Chapter 8
Whereto native title

There are three issues I would like to pursue that arise from the previous chapter that reviewed selected cases from 2006-2007:

- compensation for extinguishment of native title;
- evidence; and
- resurgence of culture and human rights.

These issues highlight some concerns I have with the operation of the *Native Title Act 1993* (Cth) (Native Title Act), how it is interpreted by the common law and how the native title system is operating. They seriously impact on the exercise and enjoyment of human rights of Indigenous peoples.

Compensation for extinguishment of native title

The *Jango* case was the first compensation case litigated to judgment. It was unsuccessful, failing on threshold issues. From the comments of the judge in the case it appears it will be very difficult to be successful in any claim for compensation under the scheme established by the Native Title Act. A broad look at the legal basis for compensation provides a context in which I suggest the compensation scheme under the Native Title Act needs to be reviewed. The scheme doesn't appear to be working to provide compensation for extinguishment of native title to which Indigenous people are justly entitled and as intended by the Act.

Has any compensation been paid?

Up until 30 June 2007 the Federal Court has awarded no compensation. There have been 33 applications for compensation made under Section 61 of the Native Title Act. Most have been discontinued. A number are still 'active' but none are currently being actively pursued.

There has been money given to claimants through agreements made under the Native Title Act, but no determinations of compensation have been made by the Federal Court. It is not possible to determine what compensation, if anything, may have been paid for extinguishment under these agreements because they are confidential. It is also not known what, if anything, may have been defined as compensation.

A legal right to compensation?

The legal right of native title holders to recover compensation for the extinguishment or impairment of native title is highly restricted.

At common law, there is no general right to recover compensation for extinguishment by inconsistent Crown grant, unless a statute says otherwise in a clear and unambiguous fashion.[1] Compensation is not available prior to 31 October 1975 (the Territories are a possible exception).

Compensation for extinguishment of native title by acts of government occurring after 30 October 1975 (the date the *Racial Discrimination Act 1975* (Cth) (RDA) came into effect) may be available either as a result of:

- the compensation scheme in the Native Title Act; or
- the RDA in combination with the Native Title Act.

The vast majority of acts extinguishing native title are likely to have been committed prior to this date.

Whether compensation is payable, though, is a question specific to each particular situation.

Compensation under the Native Title Act

Under the Native Title Act compensation is payable for extinguishment of native title in very limited circumstances. Division 5 of Part 2 of the Native Title Act governs the payment of compensation under the Act.

A registered native title body corporate or a compensation claim group may apply to the Federal Court for a determination of compensation under Sections 50(2) and 61 of Division 5 of Part 2.

The criteria for determining compensation are set out in Section 51 of Division 5. These include:

- compensation must be made on just terms (Section 51(1));[2] and
- compensation must consist of the payment of money (Section 51(5)).[3]

The amount of compensation mustn't exceed the amount which would have been payable if the act that extinguished native title had been the compulsory acquisition of a freehold estate (the so-called 'freehold cap')(Section 51A). This is subject to the requirement that the compensation be on 'just terms' if it would amount to an 'acquisition of property' for the purposes of Section 51(xxxi) of the Australian Constitution.

Compensation is payable under Divisions 2, 2A, 2B, 3, or 4 of Part 2 of the Native Title Act.

Division 2 validates certain acts that occurred before 1 January 1994 (the date the Native Title Act came into effect). These acts would have otherwise been invalid because of native title. This is known as the 'past acts' regime. Part of this regime provides that when certain past acts have taken place that extinguish native title, and which the Native Title Act has made valid, the native title holders are entitled to compensation.[4]

Division 2A extended this period of retrospective validation to cover certain acts that occurred between 1 January 1994 and 23 December 1996. The date of 23 December 1996 is when the High Court decision in the *Wik* case confirmed the potential for native title to co-exist on Crown tenures such as pastoral leases.

Division 2B came into effect on 30 September 1998. This Division 'confirms' that native title was extinguished (either fully or in part) by certain acts that were done by the government. These acts are:

- *previous exclusive possession acts* (PEPAs) such as granting a freehold estate; or
- *previous non-exclusive possession acts* (PNEPAs) such as granting a non-exclusive pastoral lease.

This regime provides that native title holders are entitled to compensation when their rights and interests have been extinguished under this Division. However, the entitlement to compensation under this Division only arises where the statutory extinguishment exceeds the extinguishment that would have occurred at common law.[5]

Division 3 provides for compensation for extinguishing acts done after the Native Title Act came into operation in 1994 ('future acts').

Division 4 provides that if compensation is payable to native title holders by virtue of the Racial Discrimination Act, then it must be determined in accordance with the Native Title Act.[6] Some native title holders may have the loss of their rights and interests compensated for under Section 10 of the Racial Discrimination Act.[7]

The Australian Constitution and compensation

Behind these statutory provisions lies the unresolved operation of the 'just terms' guarantee in the Australian Constitution (Section 51(xxxi)). A Commonwealth law 'with respect to' an 'acquisition of property' must provide 'just terms'. But the same guarantee does not apply to the States. States enacted the lion's share of legislation resulting in extinguishment of native title by inconsistent grant. Nevertheless, the just terms guarantee in the Constitution remains potentially relevant to the extinguishment of native title in the territories.

The principle of compensating people when their proprietary interest in land has been lost is one of the few rights recognised in the Australian Constitution. Section 51(xxxi) of the Constitution provides:

> 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:
>
> (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws ; …

How this Constitutional protection applies to native title rights and interests is still uncertain.[8]

Although it is still unclear whether Section 51(xxxi) would apply to native title, there are strong arguments for why it should. After all native title:

> … enjoys many of the characteristics associated with notions of property … There seem to be no persuasive grounds for excluding traditional rights in relation to land or waters of indigenous people from the constitutional category of 'property' and indeed a number of High Court judges have already indicated that they regard native title as property in the constitutional sense.[9]

The right to compensation under the Native Title Act should be equally accessible and comprehensive for Indigenous peoples' native title rights and interests as it is for any other Australian's right to compensation under the Constitution.

Compensation under International human rights law

The right to compensation for the deprivation of native title has a basis in international human rights law.

As pointed out in previous native title reports, the arbitrary deprivation of a property right belonging to a particular race or ethnic group is a breach of Article 5(d) of the International Covenant on the Elimination of All Forms of Racial Discrimination (the ICERD). Australia has ratified this convention and committed to making it part of domestic law. The United Nations Committee on the Elimination of Racial Discrimination makes it clear in General Recommendation 23 on Indigenous Peoples[10] that:

> … where [Indigenous Peoples] have been deprived of their lands and territories traditionally used or otherwise inhabited or used without their free and informed consent, [States are] to take steps to return these land and territories. Only where this is for factual reasons not possible, the right to restitution should be substituted by the right to *just, fair and prompt* compensation. Such compensation should as far as possible take the form of lands and territories. [Italics added.][11]

This principle was further cemented in 2007 with the adoption by the United Nations General Assembly of the Declaration on the Rights of Indigenous Peoples (the DRIP). The DRIP specifically mentions the right of Indigenous peoples to compensation. Article 28 states:

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

The amount of compensation

The amount of any compensation that may be payable under the Native Title Act for extinguishment of compensation is an issue. Justice Sackville commented on this in the *Jango* case.[12] He observed that prolonged recognition of a place as a site of spiritual significance would be relevant to the amount of compensation payable under the Native Title Act.

There are two principles involved:

- *the value of the land as freehold estate:* Section 51A of the Native Title Act refers to the amount of compensation being capped at an amount quantified under land valuation principles for a freehold estate (that is, the value of the land as a freehold estate).
- *compensation on just terms:* Section 51(1) of the Native Title Act states that an entitlement to compensation is an entitlement to compensation on just terms.

These two principles have the potential for quite divergent interpretation. The comments of Justice Sackville in the *Jango* case appear to clarify that compensation for native title rights and interests may exceed the freehold value of land. Compensation may take into consideration particular connection with country that Indigenous peoples may have when evaluating 'just terms'.

Commenting on this aspect of the *Jango* decision, the Native Title Research Unit considers that:[13]

> Sackville J's comments in *Jango* may indicate that where native title has been extinguished over land containing a significant site or sites, a greater amount of compensation may be payable than under land valuation principles for a freehold estate as capped in s. 51A of the NTA.

This interpretation recognises what previous High Court and Federal Court decisions have also recognised – that the connection that Indigenous people have with country is essentially a spiritual one.[14] For instance, in *Milirrpum v Nabalco* Justice Blackburn referred to the fact that:[15]

> 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 one indissoluble whole.

In recognising the potential imbalance between market value compensation and the actual intrinsic value of the land to Indigenous people, the National Native Title Tribunal has also recognised that market value for compensation of native title may be of limited use:[16]

> … market value is an 'uncertain guide to the true value of a loss of native title rights and interests in the land ... [a]t best, the land value is a starting point, for want of a better yardstick' In *Western Australia v Thomas* the NNTT considered the application of the 'similar compensable interest test' in s. 240, under the old NTA and stated that it may lead to inequality as:
>
> … the rights and interests of native title holders are artificially converted to freehold rights and that the peculiar features of native title are to be ignored. To do so may impose a regime of formal legal equality which gives rise to actual inequality.

Justice Sackville's comments in *Jango* on compensation were not part of the reasons for his decision (they were 'obiter'). Whether they are taken up by higher courts (the Full Federal Court or the High Court) and become binding is yet to be seen. They are a welcome and positive interpretation that is consistent with Australia's international human rights commitments under the International Covenant on the Elimination of All Forms of Racial Discrimination (which provides a right to just, fair

and prompt compensation). It is also consistent with the purpose of the Native Title Act itself:[17]

> When considering the value of land in the context of Aboriginal ownership, the purpose of the NTA must also be considered. In *Commonwealth v Yarmirr* McHugh J stated:
>
> > The [NTA] should therefore be read as having a legislative purpose of wiping away or at all events ameliorating the 'national legacy of unutterable shame' that in the eyes of many has haunted the nation for decades. Where the Act is capable of construction that would ameliorate any of those injustices or redeem that legacy, it should be given that construction.

An inquiry into compensation?

Section 137 of the Native Title Act provides that the minister may ask the National Native Title Tribunal to hold an inquiry into an issue relating to native title. A specific example in Section 137(2) of the type of inquiry that may be held is to examine alternative forms of compensation that could be provided in relation to acts covered by the Native Title Act.

As far as I am aware the power of the minister in Section 137 has never been invoked. Further, no government has ever initiated any review of the compensation mechanisms provided for in the Native Title Act to ascertain whether they are working to ensure Indigenous peoples' right to compensation is being realised. I have made a recommendation at the end of this chapter.

Evidence

The production of evidence before the court is a major concern of all parties to any native title proceeding. It is the second main area I would like to highlight from the review of the cases in the previous chapter.

Section 82 of the Native Title Act

Section 82 of the Native Title Act deals with how the court can receive evidence during a native title proceeding.

When the Act was introduced in 1993, Section 82 provided:

> 82(1) The Federal Court must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt.
>
> (2) The Court, in conducting proceedings, must take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.
>
> (3) The Court, in conducting proceedings, is not bound by technicalities, legal forms or rules of evidence.

In applying this provision, Justice Olney in the Federal Court decision of *Yorta Yorta*[18] said:

> One of the mechanisms which the Court has adopted, consistent with its obligation under s.82(1), is to permit the parties to tender the evidence-in-chief of their witnesses in the form of a written statement which may either be verified by the witness in Court, or by consent of the other parties, and tendered without formal proof.

> It should perhaps be observed at this point that since this matter was first raised in Court I have had the opportunity to read an article … in which the author observes in relation to s.82(3) …:
>
> > It is not to be expected that the Court will lapse into whimsical regulation of the evidence it admits. Requirements of procedural fairness and the requirement of s82(1) of the Native Title Act that the Court must pursue the objective of providing a mechanism that is fair, just, economical, informal and prompt should ensure this.
>
> The point is well made but in addition … there is the more fundamental requirement that in arriving at its findings of fact the Court may have regard only to evidence which is relevant, probative and cogent…

Between the judgment at first instance and the final appeal to the High Court in *Yorta Yorta,* Section 82 of the Native Title Act was amended as part of the substantial amendments to the Act made in 1998. Section 82 now reads [text in *italics* are the amendments]:

> 82(1) *The Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.*
>
> (2) In conducting its proceedings, the Court *may* take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, *but not so as to prejudice unduly any other party to the proceedings.*
>
> (3) *The Court or a Judge must exercise the discretion under section 47B of the Federal Court of Australia Act 1976 to allow a person to appear before the Court or Judge, or make a submission to the Court or Judge, by way of video link, audio link or other appropriate means if the Court or the Judge is satisfied that:*
>
> *(a) the conditions set out in section 47C in relation to the video link, audio link or other appropriate means are met; and*
>
> *(b) it is not contrary to the interests of justice to do so.*

The law itself and the accompanying Explanatory Memorandum to the Bill provide no guidance on what factors may justify an order setting aside the rules of evidence.

The High Court in *Yorta Yorta* noted the changes to Section 82 and the difficulties of evidence that may now arise in native title claims:[19]

> It may be accepted that demonstrating the content of that traditional law and custom may very well present difficult problems of proof. But the difficulty of the forensic task which may confront claimants does not alter the requirements of the statutory provision. In many cases, perhaps most, claimants will invite the Court to infer, from evidence led at trial, the content of traditional law and custom at times earlier than those described in the evidence. …
>
> When the primary judge was hearing evidence in this matter the *Native Title Act* provided that, in conducting proceedings under the Act, the Federal Court, first, was "not bound by technicalities, legal forms or rules of evidence" and, secondly, "must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt". It may be that, under those provisions, a rather broader base could be built for drawing inferences about past practices than can be built since the 1998 Amendment Act came into operation. …

Presumption of rules of evidence

The Native Title Act now starts from the premise that in native title proceedings, the rules of evidence will apply. In previous Native Title Reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner (the 2002[20] and 2005[21] reports) reference has been made to the significant evidentiary difficulties faced by Indigenous peoples seeking to establish the elements of the definition of native title in Section 223 of the Native Title Act. The standard and burden of proof required, and the operation of Section 82 place particular burdens on Indigenous people seeking to gain recognition and protection of their native title.

In 2005, the United Nations Committee on the Elimination of Racial Discrimination stated in its Concluding Observations on Australia's periodic reports on the Convention on the Elimination of All Forms of Racial Discrimination:[22]

> The Committee is concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The high standard of proof required is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands (art. 5). ...
>
> [The Committee] recommends that the State party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of indigenous peoples to their land.

The Australian Law Reform Commission addressed the issue of evidence in detail in its December 2005 report on the Uniform Evidence Law. In considering whether the uniform Evidence Acts[23] should be amended to include a provision dealing specifically with the admissibility of evidence of Indigenous traditional laws and customs they recommended:[24]

> In recognition of the fact that the rules of evidence have not been sufficiently responsive to some of the inherent difficulties in proving in an Australian court ATSI [Aboriginal and Torres Strait Islander] traditional laws and customs, the Commissions recommend that the uniform Evidence Acts be amended to include a provision dealing specifically with the admissibility of such evidence. The adoption of a broad definition of 'traditional laws and customs', which includes the observances, practices, knowledge and beliefs of an ATSI group, will facilitate the receipt of more diverse evidence which can be used to prove the existence and content of particular traditional laws and customs of the group.

The ALRC observed that the central difficulty for proof of traditional laws and customs presented by the rules of evidence arises from the distinction between matters of fact and matters of opinion. As well as from the insistence on first-hand evidence based on personal knowledge of matters of fact. Both the opinion rule and the hearsay rule create problems for proving traditional laws and customs developed and maintained over time as part of an oral tradition.[25]

Federal Court judges involved in native title proceedings have also commented many times on the difficulties of evidence in native title proceedings. In *Ward v Western Australia,*[26] Justice Lee said:

> Of particular importance in that regard is the disadvantage faced by Aboriginal people as participants in a trial system structured for, and by, a literate society when they have no written records and depend upon oral histories and accounts, often localised in nature. In such circumstances application of a rule of evidence to exclude such material unless it is evidence of general reputation may work substantial injustice …

Section 82 rarely used

The amended Section 82 gives the court the power to order that the parties are not bound by the rules of evidence. It has rarely been used by the courts. In *Daniel v Western Australia,* Justice Nicholson held that it 'requires some factor for the court to otherwise order'.[27] The ALRC states that the 'Native Title Act does not allow the court to dispense generally with the rules of evidence in native title proceedings'.[28] In the *Wongatha* case (considered in the previous chapter), Justice Lindgren noted that for Section 82 to be invoked it is:[29]

> … not a sufficient reason that the rules of evidence render certain evidence inadmissible: the terms of section 82 reflect an acceptance by the Parliament that this will be so, and that the position, should not, as a matter of course, be relieved from.

Nonetheless, Section 82 has been used to allow evidence to be submitted that would otherwise be inadmissible. Justice O'Loughlin relied on it in *De Rose v South Australia* to allow hearsay evidence to be admitted.[30] The judge accepted hearsay evidence. He gave the reason that Aboriginal witnesses, with an oral history, were told about traditional laws and customs, particularly by older generations. The judge dealt at some length with the evidentiary problems that are seen as peculiar to native title claims, particularly in what is normally regarded as hearsay evidence.[31] He clearly stated that he would use the discretion in Section 82 to admit evidence to: [32]

> … ensure that applicants are not required to meet an evidentiary burden that is, in the circumstances that are unique to every native title application, impossible to meet.

It is far from clear what is necessary for the court to use the Section 82 discretion. The Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation stated in its submission to the ALRC that the factor required by Section 82 for the court to dispense of the evidence rules 'remains an enigma with no judicial determination of what this entails'.[33]

The ALRC had received submissions and reviewed cases that highlighted the inconsistent way the evidence rules were being applied for native title cases. How they were applied depended on counsel, judges and 'improvised solutions'.[34] The admissibility of evidence also depends on the respondent's objections and whether counsel for the respondent 'tires' of objecting.

These factors were evident in the cases considered in the previous chapter. In *Wongatha,* Justice Lindgren faced 30 expert reports, to which 1426 objections were lodged.[35] In *Jango* it was a similar story; certain expert anthropologists' reports were the subject of in excess of 1000 objections by the respondents.[36]

In the *Larrakia* case, Justice Mansfield dealt with evidence, specifically stating that under Section 82 of the Native Title Act he was bound by the rules of evidence.[37] Nonetheless, Justice Mansfield commented on many difficulties associated with evidence in native title proceedings including:[38]

> [I]t must always be borne in mind that any historical record about Aboriginal people is incomplete. There are 'silences' in the historical record … '[t]he nature of these 'silences' and the manner in which they should be addressed is the subject not merely of academic interest, but one that bears directly upon the approach the Court must take in order to interpret the expert and witness evidence, and to derive the inferences that of necessity must be made, in order to decide upon the issues in contention'.

As a consequence of these various approaches to evidence in native title proceedings, the ALRC considered: [39]

> … that without statutory amendment, the laws of evidence will continue to present undesirable barriers to the admission and use of evidence of traditional laws and customs. Submissions and consultations indicate that the admission of such evidence is often contested, and divergent judicial approaches are developing to resolve these disputes.

The role of written European evidence in native title proceedings

In three of the cases reviewed in the previous chapter the judges referred to the role that written European evidence played in proving aspects of the Indigenous culture at the time of sovereignty. This highlights the tension between the admissibility and weight given to oral evidence and that given to written evidence.

In the *Noongar* decision, Justice Wilcox referred to the written evidence left over from Europeans at settlement:[40]

> An unusual feature of this case is the wealth of material left to us by Europeans who visited, or resided in, the claim area at, or shortly after, the date of settlement … The cumulative effect of these writings is to provide an insight into Aboriginal life, including Aboriginal laws and customs, in and about the date of settlement, which is possibly not replicated elsewhere in Australia.

One of the expert witnesses in the case commented that:[41]

> 'The observers provided more information than we have for many other comparable parts of Australia'. Dr Brunton thought the information was sufficient to allow him to conclude 'that in the South West of Western Australia at sovereignty there was a normative system under which rights to speak for country were held by estate groups, membership of which was reckoned by patrilineal descent.'

On the other hand, the counsel for the respondents warned the court not to put too much weight on the evidence of contemporary Aboriginal witnesses in identifying the society that existed in 1829. Counsel warned that the knowledge held by the current Aboriginal society may be as a result of a resurgence in interest in their traditions and culture – and not one that has continued since colonisation. Justice Wilcox essentially accepted the warning. [42] Nevertheless, ultimately, Justice Wilcox found that native title rights and interests do exist over the claim area.

In the *Larrakia* case, the expert witnesses and evidence presented to the court also recognised the importance of early written European documentation of

Indigenous people in the region. These written documents from the period of settlement impacted on the expert evidence that was presented to the court. One expert recognised that the lack of written historical records, partly because of destruction of those records, impacted on the conclusions they could make about the Larrakia people.[43] The court found that native title rights and interests did not exist over the claim area.

In the summary of the *Wongatha* case, Justice Lindgren observed the difficulties that arise where claimants must prove matters back to the date of sovereignty (1829 in Western Australia) that is earlier than first European settlement. Often, in the intervening period there will be no written records of Aboriginal laws and customs. The result is 'what may appear to be unequal treatment as between different groups of Aboriginal people':[44]

> **…** in the present case, the claimants must prove what indigenous laws and customs were being acknowledged and observed in the Goldfields at the date of sovereignty – 1829. But the first explorer did not reach any part of the Wongatha claim area until 1869, and, in substance, European settlement did not occur there until the gold rush in the 1890s. In other words, the first substantial written records we have of Aboriginal people anywhere in the Wongatha Claim area relate to the last decade of the nineteenth century, yet the claimants bear the onus of proving what the position was there in 1829. By contrast, in a case relating to an area where settlement of a colony first occurred, there will be written records relating to Aboriginal laws and customs as they existed at sovereignty.
>
> … any lack of proof or inference as to what the position was in the Goldfields in 1829 tells against the claimants, who bear the onus of proving all the elements of their claims.

Justice Lindgren dismissed the claim.

Reconciling the evidence rules and Indigenous culture

I am concerned that the current evidence requirements for native title prescribed by Section 82 appear not to be working. As the law currently operates, Section 82 remains a significant barrier to Indigenous people trying to use the Native Title Act to access their native title rights and interests.

The ALRC's report on the rules of evidence (the report was not on the Native Title Act) recommended that the Evidence Acts be amended to provide exceptions to the hearsay and opinion evidence rules for evidence relevant to Aboriginal or Torres Strait Islander traditional laws and customs. These traditional laws and customs include a wide range of topics, including knowledge, beliefs, practices and observances.[45]

The report recommended that the hearsay rule be amended to allow an exception related to Aboriginal or Torres Strait Islander traditional laws and customs. In determining admissibility the ALRC considered the focus should shift from technical breaches of the law, to whether the particular evidence is reliable.[46]

The ALRC also recommended amending the opinion evidence rule to permit a member of an Indigenous group to give opinion evidence about the laws and customs of that group. This means the Indigenous member would not have to establish that he or she has 'specialised knowledge based on [his or her] training study or experience' as required under Section 79 of the Evidence Act.[47]

The recommendations of the ALRC are positive and the government should consider the report and make commitments on what action it will take on these recommendations.

The ALRC paper focused solely on the Evidence Acts. It did not recommend how Section 82 of the Native Title Act should be amended (if at all). The ALRC did, however, conclude that Section 82 did not appear to be operating effectively. It recommended that the section be reviewed as 'the provision does not provide sufficient guidance or certainty on the admissibility of evidence in native title proceedings.'[48] This observation is supported by the cases reviewed in the previous chapter.

Resurgence of culture – native title and human rights

The resurgence of culture amongst Indigenous peoples is occurring in many parts of the country. It is raised in native title proceedings when the court considers the issues of continuity of society and continuity of observance of traditional laws and customs. Continuity of observance must continue 'substantially uninterrupted' from sovereignty to the present time for the laws and customs currently practiced to be considered traditional.

If the court determines there has been a substantial interruption then any later resurgence of culture and of the practice of laws and customs will not overcome it. They will not be considered 'traditional' to the extent required for recognition of native title.

In the *Noongar, Larrakia,* and *Wongatha* cases, the judges of the Federal Court recognised Indigenous peoples' attempts to reinvigorate their culture and traditions. The judges explicitly recognised the strength of these various Indigenous communities.

They also recognised that communities that have reinvigorated their culture and traditions will not be able to have these recognised as native title rights and interests by Australian law as it stands. That is unless the laws and customs they are revitalising have continued to be observed, substantially uninterrupted, since sovereignty.

This constraint is due, primarily, to the definition of native title in Section 223 and the High Court's interpretation of that section in the *Yorta Yorta* case.

Justice Wilcox was aware of this constraint and the need to be cautious where evidence was given of the resurgence of culture in native title proceedings. Counsel for the respondents in the *Noongar* case emphasised: 'in recent years there has been a resurgence of interest in Western Australian Aboriginal history and tradition, perhaps particularly amongst the Aborigines themselves'. Justice Wilcox accepted this was a reason the court should be cautious in relying on Aboriginal witnesses in identifying the society that existed since 1829. Despite this he went on to find that native title existed, stating in his judgment:

> I did not gain an impression, in relation to any of the 30 Aboriginal witnesses, that his or her evidence was tailored to suit the claim or that the identification arose out of the recent resurgence of interest in the Aboriginal traditions of south west Western Australia.[49]

I am concerned about current common law and its interpretation of the Native Title Act. It appears to deny how societies and cultures evolve. It is a narrow, unnecessarily legalistic, interpretation of the requirement for recognition of native title. The effect is to restrict Indigenous peoples' exercise of their human rights. It is an impediment on the capacity of the Native Title Act to deliver in accordance with its preamble.

The resurgence of culture and tradition needs to be seen in the context of Indigenous peoples' human rights as understood in international law. Resurgence is very much in line with those human rights.

Indigenous peoples' human rights

International human rights standards provide considerable direction on a State's obligations to protect the cultural, religious, property and governance rights of Indigenous people.

The rights to minority cultures

The preservation and protection of Indigenous culture is addressed in the *International Covenant on Civil and Political Rights*[50] (ICCPR) and the *Convention on the Rights of the Child*.[51] Both agreements have similar wording, providing that people belonging to ethnic, religious or linguistic minorities have the right, in community with their group, to enjoy their own culture and to use their own language.[52] The Human Rights Committee, in explaining the importance of these rights, noted:

> [ICCPR] article 27 [protecting minority culture] relates to rights whose protection imposes specific obligations on States Parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.[53]

The Human Rights Committee expressed concern about potential inconsistencies between the 1998 amendments to the Native Title Act and Australia's obligations under ICCPR Article 27:[54]

> The Committee is concerned ... that the Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands. The Committee recommends that the State party take further steps in order to secure the rights of its indigenous population under article 27 of the Covenant. The high level of exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns. In particular, the Committee recommends that the necessary steps be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns.
>
> The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, which must be protected under article 27, are not always a major factor in determining land use.

The right to equality before the law and to not be discriminated on the basis of race

Guarantees of equality before the law and racial non-discrimination[55] are contained in Article 26 of the ICCPR and Articles 2 and 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*[56] (ICERD).

The recognition and protection of the distinct rights of Indigenous peoples is also implicit in the concept of equality. The Committee on the Elimination of Racial Discrimination has recognised, as aspects of the principle of equality, the obligations of States to protect Indigenous culture. The CERD Committee explained that States must ensure that Indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs and to preserve and to practise their languages.[57]

> [T]he provisions of ... [ICERD] apply to indigenous peoples. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized. The Committee calls in particular upon States parties to ... ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.[58]

The right to freedom of religion and belief

The right to freely practice one's religion and belief are protected at international law. Article 18 ICCPR states:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to … manifest [t]his religion or belief in worship, observance, practice and teaching.[59]

There is commentary suggesting that the human right to freedom of religion and belief provides support for protection of sites that are sacred or significant to Indigenous people.[60]

The High Court, in the *Ward* decision, recognised the relationship between Indigenous people and their land as a spiritual one. Native title, as a recognition of Indigenous relationships to land encompasses this spiritual dimension. In the *Ward* decision, Justice Kirby, emphasised the lack of attention, in native title cases, that has thus far been given to the freedom of religion,[61] which is protected not only in international human rights standards, but under the Australian Constitution.[62]

Justice Kirby indicated that freedom of religion could provide greater protection of Indigenous interests than has, to date, been accorded:

> There is one further possibility that I should mention. It concerns the possible availability of a constitutional argument for the protection of the right to cultural knowledge, so far as it is based upon the spirituality of Australia's indigenous people. That involves the application of s 116 of the Constitution, which provides a prohibition on laws affecting the free exercise of religion. The operation of that section has not been argued in these appeals. ... The full significance of s 116 of the Constitution regarding freedom of religion has not yet been explored in relation to Aboriginal spirituality and its significance for Aboriginal civil rights. ... One thing is

> certain – the section speaks to all Australians and of all religions. It is not restricted to settlers, their descendants and successors, nor to the Christian or other organised institutional religions. It may be necessary in the future to consider s 116 of the Constitution in this context.[63]

The right to self-determination

The right to self-determination is enshrined in Article 1 of the ICCPR and the *International Covenant on Economic, Social and Cultural Rights*[64] (ICESCR). Australia is a party to both of these covenants and is bound to act in compliance with their terms. The common Article 1 reads:[65]

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The Declaration on the Rights of Indigenous People

In September 2007 the United Nations General Assembly adopted the *Declaration on the Rights of Indigenous People* (the DRIP). The declaration specifically states in Article 11 that Indigenous peoples have the right to practice and revitalise their cultural traditions and customs. Australia is expected to adopt the declaration.

The Native Title Act as a mechanism to realise human rights?

In Australia's current legal framework there are limited avenues for Indigenous people to hold the government to account for access to their human rights. The Native Title Act may be an avenue through which Indigenous people might be able to access their human rights when they are related to land and waters.

The Act has not always proved an effective way to access their human rights particularly so after the 1998 amendments to the Act. The Native Title Act, as currently interpreted and applied, can only be used by Indigenous people in very limited circumstances to access very limited and specific rights. This is despite its drafting as 'beneficial legislation'. This tension between the interpretation and application of the Act, and the original intent and purpose underpinning the legislation, is highlighted in the *Larrakia* case.

In *Larrakia*, Justice Mansfield recognised throughout his judgment the strength of the Indigenous society before him. After giving his conclusion that native title didn't exist, he stated:[66]

> It is a conclusion which is not intended to, and should not, be seen as meaning that the Larrakia people do not presently exist as a society in the Darwin area with a structure of rules and practices directing their affairs. They clearly do.

Justice Mansfield specifically identified the limitations on the court taking into account re-establishment of traditional laws and customs when determining native title under the Native Title Act:[67]

> In my judgment, the present laws and customs of the Larrakia people reflect a sincere and intense desire to re-establish those traditional laws and customs adapted to the modern context. These are the consequence of significant efforts on the part of many to achieve that result. It is an entirely proper objective. It is apparent that the process is enriching the lives of the Larrakia people, and of the Darwin community. That, however, is not a sufficient factual foundation for making a determination of native title rights and interests in this proceeding. …
>
> To summarise, in my judgment, the Larrakia people were a community of Aboriginal people living in the claim area at the time of sovereignty. The settlement of Darwin from 1869, the influx of other Aboriginal groups into the claim area, the attempted assimilation of Aboriginal people into the European community and the consequences of the implementation of those attempts and other government policies (however one might judge their correctness), led to the reduction of the Larrakia population, the dispersal of Larrakia people from the claim area, and to a breakdown in Larrakia people's observance and acknowledgement of traditional laws and customs. In the 1970s the land claims drew interest to the Larrakia culture and there has since been a revival of the Larrakia community and culture. A large number of people who now identify as Larrakia only became aware of their ancestry during these land claims, and acquired much 'knowledge' at this time. The Larrakia community of 2005 is a strong, vibrant and dynamic society. However, the evidence demonstrates an interruption to the Larrakia people's connection to their country and in their acknowledgement and observance of their traditional laws and customs so that the laws and customs they now respect and practice are not 'traditional' as required by s 223(1) of the NT Act.

The Larrakia people may be an Indigenous society presently existing in the Darwin area with a structure of rules and practices directing their affairs. Their structure of laws and customs may reflect a sincere and intense desire to re-establish traditional laws and customs, adapted to the modern context. Yet Australian law as it currently interprets and applies native title law will not recognise those rights and interests created by those laws and customs as native title. This failure limits the capacity of Australian law to promote the exercise and enjoyment of human rights of Indigenous people.

The definition in Section 223 of the Act, and the common law's interpretation, especially of 'traditional' by three judges of the High Court, has limited the scope of recognition of native title.

Australian law loses an opportunity, through the application of the Native Title Act, to foster a minority culture, to promote self-determination, equality before the law, and freedom of religion.

The Native Title Act and the system it establishes were initially perceived, and to many, still are perceived, as allowing Indigenous people access to human rights. In the *Wongatha* decision, Justice Lindgren considered this when he considered the 'unsatisfactory state of affairs in the native title area':[68]

> One matter is that expectations are created. The indigenous people in this case are the descendents of those who lived in Australia for tens of thousands of years. One witness said words to the effect, 'if I cannot claim native title in this area, where can I claim it?'

In the *Noongar* case Justice Wilcox stated that 'Native Title is neither the pot of gold for the indigenous claimants nor the disaster for the remainder of the community that is sometimes painted'.[69]

The Native Title Act does not currently fulfil Australia's human rights obligations to its Indigenous population to the extent the preamble and objects suggest was the original intent of the Australian Parliament.

Recommendations

8.1 That the Attorney-General use the power in Section 137 of the Native Title Act to ask the National Native Title Tribunal to hold a public inquiry:

- into how the compensation provisions of the Native Title Act are currently operating; and
- whether they operate to effectively provide for Indigenous peoples' access to their human right to compensation.

In undertaking the inquiry the tribunal collaborate with native title claimants, Indigenous communities, native title representative bodies, prescribed bodies corporate, registered native title bodies corporate, the Federal Court, and the federal, state and territory governments.

The tribunal present to Parliament specific options for reform:

- to ensure Indigenous people can effectively and practically access their human right to compensation; and
- to ensure the amount of compensation is just, fair and equitable.

8.2 That the Native Title Act be amended to insert a definition of 'traditional' for the purposes of Section 223 that provides for the revitalisation of culture and recognition of native title rights and interests.

8.3 That Section 82 of the Native Title Act be amended to include Subsections (1), (2), and (3) of Section 82 as it was originally enacted in 1993.

8.4 That the Attorney-General prepare guidelines for the Federal Court and parties to native title proceedings on the application of Section 82 of the Native Title Act. In preparing these guidelines the Attorney-General should consult closely with Indigenous peoples to ensure the guidelines reflect and respect the culture and practices of Indigenous peoples.

1 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15.
2 The requirement for 'just terms' does not apply to cases falling within section 51(3), that is, where the act is not a compulsory acquisition but is one to which the similar compensable interest test applies. This test is defined in section 240 of the *Native Title Act 1993 (Cth)* and is satisfied if the native title concerned related to an onshore place and compensation would be payable under any law for the act if the native title holders instead held ordinary title to the land. See Perry, M. and Lloyd, S., Australian Native Title Law, Lawbook Co., Sydney, 2003, p402 onwards.
3 Although requests can be made for non-monetary compensation: s51(6) of the *Native Title Act 1993* (Cth).
4 See sections 17 and 20 of the *Native Title Act 1993* (Cth).
5 See section 23J of the *Native Title Act 1993* (Cth).
6 Section 45 of the *Native Title Act 1993* (Cth).
7 Section 10(1) of the *Racial Discrimination Act 1975* provides that: '10(1) If by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.'
8 See Brennan S., 'Native title and the 'acquisition of property' under the Australian Constitution' (2004), Volume 28, *Melbourne University Law Review*, p28.
9 Brennan S., 'Native title and the 'acquisition of property' under the Australian Constitution' (2004), Volume 28, *Melbourne University Law Review*, p77.
10 United Nations Economic and Social Council, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN doc HRI/GEN/1/Rev.5, United Nations, Geneva, 2001, p192.
11 As referred to in the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, p69. See also United Nations Economic and Social Council, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN doc HRI/GEN/1/Rev.5, United Nations, Geneva, 2001, p192.
12 Justice Sackville commented on a number of legal points regarding the compensation claim such as the date at which the entitlement to compensation would have arisen – that being the date the acts were done or the construction commenced and that the person or group entitled to compensation would be those who held native title rights and interests at the date the compensation act happened.
13 Jowett, K. and Williams K., 'Jango: Payment of Compensation for the Extinguishment of Native Title', *Land, Rights, Laws: Issues of Native Title* (May 2007), Volume 3 (Paper No.8), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p9.
14 Jowett, K. and Williams K., 'Jango: Payment of Compensation for the Extinguishment of Native Title', *Land, Rights, Laws: Issues of Native Title* (May 2007), Volume 3 (Paper No.8), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p9 quoting Justice Blackburn in *Milirrpum v Nabalco* (1971) 17 FLR 141.
15 Jowett, K. and Williams K., 'Jango: Payment of Compensation for the Extinguishment of Native Title', *Land, Rights, Laws: Issues of Native Title* (May 2007), Volume 3 (Paper No.8), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p9 quoting Justice Blackburn in *Milirrpum v Nabalco* (1971) 17 FLR 141.
16 Jowett, K. and Williams K., 'Jango: Payment of Compensation for the Extinguishment of Native Title', *Land, Rights, Laws: Issues of Native Title* (May 2007), Volume 3 (Paper No.8), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p10.
17 Jowett, K. and Williams K., 'Jango: Payment of Compensation for the Extinguishment of Native Title', *Land, Rights, Laws: Issues of Native Title* (May 2007), Volume 3 (Paper No.8), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p9.
18 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
19 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, per Gleesan CJ, Gummow and Hayne JJ, at Paras [80] [81].
20 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, p22.
21 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, p135-136, and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*.
22 United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN doc CERD/C/AUS/CO/14, United Nations, Geneva, 2005.
23 The uniform Evidence Acts, for the purposes of the ALRC inquiry was a consideration of the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW), the *Evidence Act 2001* (Tas) and the *Evidence Act 2004* (NT).

24 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/, main recommendations.
25 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/ para 17. 6.
26 *Ward v Western Australia* (1998) 159 ALR 483
27 *Daniel v Western Australia* (2000) 178 ALR 542.
28 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/, para 19.37.
29 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/, para 17.28.
30 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/, para 19.38 and 19.39, citing *De Rose v South Australia* [2002] FCA 1342.
31 *De Rose v South Australia No 2* (2005) 145 FCR 290, para [264]-[271].
32 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/, para 19.38 and 19.39, citing *De Rose v South Australia* [2002] FCA 1342, at para [270].
33 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/, para 19.40.
34 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/, para 19.68.
35 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [456], referring to *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) 238 ALR 1.
36 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [458], referring to *Jango v Northern Territory* 15 FCR 150.
37 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [451].
38 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [135] referring to *Daniel v State of Western Australia* [2003] FCA 666, per Nicholson J, para [149].
39 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/, para 19.67.
40 Wilcox J's statement attached to *Bennell v Western Australia* [2006] FCA 1243.
41 *Bennell v Western Australia* [2006] 230 ALR 603, per Wilcox J, para [112].
42 *Bennell v Western Australia* [2006] 230 ALR 603, per Wilcox J, para [449].
43 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [107] – [122].
44 Lindgren J's summary attached to *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31, p3.
45 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/, recommendations 19.1-19.3. For more detail on how these recommendations were arrived at, and for the recommendation on how 'traditional laws and customs' should be defined, see chapter 19 of the paper.
46 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/, para 19.74.
47 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/, para 19.77.
48 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/, para 19.86.
49 *Bennell v Western Australia* [2006] FCA 1243, per Wilcox J, para [449] – [450].
50 United Nations General Assembly, *International Covenant on Civil and Political Rights,* United Nations Treaty Series ('UNTS') 171, UN Doc A/6316, United Nations, Geneva, 1966. Australia ratified the Convention in 1980.
51 United Nations General Assembly, *Convention on the Rights of the Child,* 1577 UNTS 3, 1989. Australia ratified the Convention in 1990.
52 United Nations General Assembly, *International Covenant on Civil and Political Rights,* United Nations Treaty Series ('UNTS') 171, UN Doc A/6316, United Nations, Geneva, 1966, Article 27. See also United Nations General Assembly, *Convention on the Rights of the Child,* 1577 UNTS 3, 1989, Article 30.
53 Human Rights Committee, *General Comment 23 – The rights of minorities*, (1994) para 9; in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, United Nations ('UN') doc HRI/GEN/1/Rev.5 (26 April 2001), p147.
54 Human Rights Committee, *Concluding observation of the Human Rights Committee: Australia*, (UN doc A/55/40 para's 498-528) 24 July 2000.

55 The international legal approach to equality is one of substantive rather than formal equality: G Triggs, 'Australia's Indigenous Peoples and International Law' (1999) 23 *Melbourne University Law Review* 372 at 379-381; also Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws,* Report No 31(1986) paras 150, 158. The Committee on the Elimination of Racial Discrimination has recognised as aspects of the principle of equality the obligations of States parties to ICERD (inf.) to ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent, as well as to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands and territories and resources: General Recommendation XXIII – Indigenous Peoples, (1997) para's 4-5, in Human Rights Committee, *General Comment 23 – The rights of minorities*, (1994) para 9; in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, United Nations ('UN') doc HRI/GEN/1/Rev.5 (26 April 2001), p192.

56 United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 660 UNTS 195, UN Doc A/6316, United Nations, Geneva, 1966. Australia ratified the Convention in 1975.

57 United Nations Human Rights Committee, *General Comment 23: The rights of minorities (Art. 27)*, UN Doc CCPR/C/21/Rev.1/Add.5, United Nations Office of the High Commissioner for Refugees, Geneva, 1994, para 4(e).

58 United Nations Human Rights Committee, *General Comment 23: The rights of minorities (Art. 27)*, UN Doc CCPR/C/21/Rev.1/Add.5, United Nations Office of the High Commissioner for Refugees, Geneva, 1994, para 2-4(e).

59 United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 660 UNTS 195, UN Doc A/6316, United Nations, Geneva, 1966. Article 18.

60 'Article 18 [freedom of religion]...might well assist in securing access to and control of sacred sites, skeletal remains, burial artefacts and other items of religious or cultural significance to Indigenous Australians', S Pritchard (ed), Indigenous Peoples, the United Nations and Human Rights, The Federation Press, Sydney, 1998, p192. Another commentary indicates that proposing article 18 as supporting the right to exclude people from a place would be 'new ground' for this article: 'It is unfortunate that the HRC [Human Rights Committee] has issued so few consensus comments on the limits to the freedom to manifest religion or belief. It would be instructive, for example, for the HRC to issue opinions on the permissibility of restrictions of such religious activities as polygamy, animal sacrifice, or the exclusion of women from the church hierarchy': S Joseph, J Schultz & M Castan, The International Covenant on Civil and Political Rights, Oxford University Press, Oxford, 2000, at [17.13]

61 *Western Australia v Ward (2002)* 213 CLR 1 at para [586].

62 Section 116, *Constitution of Australia*.

63 Western Australia v Ward (2002) 213 CLR 1, per Kirby J, at para [586].

64 United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 660 UNTS 195, UN Doc A/6316, United Nations, Geneva, 1966.

65 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1999*, Human Rights and Equal Opportunity Commission, Sydney, 2000, pp89- 97.

66 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [938].

67 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [836] and [839].

68 Lindgren J's summary attached to *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31, p2.

69 Wilcox J's statement attached to *Bennell v Western Australia* [2006] FCA 1243.