “religious” experience at the Lincoln Memorial in Washington, D.C. If the Navajo’s claim is regarded similarly to this hypothetical then the defendants’ argued that the claim is just as spurious as the hypothetical fervent tourist. *Badoni supra* note 148 at 645
\(^ {150}\) “there is nothing to indicate that at the present time the Rainbow Bridge National Monument and its environs has anything approaching deep, religious significance to any organized group, or has in recent decades been intimately related to the daily living of any group or individual. Rather, the record supplied by the plaintiffs is to the contrary.” Aldon J., Anderson C.J. for the court *Ibid.* at 646
needs for the dam tipped the scales against the Navajo. The dam was considered crucial to a multi-state water storage and power project. Draining the waters to a level that would appease the Navajo would reduce the water level by half, too much for the continuation of the project.\footnote{152} The Court considered that the government had shown a compelling interest in maintaining the water levels in this regard.

The claimants had also requested that tourist access and behaviour at the site be managed. The Court held that any government effort to control the behaviour of tourists at the site would run afoul of the establishment clause of the First Amendment. In making this claim, the court intimated that controlling tourist traffic in a national park could not be legislated as it would facilitate the Navajo's exercise of their religion and thus could be seen to be a law for the benefit of the Navajo religion: "[there is] no basis in the law for ordering the government to exclude the public from public areas to insure privacy during the exercise of First Amendment rights... Were it otherwise, the Monument would become a government-managed religious shrine."\footnote{153} Such a view of the establishment clause is restrictive and ignores previous decisions on free exercise cases.\footnote{154} The Rainbow Bridge monument was situated in a national park for which the government had already established certain management procedures, such as opening hours and payment of entrance fees. To extend the management of tourist traffic that already existed could

\footnote{152} The importance of the Glen Canyon Dam was the subject of a previous case. In Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973) cert. Denied, 414 U.S. 1171 (1974) the 10th Circuit court held that the Glen Canyon Dam formed an integral part of the whole project.

\footnote{153} Bodoni supra note 151 at 179

\footnote{154} The outer limit of whether legislation is in contravention of the establishment clause was set out in Committee for Public Education & Religious Liberty v. Nyquist 413 U.S. 756 (1973) where it was held that government action will survive First Amendment scrutiny if it is motivated by a secular legislative purpose, that its primary effect neither advances nor inhibits religion, and that it does not require excessive government involvement in religious institutions and practices.
easily have been implemented without endangering the First Amendment cap on religious establishment.

In both Sequoyah and Badoni the plaintiffs did not make their claims until the development in question had begun. In balancing the religious interests of a Native American minority to the interests of a government providing resources to a larger population, courts will be more reluctant to discontinue a project for the economic ramifications. This reasoning has lead one writer to conclude “the government will automatically satisfy its burden of proof whenever the controversy involves a substantially completed project.”\(^{155}\)

4.2.3.3 Bear Butte Park - Crow v. Gullett

In another early 1980s case, the court found a religious interest that is worthy of constitutional protection but the courts also found that the government use of the lands did not burden the exercise of those religions. In Crow v Gullett\(^ {156}\) the plaintiffs’ access to the Bear Butte Park in the Black Hills region of South Dakota had been restricted for a period when they wanted access to conduct vision quests. The Lakota considered the area the most significant site of their religion while the Tsistsistas made pilgrimages there for spiritual renewal. The burden was in the form of construction of roads, viewing platforms, parking lots and other buildings that obstructed the Lakota and Tsistsistas from performing their rituals. The court misapplied the test: “the district court held that the First Amendment requires only that the state not prohibit religion, but that it does not

\(^{155}\) L. Ensworth “Native American Free Exercise Rights to the Use of Public Lands” (1983) 63 Boston Uni. L. Rev. 141 at 176

\(^{156}\) 541 F. Supp. 785 (D.S.D. 1982)
impose a duty to facilitate the practice.” This is stricter than the Yoder and Sherbert tests where even infringements of a practice of religion by legislation of general application are contrary to First Amendment protection.

4.2.4 The Supreme Court: Lyng v. Northwest

The 1988 case of Lyng v. Northwest Indian Cemetery Protective Association presented the Supreme Court with an opportunity to correct the misapplication by the lower courts of the First Amendment test as set out in Yoder and Sherbert in cases on Native American’s access to sacred sites. The subject of the case was whether the construction and paving of a road through the Six Rivers National Forest in Northern California to the Chimney Rock area held sacred by the Yurok, Karok and Tolowa infringed their religious rights. There was also interest from the government at the time to open the area to logging, but the government’s own study commissioned to examine the viability of a forestry industry in the National Park area noted that the necessary road would cause serious damage to the sacred areas. Relying on these facts, the lower court held that the road building and subsequent forestry activities were infringements of the Native Americans’ right to exercise their religions. In making this decision, the District Court for the Northern District of California became the first federal court to apply the Yoder and Sherbert test and find a First Amendment violation of Native American religious practice. The court found that there was no compelling interest in the completion of the

\[157^{157} \text{S. McAndrew "Lyng v Northwest: Closing the Door to Indian Religious Sites" (1989) 18 Southwestern Uni. L. Rev. 603 at 616}

\[158^{158} \text{supra note 125}

\[159^{159} \text{Northwest Indian Cemetery Protective Association v. Peterson 565 F. Supp. 586 (N.D. Cal. 1983)\]
road to justify upholding this against the Native American’s right to exercise their religion. In an appeal to the Ninth Circuit, this decision was upheld.\footnote{160}

The government appealed to the Supreme Court. The Supreme Court did not apply the standard \textit{Yoder} and \textit{Sherbert} tests in the appeal but instead relied on a case involving different facts: the case of \textit{Bowen v. Roy}.\footnote{161} In \textit{Bowen v Roy} the Native American plaintiffs claimed that giving their child a social security number would effectively rob her of her spirit and prevent her from becoming a holy person. The Supreme Court in \textit{Lyng} followed its decision in \textit{Roy} stating that the facts were similar. In so holding the Court noted that “the Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of its particular citizens.”\footnote{162} The facts in the two cases, however, seem to be quite different: an insurance program and access to sacred sites. This is an incompatible mix of the two cases and further enhances the Supreme Court’s definition of Native American religious practice to be cultural rather than truly religious. The Court relied on this line of argument and held that the Native Americans in \textit{Lyng} did not have a constitutional justification for their claim, that the Constitution cannot be used to uphold every individual citizen’s religious claim as that would severely restrict government operations. In doing so the Supreme Court characterised Native American religious belief to be less than other religions that are protected by the First Amendment.

The effect of the decision was that the U.S Forest Service could destroy a sacred area for a group of thousands of people whose ancestors had been practicing the religion at the

\footnote{160} \textit{Northwest Indian Cemetery Protective Association v. Peterson} 795 F. 2d. 688 (9th Cir. 1986)
\footnote{161} 476 U.S. 693 (1986)
area for at least the last 200 years.163 Before the appeal was heard in the Supreme Court, Congress passed legislation that restricted logging in the area164 so the amount of timber that could be harvested from the area after the decision was minimal. *Lyng* is now precedent for government land management which has the power to intervene with the practice of Native American religion on public land, even though the government interest may be less than compelling.

*Lyng* set out a different and weaker test to be applied to the practice of Native American religion. Because of the central importance of land to Native American religion and the difference of that religion to the judeo-christian beliefs of the majority of Americans, a different test has been prescribed to define whether Native American First Amendment constitutional guarantees will be recognised. It seems as though the Supreme Court was hesitant to acknowledge an Indian right to land that holds specific spiritual significance despite the AIRFA in which Congress recognised the importance of land to Indian religion and set out policy guidelines for government agencies to allow access to those sites. It is the very nature of Native American beliefs and the importance of land to those beliefs that the Court cannot give the same protection to that religion.

4.2.5 Post *Lyng: Smith* and the Religious Freedom Restoration Act

Following *Lyng* was the 1990 case of *Smith*165 involving Native American religious practice. In that case, the constitutional validity of the criminal code making illegal the ingestion of peyote, a hallucinogenic drug from a cactus used by many Native American

---

162 *Lyng* supra note 125 at 448 (quoting *Roy* at 699)
163 McAndrew *supra* note 157 at 624
165 *Employment Division, Department of Human Resources v. Smith* 494 U.S. 872 (1990)
religious practitioners, was considered. Although not a sacred sites case it confirmed the position of the Lyng court and "sent an even stronger statement that the First Amendment is no longer a method by which Native American practitioners can prevent the government from interfering with the practice of their religious beliefs." Justice Scalia for the Court stated that a simple infringement upon the free exercise of religion was no longer enough to make a neutral law unconstitutional. Instead, a law must violate religious freedom and other constitutionally protected freedoms to be unconstitutional. From this ruling, the Supreme Court ignored the Sherbert test of "compelling interest" and hence it no longer makes a part of the First Amendment free exercise of religion judicial inquiry. As a result, Smith "sent shock waves throughout religious communities everywhere." Not only Native American religions would be affected by this ruling but other religions also. The rejection of the Sherbert safety net sent the battle for reinstatement of religious protection to the political arena.

The result was the passing of the Religious Freedom Restoration Act (RFRA) in 1993. The RFRA re-instated the Supreme Court's previous First Amendment religious freedom tests as set out in Sherbert and Yoder. In particular it made clear that the state needed to

---

166 R. J. Griffin "Sacred Site Protection Against a Backdrop of Religious Intolerance" (1995) 31 Tulsa L. J. 395 at 408
167 Smith supra note 165 at 881-882
168 Griffin supra note 166 at 409
show a compelling interest for acting in a way that infringes on the free exercise of religion. The RFRA provided judicial relief to those who had been burdened in violation of the Act, thus making it more than a policy statement like the AIRFA.

The re-opening of the door closed by Lyng did not last very long. The RFRA was struck down in 1997 in the Supreme Court’s decision of City of Boerne, Texas v. Flores\textsuperscript{171} for being in violation of the establishment clause of the First Amendment. Whether the Act would have provided better protection to Native American religions is moot.\textsuperscript{172} So too were legislative proposals put forward by the Committee on Indian Affairs that would have seen specific protection of Native American religious practice and sacred sites. A Senate Bill was introduced on May 23, 1993\textsuperscript{173} but through many discussions and revisions, it still had not been passed by August 1994 and has not been revived to this day. As the Bill was modeled on the RFRA it is doubtful that it would have survived judicial scrutiny considering the Supreme Court’s finding in Boerne.

4.2.6 The Establishment Clause and Congress’ Fiduciary Responsibilities

The RFRA was struck down as it violated the establishment clause of the First Amendment. The establishment clause curtails any action by Congress in legislating to

\textsuperscript{170} supra note 126


\textsuperscript{172} Some writers at the time thought that as the RFRA was passed to re-instate the free exercise test that existed prior to Smith only takes Native American free exercise cases back to the position in Lyng, not a very favourable position. “Given the usual judicial insensitivity to native religions, it is possible that no Indian religious activity, especially on sacred sites, will be considered substantially burdened.” L.D. Tapahoe “After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshippers” (1994) 24 N. Mexico L. Rev. 332 at 345.

\textsuperscript{173} Senate Bill 1021: “The Native American Free Exercise of Religion Act”. See Griffin supra note 166 at 411-417 for an analysis of the Bill, its re-drafting and administrative discussions.
protect the free exercise of religion, as church and state must be separate. Despite this, during the nineteenth century, Congress was able to legislate for the Christianisation of Native Americans including teaching Christianity in public schools apparently in contravention of the establishment clause.\(^\text{174}\) It is therefore ironic that in the area of Native American religion cases the establishment clause has been used to thwart their free exercise.\(^\text{175}\) As in Canada,\(^\text{176}\) however, Congress has a special authority in the arena of federal-tribal relationships.\(^\text{177}\) It is a trust relationship which "provides Congress with the authority to develop exemptions and preferences for Indians that might otherwise be unconstitutional."\(^\text{178}\) Congress has relied on this fiduciary relationship to pass constitutionally valid laws to protect some aspects of Native American religious practices.\(^\text{179}\) Congress has also passed specific legislation to protect certain areas held sacred to Native Americans.\(^\text{180}\) Congress' fiduciary duty exemption from constitutional scrutiny does not extend to other government agencies. In *Bear Lodge Multiple Use*

---


\(^{175}\) In *Badoni* supra note 151 the Tenth Circuit court also considered the plaintiffs' request for government officials to issue rules to prevent the desecration of the Rainbow Bridge site. The court held that this would be in violation of the establishment clause.

\(^{176}\) *Guerin* supra note 32.

\(^{177}\) The federal government and Indian tribes have a trust relationship based on "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Morton v. Mancari*, 417 U.S. 535 at 551 (1974)


\(^{179}\) for example exemptions under the Endangered Species act for possessing Bald Eagle feathers for religious purposes as discussed previously (*supra* note 117), and the decriminalisation of peyote ingestion during religious ceremonies after the case of *Smith: AIRFA Amendment “Traditional Indian Religious Use of Peyote”* 42 U.S.C.A. §1996a (1994)

\(^{180}\) for example the *California Desert Protection Act* 16 U.S.C.A. § 410aaa notes that the Secretary of the Interior must, upon the request of an Indian tribe or Indian religious community, temporarily close areas to the general public to provide privacy for religious activities. The closure must affect the minimum amount of land for the minimum amount of time (s75(a)).
Association v. Babbitt\textsuperscript{181} the District Court of Wyoming held that a National Park Service’s ban on commercially guided tours of the Devil’s Tower National Monument during the June Summer solstice celebrations for the Cheyenne River Sioux was in violation of the establishment clause. If Congress rather than the National Park Service had made the rule, it could have been saved under the trust relationship.

4.2.7 The Future Protection of Native American Sacred Sites

Congress has not passed general sacred land statutes and there is no indication that Congress would consider such legislation. The Bill of Rights is not enough to protect the religious freedoms of Native Americans that are otherwise constitutionally guaranteed. Instead, Native Americans have to resort to lobbying Congress to gain incremental legislative protection. At this point in time, the tension between the establishment clause and the free exercise clause of the First Amendment will not allow Native Americans to seek protection of their sacred sites.

4.2.8 What can the United States teach Australia?

In a country that was founded on democratic liberal ideals, general constitutional guarantees such as those found in the First Amendment are not enough to protect the rights of Native Americans. Instead, the Bill of Rights is defined by a judiciary to whom the integration of the physical, cultural, legal and spiritual dimensions of Native American society is invisible. If Australia is contemplating a similar style of Bill of Rights, relying on generally worded protections will similarly not be adequate to protect Indigenous Australians’ spiritual connection to land. In fact, Australia already has a

\textsuperscript{181} 96 CV-063 (unreported - D. Wyo. 1996)
guarantee of religious freedom in s. 116 of the Constitution.\textsuperscript{182} In the recent case of \textit{Kruger and Bray v. Commonwealth}\textsuperscript{183} a group of Northern Territory Aborigines, who were removed from their families by the Protector of Aborigines in accordance with the \textit{Aboriginal Ordinance} 1918 (NT), claimed that the Ordinance effectively prohibited them from exercising their traditional spiritual practices. The High Court held that while s. 116 protects the free exercise of religion, a law will be unconstitutional only if its \textit{purpose} is to prohibit that free exercise.\textsuperscript{184} It is not enough that the \textit{effect} of a law is to prohibit free exercise.\textsuperscript{185} \textit{Kruger} helps to show that protecting religious practice will not be enough to protect Indigenous spiritual connection to land. The case also indicates that if Australia needs to look at a precedent, that gaze should be towards the specific guarantee in Canada's constitution for the recognition of Aboriginal rights. International law precedent will also serve as a guide to ensure specific protections of Indigenous rights.

### 4.3 International Law

The Indigenous peoples' rights movement is perhaps the "most significant" in current international human rights.\textsuperscript{186} International law has created a paradigm shift for recognising Indigenous peoples' connection to land in the countries that originally denied it. Historically there was no recognition of Indigenous peoples' rights in international

\footnotesize{\textsuperscript{182} s. 116 of the Australian Constitution reads: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."
\textsuperscript{183} (1997) 190 CLR 1, 146 ALR 163, 71 ALJR 991 (Aust. H.C.) [hereinafter \textit{Kruger} cited to CLR]
\textsuperscript{184} held by Toohey, Gaudron and Gummow JJ. Dawson and McHugh JJ. held that s116 did not constrain the Commonwealth's power in s. 122 to legislate for the territories, hence the \textit{Aboriginal Ordinance} did not need to be analysed in light of s. 116. Brennan C.J. held that the \textit{Aboriginal Ordinance} should be judged by the standards of its day and did not consider s. 116.
\textsuperscript{185} Toohey J noted that "It may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people of the Northern Territory...[b]ut I am unable to discern in the language of the Ordinance such a purpose." \textit{Kruger} supra note 183 at 86}
law. Europeans “discovered” new lands during the fourteenth to nineteenth century colonial period and reinforced ownership rights through the internationally recognised legal doctrine of “terra nullius”.\textsuperscript{187} The doctrine of “terra nullius” was not only applied to empty land but also to land where the Indigenous presence was perceived by the early Europeans to be so primitive that the Indigenous inhabitants needed to be looked after by the paternal, colonising state.\textsuperscript{188} Indigenous peoples were taken from their lands and attempts were made to assimilate them into the colonising society: those not considered fit for assimilation were sent to reserves, often far away from ancestral lands.

From a holistic point of view this system impoverishes Indigenous communities’ values. Therefore recognition of land rights worldwide will increase awareness and protection of Indigenous peoples’ cultural heritage as rights to land and protection of cultural heritage are inextricably linked:

> Interference with indigenous peoples’ land directly affects and damages our cultural heritage. This is a natural consequence of the special relationship that most indigenous societies have with the lands upon which we reside. Land is essential not just to gain a level of economic independence. It is also central to religious and social activity. In this regard the human right to have our cultural heritage recognised and protected is intertwined with our need to have the land ownership recognised and protected.\textsuperscript{189}

\textsuperscript{187} the international law doctrine of “discovery” as applied by European colonising states this millenium. See, for example, R. Williams Jr. “Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World”[1990] Duke L. J. 660 at 672-676.
\textsuperscript{188} “If the inhabitants of the territory concerned are an uncivilised people, deemed to be incapable of possessing a right of property and control, the conqueror may, in fact, choose to ignore their title, and proceed to occupy the land as though it were vacant.” C. Clyde \textit{International Law chiefly as Interpreted and Applied by the United States} (1945) as quoted in Williams supra note 3 at 675. See also \textit{In Re Southern Rhodesia supra}
\textsuperscript{189} M. Dodson “Human Rights and the Extinguishment of Native Title” in E. Johnston, M. Hinton and D. Rigney (Eds.) \textit{Indigenous Australians and the Law} (Sydney: Cavendish Publishing, 1997)at 159
As the twentieth century draws to a close, the doctrine of terra nullius has been eroded and with it the displacement of Indigenous peoples within their own countries. Two important cultural shifts have contributed to this change: the first international human rights, and the second, concern for the environment. This has been brought about in part by a first world shift that has focussed on the increasing importance of human rights as an international concern and Indigenous groups’ determination to utilise international human rights as a vehicle to further reclaim their land rights and thus their heritage.

This section will explore the interplay in international law between international environmentalism and human rights in the recognition of Indigenous rights to land. It will be shown that the international environmental movement has not fulfilled Indigenous ambitions toward land rights. Expansive interpretations of rights in international human rights, however, has been more useful, particularly in complaints brought under the International Covenant on Civil and Political Rights. Increasing awareness of Indigenous peoples’ rights in international law has seen a completed draft Declaration of the Rights of Indigenous Peoples. Regardless of whether this is adopted or not, it will be shown that Indigenous rights are accepted within the international community.

4.3.1 Indigenous Peoples’ Spiritual Connection to Land: Environmentalism’s Conflicting Views

There is a growing amount of ecological scholarship that emphasises the importance of Indigenous communities’ value systems in the ecological repair of the world.  

---

190 See for example the Western Sahara Case [1975] ICJR 12 and Mabo supra note 5.
191 See, for example, the Bruntland report and the Rio Declaration on the Environment: “[Indigenous peoples’] traditional life-styles … can offer modern societies many lessons in the management of resources in complex forest, mountain, and dryland ecosystems.” World Commission on Environment Development Our Common Future (Oxford: Oxford University Press, 1987) at 12. Also, Agenda 21, Chapter 26
Indigenous communities throughout the world point to their differing views of land and how it should be treated, with those of the industrialised west. When Indigenous people's rights are referred to, the special relationship that these groups have with their land cannot go unmentioned:

The indigenous relationship with the environment provided the basis for law, tradition, religion and all other aspects of life. Life and the creation are inter-linked as one, an alien concept to the superior political powers of modern nation-states. These are, in contrast, centred and based upon notions of hierarchy, alienation and power.192

Ecological scholarship examines western legal systems which impose a Lockean ideal of ownership of land which states that land is to be exploited and utilised to produce goods that can be used for commercial gain or agricultural advancement. Therefore it is difficult for these systems to appreciate fully different perceptions of land. With the rise of environmentalism, the importance of land conservation is deemed to be necessary for the whole planet's survival and so environmental protection at the local and international level has resulted. In a similar way, the western community is also coming to respect the indigenous connection to land through spirituality: the concept of the earth as "Mother".193 To many Indigenous peoples, land is not a commodity to be owned but an important part of the ecosystem that needs to be respected, revered and looked after. Environmentalists, however, situate Indigenous peoples in a Utopian framework, objectified outside or alongside the solution to environmental issues rather than a part of discussing the solutions. The use of Indigenous groups by environmentalists is primarily

192 "Recognising and Strengthening the Role of Indigenous People and Their Communities" of the "Rio Declaration on the Environment" UN Doc A/CONF.151/26 (Vol. 3), at 16, Annex 2 (1992)
based on sentimental values of what Europe has lost.\textsuperscript{194} Situating Indigenous peoples in this way denies them the voice of equality in international relations and recognition of their heritage to land.

International environmentalism has helped to articulate the profound nature of Indigenous peoples’ connection to land, but it has not assisted in securing land rights for Indigenous groups. It is not enough to agree with Indigenous views on land when it aligns with conservation rhetoric.\textsuperscript{195} Doing so is “intellectual plundering” that only romanticises indigenous reality with disregard for the effect of centuries of colonial oppression.\textsuperscript{196} Autonomy of land management decisions is important for Indigenous peoples and acknowledgement of this in the international arena will be useful politically for domestic recognition of Indigenous rights. As international environmentalism has been ineffective in giving full recognition to Indigenous land rights, Indigenous groups have pursued their human rights in the international community which has lead to further protection and recognition of their rights in international law.

\textsuperscript{194} This objectifying of indigenous peoples as “noble savages” with a place in the ecosystem is problematic in many respects: “indigenous peoples are represented in the literature as having these characteristics because the characteristics are needed to support a polemic against modernity. The critical-utopian distance of the noble primitive is necessary to the polemic and in the contemporary era, indigenous peoples are understood as noble primitives.” C. Tennant “Indigenous Peoples, International Institutions and the International Legal Literature from 1945 - 1993” (1994) 16 Hum. Rts Q. 1 at 20.

\textsuperscript{195} See, for example, discussion of aspects of Native Americans and Australian Aborigines in J. Baird Callicott \textit{Earth's Insights: A Multicultural Survey of Ecological Ethics from the Mediterranean Basin to the Australian Outback} (Berkeley: University of California Press, 1994) at 119-132 and 172-184

\textsuperscript{196} A.L. Booth and H.M. Jacobs “Ties That Bind: Native American Beliefs as a Foundation for Environmental Consciousness” (1990) 12 Env. Ethics 27 at 42
4.3.2 The Changing Nature of International Law

International law is not only a set of rules but it is an institution. Thus one cannot just consult various written documents to understand what is accepted as international law. It is more than just a regulation of how states can act, it includes customary behaviour and it has a normative role in the relationship between states and the action of individual states.

How international law is developed is difficult to pinpoint. Sources of international law include States but also more than that. Beyond states there are the individual actors who decide policy for states to follow, there are many internationally respected jurists, non-government organisations and decisions of the International Court of Justice where international law is created. Changes to international law are due to the purposive action of governments and other relevant actors.

Hence, international law is a dynamic and organic process. Schachter has developed four perspectives on the development of international law to assist explanation of the dynamic process. The first is that the development of international law is caused by changes in human interests. The “friction” between human needs and the environment is instrumental in necessitating rules by which to live. The second is related to the first, namely that laws develop through the need to solve problems. There must be some standards utilised so that states and the general population can understand what is expected of them. Hence changes in law are sometimes specific responses to particular

acts. Friction between human beings give rise to conflicts and it is the settling of those conflicts that enable legal standards to be set. The third is a combination of the first two, that the development of the structures of international society over time also creates legal norms. Schachter notes as an example that the change from feudalism to capitalism brought with it changing expectations in the relationships between states. Hence historical changes to norms also affects the development of international law. The fourth perspective is that of power. Schachter notes that power is not just the “Realpolitik” of international law, it is a dimension of the law-enforcing structures in international politics. Whether a state decides to conform to international obligations is a decision based on power.

Schachter’s perspectives underline the need for approaches to international law that are different to a standard positivist view. He notes that the perspectives “enjoin us to look behind rules and principles to the social friction that generates an awareness of interests, national and human.”200 Hence international law is developed through a constantly evolving process, based on a system of principles, which by customary use by States and other international bodies are asserted as law. Treaties and other international documents, however, are a significant part of international law and also show consolidation of what may be regarded to be customary law between States. Hence although documentary formulation of accepted behaviour may not exist, certain behaviour may be prescribed within international law through the “institutional” aspect of international law.

198 Ibid. at 745 - 808
199 Ibid. at 749-755
200 Ibid. at 755
4.3.3 The Historical Development of Indigenous Peoples' Rights at International Law

Schachter’s formulation of international law as a dynamic institution can be seen in the advance of the recognition of Indigenous peoples’ rights. Traditionally, in the period of colonialism Indigenous peoples were “conquered or converted to the beliefs of the more ‘advanced’ society.” In some countries, the Indigenous peoples were considered so primitive that in keeping with social Darwinism, the indigenous races would eventually die out. Policies were developed by these countries to assist with this process, for example the assimilation procedure of missions in Australia and residential schools in Canada. However, by the 1960s Indigenous peoples were not dying out and in some countries their birthrates were increasing.

As the colonial age dissipated, changing attitudes towards Indigenous peoples became increasingly evident through international conventions, for example, in the International Labour Organisation’s (“the ILO”) Convention Number 107. Convention 107 was passed to address issues of Indigenous peoples within colonised countries in a way that promoted integration and non-discrimination, by an assertion of formal equality between all citizens. Although couched in colonialist terms, ILO Convention 107 showed that there was some movement to recognise the place of Indigenous peoples in society. Later

---

202 See, e.g. describing various policies towards the Aboriginal population in Australia A. P. Elkin The Australian Aborigines (Sydney: Angus and Robertson, 1979) at 366.
203 Human Rights and Equal Opportunity Commission Bringing Them Home: Report into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Canberra: AGPS, 1997)
205 of 1957: “Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.”
206 Hannum supra note 201 at 653
the ILO amended its stance with Convention Number 169,\textsuperscript{207} which was adopted in 1989. Currently it is the only treaty in the international arena that specifically refers to the rights of indigenous peoples to their land and resources.

Other United Nations and international documents arguably cover rights of indigenous concerns in respect of land although Indigenous peoples are not expressly referred to. For example Article 17 of the Universal Declaration of Human Rights, 1948,\textsuperscript{208} refers to the right to property, whether individually or collectively. In other areas of the international civil society the concerns of Indigenous peoples are met through such conventions as the International Convention on the Elimination of All Forms of Racial Discrimination adopted in 1965.\textsuperscript{209} Similarly the Conventions of 1966, the International Covenant of Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) enumerate various rights that are applicable to all people internationally. In relation to the ICCPR an expansive interpretation of the articles, in particular Article 27, has enabled Indigenous groups to assert their rights in the international forum.

4.3.4 Article 27 of the ICCPR

History shows that Article 27 of the ICCPR was not proposed for the protection of Indigenous peoples, but was intended for the protection of those minorities in the European states that wanted to remain true to their different ethnic roots. European colonial states that depended on immigration for populating vast frontier areas were more

\textsuperscript{207} of 1989: "Convention Concerning Indigenous and Tribal Peoples in Independent Countries."

\textsuperscript{208} Universal Declaration of Human Rights G.A. Res. 217A, UN Doc A/810, 1948

intent on assimilating newcomers to create homogeneity within the colonies. Australia in the 1950s, for example, had a strict immigration policy designed to populate its interior with European immigrants as further acts of possession by a European power of a land threatened by its geographical proximity to Asia. In this push to populate its expanse, the Australian Aborigines were viewed as neither immigrants nor true inhabitants. They were somewhere in between, requiring assimilation into the new society. They were considered to have no separate or competing culture of their own, so primitive that they had only reached the level of "food-gatherers". This attitude towards Indigenous peoples as "ignoble savages" was prevalent in what Tennant refers to as the "ILO Period" and persisted in international and domestic law through the 1970s. During the United Nations discussions of Article 27, which articulated protection of minorities' rights, the Australian representative indicated that special rights accruing to the Indigenous population was not on the government's agenda. Consequently the Australian Aborigines were not defined as being a "minority". Hence, such a group could not be viewed in the same light as the new immigrants:

Besides the immigrant population, Australia had a small group of Aborigines whose way of life was still very primitive but who could not be considered a 'minority' within the meaning given to that term by the Commission on Human Rights. The policy of the Australian Government was to encourage their progressive assimilation into the normal life of the nation, but without compulsion, and only as and when they themselves desired to associate themselves with the way of life common to the majority of Australians.

---

210 Mr. Whitlam, Representative of Australia, at the 9th Session of the Commission on Human Rights of the United Nations Economic and Social Council, 369th meeting, Geneva, Thursday 30 April 1953. UN Doc E/CN.4/SR.369 at p11
211 Tennant supra note 194 at 12 ff
212 1945-1958. Ibid.
Hence it is seen from this example of discussions in the General Assembly that the term “minorities” seemed to refer specifically to the ethnic minorities of Europe who, when displaced, became the group of new immigrants in other parts of the world.

Regardless of these objections by the “newer” countries, the United Nations adopted the ICCPR in 1966. The final wording of Article 27 reflected the queries of the member States, the division between the “old” and the “new”, by leaving the determination of minorities to the member State:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.\(^\text{214}\)

Minorities in Article 27 were meant to include only those minorities that constituted “separate and distinct groups, well defined and long-established on the territory of a State.”\(^\text{215}\) Focussing on minorities appears to deny cultural rights to a group that may be in a population majority in a particular area or region, as the Inuit in northern Canada or the Pitjantjatjara in central Australia.\(^\text{216}\) Article 27 also imposes a negative responsibility upon the state, that the minorities “shall not be denied the right” to exercise their own culture, religion and language. This is the only Article that is negatively worded in the ICCPR and was drafted in this way to appease those states concerned with “awakening”

---


\(^{215}\) M. Bossuyt Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights (Dordrecht, Neth.: Martinus Nijhoff, 1987) at 494

\(^{216}\) The Human Rights Committee, however, has determined that the term “minorities” in Article 27 refers to minorities within States, not regions. Hence in the case of Ballantine the English-speaking minority in Quebec who were claiming that the French language laws of Quebec violated their rights under Article 27 could not be considered a minority under Article 27, as English speakers are a linguistic majority in Canada. Ballantine, Davidson, McIntyre v. Canada Comm. Nos. 359/1989 and 385/1989, UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993)
or “stimulating” the minority consciousness.\(^{217}\) Thus on an initial reading the Article does not require any affirmative action by the state to protect minorities\(^{218}\) but it can also be read to prohibit any effort by a state to assimilate a minority group by interfering with the minority’s culture, religion or language.

As a result Article 27 was developed to recognise the specific rights of minority groups in European countries or immigrant groups in colonial countries. Regardless of this, the Human Rights Committee has defined Article 27 to include Indigenous peoples as minorities when it has dealt with applications under the Optional Protocol.\(^{219}\) The Optional Protocol, which came into force in 1976, allows for individual petitions against member States for violations of the ICCPR by the State. Through decisions on complaints brought by Indigenous people, the Human Rights Committee has interpreted the ICCPR expansively to infer protection of specific indigenous rights.\(^{220}\) This is

\(^{217}\) M. Nowak “Article 27: Protection of Minorities” in *U.N. Covenant on Civil and Political Rights: ICCPR Commentary* (Germany, N.P. Engel, 1993) at 500. The wording of the Article was originally “The State shall ensure to national minorities the right to use their native tongue and to possess their national schools, libraries, museums and other cultural and educational institutions” which was rejected by the General Assembly in the 9th session. (E/CN.4/SR.371, 1953). In particular, countries that relied on immigration to boost national populations expected newcomers to become part of the “national fabric” and they emphasised that the provisions of the Article “should not be invoked to justify attempts which might undermine the national unity of any state.” Bossuyt *supra* note 215 at 496.

\(^{218}\) This is open to debate since the passing of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992, UN Doc A/47/49 Volume I (1992) at 210 which refers to Article 27 of the ICCPR in the preamble. See generally Alexander B. Blades “Article 27 of the ICCPR: A Case Study on Implementation in New Zealand” [1994] 1 CNLR 1. Blades asserts that Article 27 should be interpreted as imposing a positive act on the member state and shows how this interpretation would change the current position of the Treaty of Waitangi in New Zealand.


\(^{220}\) Article 27 has been interpreted by the Human Rights Committee to expose infringements by home states of international law. For example *Lovelace v Canada* Comm No 24/1977, UN Doc CCPR/C/OP/1 (1984) (re status of married first nations women in respect of membership of their Indian band); *Kitok v Sweden* (1985) Comm No 197, (1988) UN Doc A/43/40 (re rights of Sami to reindeer herding); and *Ominyak and the Lubicon Lake Band v Canada* (1984) Comm No 17, (1990) 11 *Human Rights Law Journal* 305 (re threatened way of life from increasing industrialisation). Other Articles of the ICCPR have also been interpreted by the Human Rights Committee to provide protection to indigenous groups, for example the recent case of *Hopu and Bessert v. France* Comm. No. 549/1993 (1997), UN Doc. CCPR/C/60/D/549/1993, where the Human Rights Committee held that protection of sacred burial grounds
illustrative of the dynamic process of international law through conflicts and resolutions as noted previously by Schachter.

It is clear, however, from the language of the Optional Protocol that its use is limited to individuals. It has been argued that the reference to “in community with the other members of their group” in Article 27 infers that Indigenous groups are protected, although to assert this Indigenous groups have to rely on the Optional Protocol which only refers to communications brought by “individuals”. To bring an action as a communal group against a State, a group would have to have the standing of a State at international law, which is not the case for Indigenous groups. The reference to “minorities” in Article 27 and “peoples” in Article 1 of the ICCPR clearly refers to groups of different status and so makes it difficult for an Indigenous group to make a communal petition using the ICCPR as it currently stands. The Human Rights Committee has noted that trying to assert a claim of sovereignty under article 27 of the ICCPR by a group will not be tolerated under the Optional Protocol.

Regardless of the apparent lack of protection in the ICCPR for Indigenous groups, the Human Rights Committee has nevertheless been somewhat liberal in deciding what was sanctioned under Article 17 of the ICCPR on the basis of privacy and protection of family relationships.

---

221 Nowak supra note 217 at 497-499
222 Which says in part “All peoples have the right of self-determination”. Also stated in Article 1 of the ICESCR
223 the Lubicon Lake Band case (supra note 208) included a plea to a right of the Lubicon Lake Band to self-determination, denied to them by Canada in contravention of Article 1 of the ICCPR. The Human Rights Committee, however, dealt with the communication in respect of Article 27 and finding a violation did not consider the remainder of the application.
224 “The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party.” General Comment adopted by the Human Rights Committee at the 50th Session on 6 April 1994, UN Doc CCPR/C/21/Rev1/Add5 at 2.
Article 27 protects. In the case of Lovelace\textsuperscript{225} the Human Rights Committee was instrumental in coercing Canada to rectify the sex discrimination inherent in the application of the Indian Act, even though the Committee did not make a finding regarding sex discrimination, per se. By expansively applying Article 27 the Human Rights Committee found that Canada had violated the ICCPR by denying Sandra Lovelace the right to live with her Indian band of birth, thus denying her rights from belonging to that particular “minority” and enjoying its culture, religion and language. The effect of the decision, however, was an illustration of the sexist terms of s.12(1)(b) of the Indian Act of Canada which effectively denied Indian status to Indian women who married non-Indian men whereas Indian men did not lose their status when they married non-Indian women. The Human Rights Committee’s decisions have upheld the “cultural integrity norm”\textsuperscript{226} and have found ways of protecting more than freedom of religion or language:

\begin{quote}
Culture is not limited to internalised institutions, structures or practices related to maintaining the historic beliefs, views or attitudes of an ethnic minority, in particular, through literature and education, but extend to ‘social and economic activities’ which are ‘part of the culture’.\textsuperscript{227}
\end{quote}

It is possible, arguably, to use Article 27 for rights to land, especially if the spiritual connection to land can be expressed in a way that shows it is integral to indigenous culture. The Human Rights Committee in their General Comment in relation to Article 27 has reinforced this: “one or other aspect of the rights of individuals protected under [the protection of culture in Article 27] may consist in a way of life which is closely

\textsuperscript{226} Dominic McGoldrick “Canadian Indians, Cultural Rights and the Human Rights Committee” (1991) 40 Int. & Comp. L. Q. 658 at 665
associated with territory and use of its resources.”

For many Indigenous groups, however, land rights are collective rights and, as earlier stated, the process for asserting collective rights as a non-State group is not as yet possible under the Optional Protocol to the ICCPR. Arguing spiritual connection to land on a cultural basis under the ICCPR has not, as yet, been attempted but in the Länsman cases, it has been accepted that rights to land are protected if using the land is a typical aspect of the particular culture.

4.3.5 Draft Declaration of the Rights of Indigenous Peoples

The emergence of Indigenous peoples as subjects in international law can be seen in the report by special rapporteur José R. Martínez Cobo. Cobo was requested in 1971 to study and report on the “problem of discrimination against indigenous populations.” His work was delivered in its final five-volume form in 1986. It was the first such work undertaken by the United Nations and the findings made by Cobo helped to establish the Working Group on Indigenous Populations, a subgroup of the

---

228 Paragraph 3.2 of the General Comment adopted by the Human Rights Committee at the 50th Session on 6 April 1994, UN Doc CCPR/C/21/Rev1/Add5
229 see Buchanan supra note 186 for a discussion on current human rights protection of individual rights unable to enjoy collective rights.
230 although the dissenting opinion of T. Buergenthal et al in Hopu & Bessert v. France supra note 208 suggests that Article 27 is wide enough to protect an indigenous group’s sacred burial ground. It was not accepted in Hopu as France was perceived by the Human Rights Committee to have a reservation on Article 27.
232 In both Länsman cases the Human Rights Committee established the test for determining a violation of Article 27 in relation to land. For a State to avert an Article 27 violation in implementing a land use decision that may infringe on an Indigenous group’s enjoyment of its culture, the group concerned has a right to be consulted. The Indigenous group must have some attachment to the land through enjoying a typical aspect of their culture, not necessarily a traditional aspect. In the Länsman cases, the cultural practice was reindeer herding. Even though the herding did not provide economic sustainability for the Sami tribe, it nevertheless formed a part of their culture that under Article 27 they had a right to enjoy.
Subcommission on Prevention of Discrimination and Protection of Minorities. In particular Cobo noted in the report:

It must be understood that, for indigenous populations, land does not represent simply a possession of means of production. It is not a commodity that can be appropriated, but a physical element that must be enjoyed freely. 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.  

The report reflected the increase in recognition of the special place of Indigenous peoples in their home countries. In Canada, for example, the Aboriginal rights of the First Nations, Inuit and Métis peoples were recognised as constitutional rights in the Constitution Act of 1982. Although indigenous title to land was not recognised in Australia until 1992, land rights were recognised in the Northern Territory in 1976 and 1984 saw the passing of legislation that aimed to protect Aboriginal cultural heritage. Also in 1986 a major report by the Australian Law Reform Commission on Aboriginal Customary Law was completed which was a culmination of over a decade of work by the Commissioners on how the Australian legal system could incorporate measures to protect Aboriginal customary law practice. During the 1970s and 1980s preceding the Mabo decision, these activities showed the increasing awareness of Indigenous concerns in Australia.

236 Cobo report supra note 234 paragraph 509
237 Constitution Act supra note 1
238 Mabo supra note 5.
239 Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)
In 1982 the United Nations Working Group on Indigenous Populations commenced its annual meetings in Geneva.\textsuperscript{241} The meetings were originally cast to discuss Cobo’s report further and to establish standards for the United Nations. Instead, it became a forum for Indigenous voices to be heard on an international stage and a Declaration of the Rights of Indigenous peoples was considered its ultimate aim. The United Nations Working Group, under its Chair Erica-Irene Daes, allowed non-members of the United Nations to participate in the meetings. This is an exceptional practice not followed in other United Nations bodies where only member States can participate and certain groups may be invited to observe and speak, but not necessarily participate.\textsuperscript{242} The Working Group’s annual meetings became a place for Indigenous peoples from around the world to express their concerns. Representation of Indigenous groups at the Working Group ensured that Indigenous concerns were met in the Draft Declaration.

It was also during this time that the International Labour Organisation adopted Convention No. 169 that went much further than its previous Convention concerning Indigenous peoples. Only in a global environment of concern for the rights of Indigenous peoples could Convention No 169 be adopted. It is testament to the increasing awareness in international law of Indigenous peoples as a significant group requiring special recognition of their own.

\textsuperscript{241} for a summary of the early meetings of the Working Group see Barsh \textit{supra} note 233

\textsuperscript{242} "The Working Group on Indigenous Populations is doing on a small scale for indigenous and tribal peoples what the General Assembly once did for the third world: which is to provide a forum for the world’s powerless to voice their vision of identity and destiny in a setting of formal equality with others materially for more powerful than they." M. Cech Lam "Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination" (1992) 25 Cornell Int. L. J. 603 at 619
4.3.6 The Current Status of Indigenous Rights in International Law

International documents such as conventions and treaties are a reflection of the *opinio juris* in international law. The discussions and planning that go into adopting any international document is large. Hence, documents can be seen as evidence of customary international law. That is not to say that a ratifying country does not have to consider the contents of a document. On the contrary, states are bound to implement international treaties and conventions into domestic law. How this is done differs from state to state. The United States, for example, has a self-executing doctrine for any international document it ratifies without the need for domestic legislation.\(^{243}\) Regardless of this mechanism, states similar to the United States maintain reservations on specific articles. Other countries like Canada and Australia must implement the international document into its own law, which takes time and the national government can be selective in what is implemented.\(^{244}\)

Regardless, the doctrines agreed to by international bodies may also be crystallised in customary international law. These doctrines embody what the international community considers to be legally enforceable and are sometimes utilised by municipal courts. Hence in the Australian case of *Mabo*, where the doctrine of terra nullius in respect of Australia’s secession to the Crown of the United Kingdom was found to be invalid, the

---


\(^{244}\) Australia, for example, has made only a limited attempt to incorporate the ICCPR into domestic law with the passing of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth). There have been attempts at introducing a Bill of Rights into Australia but these attempts have fizzled in the rhetoric of federal versus state powers. See C. Caleo "Implications of Australia’s Accession to the First Optional Protocol to the ICCPR" (1993) 4 Pub. L. Rev. 175.
court referred to international legal principles to support its argument.\textsuperscript{245} Anaya asserts that the passing of ILO Convention No 169 and the increase in awareness of Indigenous people’s concerns in the international community has lead to shifting existing normative values in the international community:

It is now evident that states and other relevant actors have reached a certain new common ground about minimum standards that should govern behavior toward Indigenous peoples, and it is also evident that the standards are already in fact guiding behavior. Under modern theory, such a controlling consensus, following as it does from widely shared values of human dignity, constitutes customary international law.\textsuperscript{246}

Regardless of whether a state enforces an international document, there is a growing sense that any discussion of Indigenous peoples’ rights in the international arena will still raise the consciousness of the international community. Respect for Indigenous peoples’ rights will therefore emerge over time as international norms and will therefore be able to be enforced as customary international law.\textsuperscript{247} For Australian Aborigines in particular, the recognition of Indigenous rights in the international arena is important as challenges to the \textit{de jure} sovereignty of Australia will not be considered in a municipal court.\textsuperscript{248}

\textsuperscript{245} "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." \textit{Mabo supra} note 5 per Brennan J at 42 where Brennan J relied on the general principles of the international community to show that Australia was indeed inhabited when the First Fleet arrived in 1788. Also \textit{Deitrich v R} (1992) 177 CLR 292 at 321 and 360 per Brennan and Toohey JJ.

\textsuperscript{246} S. James Anaya \textit{Indigenous Peoples in International Law} (Oxford University Press, New York, 1996) at 50

\textsuperscript{247} For example the High Court of Australia is more willing to refer to international instruments in the development of human rights in the common law: \textit{Minister of State for Immigration and Ethnic Affairs v Ah Minh Teoh} (1995) 183 CLR 273.

\textsuperscript{248} This was the issue in \textit{Coe v Cth} (1979) 24 A LR 118 which the High Court rejected. Even after \textit{Mabo (No 2)}, full recognition of Aboriginal rights will not come from within Australia: "[t]he prevailing opinion still appears to be that any concessions to Aboriginal claims are a matter of benevolent charity, however, rather than rights governed by the international human rights instruments Australia has already ratified." R. Barsh "Indigenous Policy in Australia and North America" in B. Hocking, ed., \textit{International Law and Aboriginal Human Rights} (Law Book Co, Sydney, 1988) at 99.
4.3.7 Indigenous Rights in International Law

The General Assembly has not as yet voted on the Draft Declaration and there is no indication that the Draft Declaration will be accepted. Its effect is being felt regardless of whether the General Assembly adopts the Declaration, for example the Sub-Commission on Prevention of Discrimination and Protection of Minorities is continuing to report on practical measures of improving Indigenous rights.249 Presently the only international treaty that exists which specifically refers to Indigenous peoples' rights is the International Labour Organisation's Convention No 169. In relation to land, the Convention notes in Article 13:

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

The Article gives Governments authority to legitimise culture and spiritual values. However, the Convention has been criticised for not constraining governments and providing only goal-setting250 so the Government maintains a paternalistic position of power over Indigenous peoples by refusing to acknowledge Indigenous spirituality if it conflicts with economic incentives. This can be contrasted to the Working Group's Draft Declaration, which in Article 25 of its latest draft states:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have

250 Anaya supra note 226 at 7-8. This is a pessimistic view as Article 14 of ILO Convention 169 notes that “Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.” Anaya would argue that Article 14 has not, so far, been effective in its aims.
traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.\textsuperscript{251}

There is a great difference between the draft Article 25 and the ILO Convention No 169’s article 13 which has been ratified by an international body and it remains to be seen whether the General Assembly will adopt the Draft Declaration. Recent discussions of the Draft Declaration in the General Assembly suggests that changes will have to be made before it will be adopted. In the meantime the Indigenous rights movement is well established which will only heighten awareness in the international community and, by corollary, international law.

\textbf{4.4 Conclusion}

In Canada, since the decision in \textit{Calder} the legal recognition of Aboriginal rights has been increasing. After the disastrous political fallout from the 1969 White Paper on Indian Policy, the Canadian government learned that the Aboriginal peoples of Canada cannot be assimilated into mainstream Canadian culture.\textsuperscript{252} Political pressure from Aboriginal lobby groups saw Aboriginal rights enshrined in the Canadian Constitution. One view of these events shows that the Constitutional recognition of Aboriginal rights was a compromise from a Government unwilling to entertain notions of Aboriginal sovereignty. Defining Aboriginal rights through the Constitution has demonstrated the

\begin{itemize}
\item \textsuperscript{251} From the Draft Declaration as agreed by members of the Working Group at its 11\textsuperscript{th} session in Geneva, July 1993. UN Doc E/CN.4/Sub.2/1994/56 at 105
\item \textsuperscript{252} The White Paper assisted in mobilising Aboriginal groups into political action. The Paper suggested repealing the \textit{Indian Act} and integrating (assimilating) fully all Aboriginal peoples into Canada. An initiative of the Trudeau Government, the Paper’s suggestions was seen by the Government to rid Canadian society of its inherent racism. The opposite would be the effect as Canadian Aborigines would be denied their distinctive culture and place in Canadian society. See Introduction to M Boilt and J. Anthony Long \textit{The Quest for Justice: Aboriginal Peoples and Aboriginal Rights} (Toronto: University of Toronto Press, 1985)
\end{itemize}
legal systems’ assumptions of the supremacy of the Canadian state over Aboriginal peoples.

The Constitution is an organic document that is open to interpretations based on sociological processes and not just literal interpretations. We have seen this in other cases where constitutional interpretations have uncovered protections not literally in the text.\footnote{See for example \textit{Egan and Nesbitt v. Canada} [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 where “sexual orientation” was held to be an analogous ground to the other heads of discrimination found in s15(1) of the Charter.} However, in the Canadian cases of Aboriginal claims to title to land we can see that the prevailing sociological values are still extremely colonial in nature. Placing protection of Aboriginal rights in the Constitution is an excellent way to start, however, as shown in a systematic analysis of the Canadian judgments the interpretations of those constitutional rights are subject to prevailing popular definitions.

General protections of individual rights as in the United States Constitution are not enough to protect the importance of land for Native Americans. The Indigenous inhabitants of the United States require a specific form of protection and as the jurisprudential sequence has shown in this chapter, general protection for the free exercise of religion is not enough. This allows judicial definitions to determine what protection will be afforded and religions outside the judeo-christian norm in America are invisible in such definitions. Australia should consider these issues when contemplating a Bill of Rights if it sees this as the only measure to protect Indigenous rights.

The international arena is a dynamic forum for debate and broadening sociological values about Indigenous rights. The gains made by non-State groups in drafting a Declaration of
the Rights of Indigenous peoples is testament to the changes that have occurred in perception in the international arena. The level of customary international law recognition of Indigenous rights and the avenue of appeal to the Human Rights Committee should warn Australia against trying to limit any gains that have already been made by Australian Indigenous groups. If the Draft Declaration is adopted, through the external affairs power of the Constitution, the Australian parliament under its current guise can easily implement such a document into domestic laws. To further protect such legislation further, a constitutional guarantee such as Canada’s s. 35(1) would solidify recognition of Indigenous rights in Australian law.

---

254 s. 51(xxix) of the Australian Constitution.
Chapter 5: Constitutionalising Indigenous Land Rights

In this concluding chapter, I will open with a summary of the current political and legal situation in Australia as noted in Chapter 3, then I will examine the various levels of law found in a common law country such as Australia. I will examine the “weakest” level of law (judge-made or common law) to the “strongest” level (entrenched constitutional protection) and gauge the best method of protecting Aboriginal spiritual connection to land. As the common law system is historically based on English feudal law and Christianity, it will be useful to see how such a regime can recognise and give credence to different views or beliefs. This system of law has been applied in Australia without thought as to how a basically European law can be applied to a completely different culture. The bigger issue is how western common law systems can accommodate cultural differences.

As far as Indigenous beliefs go, the legal system, based on the application of English common law, has not been able to acknowledge Aboriginal difference. My aim, therefore, is to illustrate how the cultural difference between Indigenous and non-indigenous Australians can be bridged. Accommodating difference in a pluralistic society is, I believe, a reasonable end as contemporary western beliefs concentrate on the importance of democracy and general tenets of equality.

5.1 Cultural Mismatches Noted so far in Australia

The Indigenous peoples of Australia have had no real recognition of the interrelation of their spirituality and economic livelihood since the claiming of British sovereignty over Australia. Cursory statutory recognition through the implementation of sacred sites and
Aboriginal heritage protection legislation, while admirable in cause, has had little effect. The largest advance in this area was the recognition of inherent property rights of Australia’s Indigenous peoples to land in the Mabo¹ case in 1992. This was further solidified in the Wik² case of 1996. But these gains are being eroded and Aboriginal land rights have become intertwined with the current political climate, so much so that for most of 1997 and 1998 it appeared that a federal election based on race was inevitable.³ The election scare has been averted for now: the compromise being that legislation reducing the land rights gains made through the Mabo and Wik cases was pushed through parliament.

In Chapter 3 we saw how statutory provisions in Australia geared towards protecting and respecting indigenous heritage have not been effective in protecting Aboriginal sacred land. Through judicial dissection of administrative decisions made under such statutory regimes as the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), the protection that has been afforded has been minimal. Governments wanting to show their support of indigenous concerns but succumbing to their major constituencies of mining, farming and other industries, have only paid lip-service to protecting indigenous heritage instituting statutes that are near impossible to uphold.

Despite the problems with heritage protection schemes, there have been some outstanding successes of other statutory regimes, notably under the Land Rights (Northern Territory)
Act 1976 (Cth). Uluru (Ayers Rock) and the Kakadu region of the Northern Territory stand as examples of how Aboriginal ownership of traditional and sacred land can be fulfilled. As previously noted, these gains are tempered when it is considered that tourism is a major income earner for the far north of Australia and areas such as Uluru are situated in the Australian psyche as definitive Australian landmarks.

We saw in Chapter 3 how other areas of Australia that are not so popularly viewed will not be supported as much. Hindmarsh (Kumurangk) Island, just south of Adelaide at the mouth of the Murray River, does not hold such a high place in the average Australian’s esteem. As such, it stands as a striking example of how statutory heritage protection schemes are ineffective in affording real protection to areas of spiritual significance to Australia’s Indigenous inhabitants. The Hindmarsh (Kumurangk) Island matter also had added to it the problems of Australians’ non-acceptance of women’s spirituality as being real. Deconstructing the outcome, it is plain that the mere fact that women were asserting a knowledge that was not shared with men appeared preposterous to a society used to patriarchal world religions where men hold positions of power. The Ngarrindjeri women of Hindmarsh who claimed the spiritual significance of the area did not really have a chance in a legal system that views disclosure of information as the only way of ensuring real justice. The Hindmarsh (Kumarangk) Island matter, I hope, will be the low water mark of Australia’s legal system trying to contemplate Indigenous spiritual connection to land.

*Editorial “Race, land and politics” The Sydney Morning Herald 15 November 1997 at 42*
When the High Court negated a constitutional challenge to legislation passed to restrict the Ngarrindjeri women’s legal avenues for heritage protection, the Hindmarsh (Kumarangk) Island matter reached the end of the line in the Australian legal system. The case met its Australian end at the time that the gains made in the *Mabo* and *Wik* cases were being discussed in federal parliament and it looked as though Aboriginal land rights were going to be whittled away. Prime Minister Howard’s Ten Point Plan to “turn back the pendulum” on Aboriginal land rights has now finally been passed after the longest parliamentary debate in Australia’s federal history. Now, it is difficult for Aboriginal traditional owners to make a claim for their land if the land is subject to other property interests such as pastoral leases. This is despite the fact that since 1788 thousands of Aborigines have been dispossessed of their lands with no compensation so that non-indigenous landholders could secure their title to the land in the first place. By passing the *Native Title Bill* federal parliament has effectively condoned more than 200 years of inhumane treatment of Australia’s original inhabitants and their descendents. The horrors of dispossession that non-indigenous Australian’s have metered out to Indigenous Australians in our brief colonial and federal history has been brushed aside by the passing of a Bill that further promotes the rights of the dispossessors over the dispossessed. Under the previous *Native Title Act* the inclusion of Aboriginal negotiators in discussions over the fate of traditional and sacred land was important for going some of the way to redress this imbalance. That right, however, has now been whittled away with the passing of the *Native Title Bill*.

---


Statutory provisions other than the Native Title Act geared towards the protection of Aboriginal sacred sites and land have similarly been at the mercy of politics. Australian constitutional protections originally believed to be wide enough to encompass Aboriginal aspirations for recognition of rights to spiritual land have been ineffective in protecting sacred land. What are the solutions?

5.2 Finding Flexibility in the Common Law Through Precedent

The Mabo case found that a common law right to Aboriginal title to land had survived the acquisition of sovereignty in Australia and so it is a reminder as to how flexible the common law can be. Are there any other dormant common law rights “sleeping” until a definitive case helps the High Court bring those rights to the surface? Here I examine two possible areas: title by possession and title by custom. I will show that instead of assisting in finding Aboriginal rights to land, the common law has been misapplied and has helped to keep Aboriginal rights low on the legal agenda.

5.2.1 Possession as a Basis for Title

Possession as a basis for common law title to property is evidenced by occupation. Blackstone noted that

occupancy is the thing by which the title was in fact originally gained; every man [sic] seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else... Property [was] thus originally acquired by the first taker.7

---

6 for example s51(xxvi) long thought to give federal parliament power to legislate only for the benefit of Aborigines was not enough to protect the Aboriginal and Torres Strait Islander Heritage Protection Act (Cth) 1984 from partial repeal in Kartinyeri supra note 4; and free exercise of religion guaranteed by s16 of the Constitution was ineffective in arguing against the Northern Territory ordinances that allowed the government to remove Aboriginal children from their families and land: Kruger v. Commonwealth (1997) 190 CLR 1, 146 ALR 163, 71 ALJR 991

To prove that one owns property in common law, occupation is the first hurdle that must be shown. Applying this to Australia, the prior occupation of the land by the Indigenous inhabitants should have allowed possessory title to the Aborigines. But, as to lands in distant colonies, a different view was taken. Again, I refer to Blackstone whose *Commentaries* provide a succinct summary of English law at the time of Australia’s initial colonisation:

if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force... But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.8

Since, in fact, Australia was inhabited the customary Aboriginal law in relation to land should have been recognised by the incoming English colonisers until expressly modified or denied by statute. Or, the non-Christian original inhabitants of Australia were considered “infidels” so English law would have been adopted outright. If that was the case, then we are back to recognition of the occupancy of Aboriginal tribes as a basis for possessory title. History shows that Blackstone’s principles were not applied in this way.

Kent McNeil, in his treatise on common law Aboriginal title,9 analyses how the common law has been misapplied in jurisdictions where Indigenous rights to land should have been a foregone conclusion following common law principles of property law. In the

---

8 W. Blackstone *Commentaries on the Laws of England: Book the First* 1st Edition (Oxford: Clarendon Press, 1765) at 104-105. This is the common law application of international law norms where lands could be taken over by incoming forces by occupation (if the land was uninhabited), by cession (if treaties were made with the original inhabitants) or by being conquered. See G. Simpson “*Mabo, International Law, Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence” (1993) 19 Melbourne Uni. L. Rev. 195

United States and Canada, theories of property such as those of Locke\textsuperscript{10} were relied on to show that Native Americans did not utilise the land to its fullest extent so that it was right for the colonisers to take the Indians’ lands and make them profitable. To do otherwise would be a sin against God and nature: to leave fertile lands fallow. The common law was otherwise silent on Aboriginal rights, so Locke and his peers were lauded for providing a justification for dispossession.\textsuperscript{11}

The intriguing aspect for consideration is what was the basis of accepting English common law into Australia? English law could only have come about if Australia was uninhabited. The evidence of Blackstone and English common law norms support this argument. When the \textit{Mabo} case came before the High Court, it was necessary to revisit the issue of habitation on contact. As a result, the Court determined that the continuation of this doctrine of “terra nullius” could only be justified on racist principles as Australia was indeed inhabited in 1788: a court in the 1990s could no longer support such a thesis. Reference to international law reinforces the decision made by the High Court.

International law precedent states that a territory is taken over by occupation, or it is ceded or conquered. If occupation (the basis of terra nullius) is deemed not to apply, then Australia must have been either ceded (by treaty) or conquered. As there have never been treaties between Indigenous Australians and the Australian sovereign,\textsuperscript{12} Australia

\textsuperscript{10} J. Locke \textit{Second Treatise on Politics} P. Laslett (ed.) (Cambridge: Cambridge University Press, 1988)

\textsuperscript{11} “Lockean ideas were wrongly used against Australian Aboriginals [sic] because it was mistakenly assumed that they did nothing with the land.” G. Couvalis & H. Macdonald “Cultural Heritage, Property and the Position of Australian Aboriginals” (1996) 14 Law in Context 141 at 143. See also R.A. Williams Jr. “Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law” (1989) 31 Ariz. L. Rev. 237

\textsuperscript{12} This is still possible - treaty making is not just an historical term of art. Recently a treaty was formulated between the Nishga of British Columbia and the Canadian government. See “A New
was never ceded. If conquered, then the laws of the original inhabitants, Aboriginal customary law, must also form part of the law of Australia until otherwise overridden by statute.\textsuperscript{13} If we follow precedent systematically, Aboriginal property rights must then still be in existence. The ramifications of this conclusion are extensive and would require major rewriting of Australian law. This, of course, has not occurred. By rejecting terra nullius, however, it is not clear how the High Court expected to fill the legislative void that it had created.

Legal arguments aside, it is doubtful that the original colonisers actually thought about the state of Australia and legal structures when they landed. More realistically, the Aborigines posed little threat to the incoming English settlers who wanted to utilise the land for economic gain. The maltreatment of Australia’s indigenous inhabitants by the first settlers and their progeny was justified by legally determining Australia to be terra nullius is now a moot point.\textsuperscript{14} A factual history of Australia shows that Aborigines were dispossessed of their land “parcel by parcel.”\textsuperscript{15}

\textsuperscript{13} the international law aspect of the Mabo decision will not be further discussed here. Suffice it to say, the Mabo court recognised that Australia could not longer believe that it was terra nullius at the time of acquisition of sovereignty by Britain but did not make a finding of acquisition by conquest. Whether this issue will someday be revisited by the High Court is merely speculation. See Simpson supra note 8.

\textsuperscript{14} Ritter argues that the doctrine of terra nullius and its rejection by the High Court were just convenient means of explaining why Australia’s indigenous peoples had no recognised legal rights to their land. In fact, the concept of terra nullius was used as a “scapegoat” to cover the racist, bloody dispossession of Aborigines that up until the Mabo case in 1992 had received legitimacy, albeit surreptitiously, by the legal system. See D. Ritter “The ‘Rejection of Terra Nullius’ in Mabo: a Critical Analysis” (1996) 18 Syd. L.R. 5

\textsuperscript{15} Brennan J in Mabo supra note 1 at 69 (CLR). For a summary of this aspect of Australia’s history, see D. Day Claiming a Continent: A History of Australia (Sydney: Angus & Robertson, 1996)
Whatever legal justification is placed on this dispossession, whether through Locke or Blackstone, it was incumbent on the High Court in *Mabo* to distance modern Australia from this bloody past. Recognising the Murray Islanders’ right to their land thus allowed an historic moment in Australian legal history. The challenge awaiting the Australian courts is the question of how it can recognise these different cultural values: spiritual connection to land versus land purely as an economic resource. This same question has also been contemplated historically both in Canada and the United States. This aspect we will consider later.

5.2.2 Customary Use of Land as a Basis of Title

Apart from occupation and possession as a basis for property law, the common law also recognises customary use of land. In courts of English law, customary law is generally a matter of fact, but as McNeil notes “in territories which lack a history of judicial ascertainment of indigenous systems of land tenure, the problems of proving relevant customs may be insurmountable.”16 The Australian Law Reform Commission in its major report into the legal recognition of Aboriginal customary law noted that

The fact that the [Aboriginal] custom is unlikely to be considered "reasonable" where there are others exercising inconsistent rights and asserting control over the subject land, make it difficult to envisage situations where any customary rights could have survived dealings with land in mainland Australia by the Commonwealth and the States.17

It is obvious that customary use of land will be harder to prove than native title given the time frame and the deliberate mutilation of Aboriginal culture by non-indigenous Australia. Common law avenues appear to be closed against further stimulation for

---

16 McNeil supra note 9 at 193
Aboriginal rights. Hence, to move forward Australia needs more than a retrospective reinvigoration of old common law standards. After Mabo, the common law pronouncements of the High Court were soon put into practice by the legislature. In fact, Dawson J, in dissent suggested that such a radical finding by the Court should not be contemplated, that it should ideally be left to the legislature. With this in mind, let us leave common law principles in deference to legislative will. The benefit of statutory protection is that it is more certain and easier to implement than basic common law principles and can be thus seen as being “stronger”. Now we consider how statutory provisions fair in providing recognition of spiritual connection to land.

5.3 Statutory Provisions

When the Australian Law Reform Commission produced its report into the recognition of Aboriginal customary law, it recommended that a functional approach be used by parliament in legislating for this recognition. Such an approach would see specific forms of incorporation. But, this review leaves us with basic statutory implementations in specific areas, which is the case today: sacred sites legislation, the Aboriginal and Torres Strait Islander Heritage Protection Act. As it was shown in Chapter 3, these measures are toothless tigers, unable to protect Aboriginal spiritual connection to land. Even if

---

18 Mabo supra note 1
19 The Commission focussed on some aspects of Aboriginal life such as traditional criminal law and family law and did not specifically look at land issues since "land rights" legislation and reports, were being conducted elsewhere. But the Commission noted that discussing Aboriginal customary law without looking at land was a difficult task as the spiritual nature of the connection to land is inextricably linked with all aspects of Aboriginal life as discussed in Chapter 2. Hence, in looking at Aboriginal customary law in relation to hunting, fishing, traditional marriages and traditional criminal law, Aboriginal rights to land will also be considered implicitly. See generally the ALRC Report, supra note 17, and in particular at 154 para 212.
20 This approach helps to counter arguments that suggest Aborigines are privileged against the majority of Australians through special legislation. Such an attitude helped sway the Commission against recommending reforms that would see customary law given equal weight to general Australian law. Ibid. at 127 para 171.
statutory measures are implemented, we also saw in Chapter 3 that parliamentary supremacy allows parliament to take those same measures away. Although the Australian Law Reform Commission’s report added to academic debate around the legal recognition of Aboriginal customary law, the recommendations have gone nowhere. As far as statutory reform goes, the Report remains a benchmark of what could have been.

From the analysis in Chapter 3, it appears that Australia is not ready to endorse effective statutory recognition of Aboriginal rights to spiritual land. An alternative solution with greater power to withstand political whims and the passage of time is constitutional reform. Extensive as its investigation was, the Commission did not consider any constitutional amendments. In fact, at the time of the Report’s publication, there was a Bill of Rights being contemplated in federal parliament.21 A Bill of Rights would have fulfilled Australia’s commitments under the International Covenant on Civil and Political Rights of 1966. The Bill, however, was not passed and the push for a Bill of Rights has not been revitalised.22 At this point our gaze shifts to countries that have already grappled with constitutional Aboriginal rights to see how such rights can be entrenched.

5.4 Constitutional Guarantees

The United States Bill of Rights23 guarantees the right to “free exercise” of religion in the First Amendment. Examination of the sacred sites cases24 in Chapter 4 demonstrate that

---

21 Australian Bill of Rights 1985 (Cth)
22 Instead, as a response to the ICCPR, only the Human Rights and Equal Opportunity Commission Act 1986 (Cth) was enacted, setting up the federal Human Rights and Equal Opportunity Commission, a body devoted to developing policy and hearing some discrimination cases.
23 Amendments 1-10 of the United States Constitution
“free exercise” of religion will only be accommodated if it does not infringe a government’s right to legislate and that only government actions that specifically infringe a constitutional right will be struck down. As we saw in Chapter 4, the construction of dams, roads and viewing platforms that restrict Native American spiritual practices is not enough to “infringe” that right. This leaves open the question as to whether a general “Bill of Rights” guarantee will be sufficient to protect the particular rights of minority groups.

In Chapter 4 we also looked at the specific constitutional protection given to Aboriginal rights in Canada. Section 35(1) of the Canadian Constitution has been interpreted by the Supreme Court of Canada to support Aboriginal aspirations for control over their own land. Under s. 35(1) it is possible that Aboriginal land will be returned to the traditional Aboriginal owners, as was set out in Delgamuukw. This, of course, includes land of sacred and spiritual value as demonstrated by the Gitskan and Wet’suwet’en plaintiffs at trial. But the Supreme Court’s dicta in Delgamuukw illustrates that even when Aboriginal rights are elevated to constitutional status, there is still a hierarchy controlling where those rights actually lie. The Supreme Court’s initial s.35(1) interpretation in Sparrow was extremely liberal giving supremacy to the rights of Aborigines to fish above all other Canadians. To infringe such Aboriginal rights, the government had to conform to a strict justification test and public policy considerations were insufficient to show this “justification”. In Delgamuukw, the Aboriginal right to land was recognised in

---

26 see cases in Chapter 4 (supra note 24)
the case, but it was held to be at a level effectively below that of land used for the public good. If the Aboriginal right to land is to be recognised after the rights to land in the public benefit, what is the benefit of having such a right at a constitutional level? Lamer C.J. in *Delgamuukw* noted that the use of land for the “development of agriculture, forestry, mining … [and] general economic development” are all legitimate concerns that could well be held to be above the Aboriginal right to land. Hence, whether an Aboriginal right to land will be found will be made by judges based on Lamer C.J.’s guidelines and so the constitutional guarantee of Aboriginal rights is susceptible to judicial interpretations and judicial values. In a province such as British Columbia where mining and forestry are major income earners, a conclusion that such concerns would easily be placed above the concerns of the Indigenous inhabitants is not out of the question.

Where does that leave a comparative investigation for Australia’s benefit?

Some Australians believe that a Bill of Rights is not necessary, despite the fact that Australia is one of the last Western liberal democracies without such basic guarantees. The common argument opposing a Bill of Rights is the state of affairs presented in the United States. The Second Amendment right “to keep and bear arms” is seen as a strait-jacket on any government push to reduce the number of guns in civilian hands. Similarly the First Amendment right to freedom of speech is seen as a bar to reasonable censorship.

---

29 Lamer C.J. in *Delgamuukw* supra note 27 at 78 (CNLR)
31 UK and Israel are the only others. J. Allan and R. Cullen “A Bill of Rights Odyssey for Australia: The Sirens are Calling” (1997) 19 Uni. Of Qld L. Rev. 171 at 171
Australia, more proud of its gun-frugality and ability to curtail hateful speech, sees such “rights” as a mistake. However, the strongest argument against an Australian Bill of Rights is that it “inevitably leads to a large transfer of power from elected parliamentarians to unelected and unrepresentative judges.” This statement is true in many respects but it suggests that elected parliamentarians should be responsible for legislating for basic fundamental rights. The revoking of legislation in Australia is sufficient evidence to demonstrate that parliament is incapable of ensuring fundamental human rights.

But, as I have said above, a general Bill of Rights guarantee will not be the best method of addressing a way to give legal recognition to Aboriginal spiritual connection to land. Instead, Australia is better served in looking closer at the Canadian Constitution, since Canada appears to have put in place the strongest guidelines for ensuring equity and fairness when considering Aboriginal land rights. The primary caution we can learn from Canada is how can we curb judicial values from colouring judgments and ensure that the guidelines are taken at face value? How Australia goes about this will be the result of discussion and negotiation with relevant groups. It may be that “recognising and affirming” Aboriginal rights may not be sufficient. Should there be a specific clause for land rights? Should there be special mention of recognition of Aboriginal spirituality? Given the bloody historical past and damage that has been done to Indigenous culture by non-indigenous Australia, should we also consider a review timeframe to help evaluate the effectiveness of these laws? I leave this to future debate.

---

32 Rights have been implied in the Australian constitution by the High Court, for example, the right to political speech: (Nationwide News Pty Ltd v. Wills (1992) 177 C.L.R. 1 and Australian Capital Television Pty Ltd v. Commonwealth (1992) 177 CLR 106
Aside from constitutional reform and proactive prevention, we can look to see where else cultural change is occurring. At the international level, innovations have occurred and at present the Draft Declaration on the Rights of Indigenous Peoples has not been adopted by the United Nations. However, the discussions and preparations that have gone into creating the Draft Declaration illustrate that the rights of Indigenous peoples are very much in the international spectrum. As such, it could be argued that recognition of Indigenous peoples’ rights is increasingly part of customary international law. Given this growing awareness, international law can force governments to cross bridges of difference.\textsuperscript{34} Close consideration of the clauses in the Draft Declaration will also aid Australia in its bridging the divide between Indigenous and non-indigenous cultural norms.

5.5 Support by Indigenous People

As the Australian Law Reform Commission report noted, “[a]n essential pre-requisite of proposals for the recognition of Aboriginal customary law is that they are supported by those Aborigines to whom they will apply.”\textsuperscript{35} The aim of this thesis is not to dictate what kind of protection or recognition of Aboriginal spirituality and connection to land must be implemented. Instead my aim is to show the current situation in Australia in terms of Aboriginal rights to land and how indigenous peoples in other countries have tried to argue their case to bring their traditional lands back under their control. Ultimately, if my suggestion of constitutional protection is considered, it will only be possible if Australia’s Indigenous peoples are involved in discussions to make such reforms. My interest is in

\textsuperscript{33} Allen & Cullen supra note 31 at 172

\textsuperscript{34} for example the Racial Discrimination Act 1975 (Cth) codifies the International Convention on the Elimination of All Forms of Racial Discrimination in Australian law.
assisting the Australian legal system to consider possible alternatives especially constitutional reform. I am speaking as an Australian lawyer with an interest in seeing Australia right past wrongs and reconcile Indigenous and non-indigenous Australians and look towards the future together. When we understand the systems of justice in their entirety we can begin to determine how they can accommodate divided cultural values. As we have seen, the structures are there, it is a matter of who is within those structures, interpreting them and in whose favour those decisions lie. Bridging the divide is possible and will be reinforced with stronger constitutional guidelines.

5.6 The Reality of Constitutional Reform

The Hindmarsh (Kumarangk) Island case, the amendments to the Native Title Act and the possibility of a race-based election have been recent potholes along the bumpy road to reconciliation between Indigenous and non-indigenous Australians. Many Australians believe that the past is gone and as a nation we should not be burdened with the guilt of previous generations' mistreatment of Indigenous Australians. Without any understanding of these issues by the majority of Australians, true reconciliation between Indigenous and non-indigenous Australia is far from becoming a reality.

As to providing a vehicle for the legal recognition of spiritual connection to land, the acceptance by much of the Australian public for such a concept is small. As the Hindmarsh (Kumarangk) Island affair showed, Aborigines claiming to have spiritual affiliations to particular areas of land will always be viewed with suspicion especially if

---

35 ALRC Report supra note 17 at 81 para 106
36 This belief is shared by Prime Minister Howard who refused to give a national apology for the policies of previous governments towards Aboriginal children after the tabling of the Human Rights and Equal Opportunity Commission's Bringing them Home: Report of the National Inquiry into the Separation
such beliefs are to remain secret. It will be necessary to prove to the greater population that such legal recognition is due Aborigines by right: that such recognition is not merely a privilege. I believe that a political maelstrom such as the push to become a Republic will see such positive change occur. Otherwise, is this the racist society that we want to take with us into the new millenium?

of Aboriginal and Torres Strait Islander Children from their Families (Sydney: AGPS, 1996). "'Stolen Ones' still wait for PM's response" The Sydney Morning Herald 29 November 1997 at 11