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HOT TOPICS

LEGAL ISSUES IN PLAIN LANGUAGE

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Indigenous peoples

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Who are Indigenous people?

S James Anaya, who is now the United Nations Special Rapporteur on Indigenous Peoples described 'indigenous, native or aboriginal people' as follows:

> **Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest ... They are *indigenous* because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are *peoples* to the extent that they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.**[1]

A United Nations study on discrimination against Indigenous populations also provided a definition of 'indigenous':

> **Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.**[2]

Some countries have developed a legislative definition of their Indigenous people. For example, in Canada, the federal *Indian Act* which was first enacted in 1868, had several definitions for people who would have the status of 'Indian' under the Act. A status Indian had to be a male descendant of a group recognised as 'Indians' in 1874, or the wife or child of such a descendant. If an 'Indian' man married a non-'Indian' woman, the woman was granted 'Indian' status. If an 'Indian' woman married a non-'Indian' man, she lost her 'Indian' status. This law was not changed until 1985.

In Australia, the definition of 'Aboriginal', 'Torres Strait Islander' and 'Indigenous' has not been prescribed in terms of blood quantum or bloodline. The test most usually applied is one that requires a person to satisfy all three of the following:

- identify as an Aboriginal or Torres Strait Islander person;
- have Aboriginal or Torres Strait Islander ancestry; and
- be accepted by the Aboriginal and Torres Strait Islander community as a member.

image unavailable

An Inuit teenager, North Slope Alaska.

Joel Sartore, National Geographic Stock.

1. S James Anaya, Indigenous peoples in international law, Oxford University Press, 2nd ed., 2004 at p 3.
2. Study of the Problem of Discrimination Against Indigenous Populations, Final report submitted by the Special Rapporteur, Mr José Martínez Cobo 1986: at para 379. Available at http://www.un.org/esa/socdev/unpfii/en/spdaip.html

Indigenous peoples and International Law

When European countries began to expand their territories by colonising other parts of the world, there was a view amongst scholars that Indigenous people held certain rights under international law.

For example, Francisco de Vitoria, a notable Spanish philosopher, believed Indigenous peoples to be rational human beings and as such they enjoyed certain fundamental rights. He did believe, however, that colonisation could be justified if there was no sovereign over a territory. If Indians were unfit to be sovereign the Spanish could legitimate a claim of sovereignty. In such a case, the coloniser could administer the territory.[3]

HOT TIP

Colonialism is the policy of a nation seeking to extend or retain its authority over other territory: *Macquarie dictionary*. European countries such as Portugal, Spain, the Netherlands, Germany, France and Great Britain expanded their territories into the Americas, Africa, Asia and Australasia beginning in the 14th century, through until the Second World War.

Vitoria put two provisos on this claim to sovereignty. Firstly, the claim of sovereignty was temporary and had to be relinquished by the colonial power once Indigenous peoples were capable of governing themselves. Secondly, sovereignty claimed by the Spaniards had to be administered in the interests of the Indigenous peoples, not for the profit of the colonisers.

Other theorists, such as the English philosopher John Locke, believed that sovereignty could be asserted if there was no use of the land.[4] This interpretation meant that Indigenous peoples whose cultures were more recognisable to Europeans because of parallels with their own – use of farming methods, permanent housing – were more likely to receive protection from recognised rights under international law.

Despite these philosophical ideas, in practice the recognition of the rights of Indigenous peoples were minimal during the period of colonisation. The sovereignty of Indigenous nations was recognised in varying degrees reflecting the absence of an international standard or norm concerning interaction with Indigenous peoples of states being colonised. Sometimes treaties were signed with Indigenous peoples, as they were in New Zealand and in North America; in Australia, no treaty was signed with the Indigenous peoples.

Treaties themselves, though documents signed by two or more sovereigns, lost recognition as binding documents and instead became intentionally unbinding documents. For example, the Treaty of Waitangi, signed in New Zealand, had two versions. One was presented to the Maori peoples. The other, in English, had a different account of what the treaty was supposed to contain. Not surprisingly, it was the English document the Courts used to validate the colonisation process.[5] This transition from treating treaties made with Indigenous people as an agreement between two nations, to treating them as a domestic matter stripped Indigenous nations of any recognised sovereign capacity.

This erosion of Indigenous rights by colonial powers continued despite the views of many scholars that they should have been recognised and protected under international law.

For example, in 1888 the Institute of International Law adopted a statement on the conditions required for a State to secure an occupied territory which included a duty to watch over Indigenous populations, ensure their education and take responsibility for their moral and material conditions. Although this was a paternalistic interpretation of the duties owed by a colonising nation, it does show an understanding that Indigenous peoples retained certain inherent rights that colonial powers were violating.

3. Vitoria believed that since the indigenous peoples were wanting in intelligence, the Spanish could, indeed had a duty to, administer the lands.
4. John Locke. *Two Treatises of Government.* New York: Cambridge University Press, 1988. See especially, The Second Treatise, Chapter V, sections 32 and 45. http://www.constitution.org/jl/2ndtr05.htm
5. See, Nin Tomas. The Maori Language – The Chiefly Language of Aotearoa – The Long Struggle. in Greta Bird, Gary Martin & Jennifer Nielson (eds.). *Majah: Indigenous Peoples and the Law.* Sydney: Federation Press, 1996.

By creating an international legal system that upheld their exclusive sovereignty, States were presumed independent and guarded from interference in their internal affairs by others.[6] This principle of 'non-interference' allowed States to develop policies in relation to their Indigenous peoples that were shielded from outside scrutiny. International law was made by States, for States, to the virtual exclusion of Indigenous peoples' territorial and sovereign rights.[7]

International law up until World War I developed to deal with the claims of colonisation and negotiation of disputes between the colonial powers of Europe. The dominance of the European perspective was compounded by the (primarily European) World Wars that moulded international law through European politics, European stability and European control over the world order.

Given this background, Indigenous rights from the colonial period until the end of World War I did not have a place within the general scheme of international law. Any reference to Indigenous people at all was usually to enable colonial powers to justify their actions over their acquired territories. For instance, the Covenant of the League of Nations, adopted in 1919, committed all League members to undertake to secure the just treatment of native inhabitants under their control. But this provision was designed to validate colonial occupation rather than to ensure that Indigenous populations were allowed rights protection.

International law was also held not to apply to wandering tribes, so those Indigenous peoples who could not fit into a European concept of 'society' were also denied protection of their sovereignty and rights.[8]

International law may have been a tool to justify colonisation but, after World War II, colonised people adopted the language of international human rights law and sought to gain access to the institutions of the United Nations to assert claims of sovereignty, autonomy and/or the protection of human rights. The assertions for independence and recognition of Indigenous rights were mostly focused on the principle of self-determination.

THE PRINCIPLE OF SELF DETERMINATION UNDER INTERNATIONAL LAW

Debates within the international arena during the inter-war period and in the early post-World War II period were concerned with restructuring Europe and dividing up the colonial empires of the defeated nations.

The pivotal foundation of the post-World War II framework was the emergence of the right of self-determination, enshrined in Article 1 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 1 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Both articles adopt the same language:

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

This principle of self-determination was intended to be the foundation stone of a new and stable world order. General Assembly Resolution 1514 of 1960 confirmed the legitimacy of the aspiration of independent statehood for colonial territories. This new framework of self-determination was used in many African and Pacific nations, but always in countries where the colonised population remained a majority.

This development of international law in the decolonisation period did not apply to everyone. It was generally deemed inapplicable to colonial situations where the colonised populations constituted a minority. Many Indigenous peoples, including Aboriginal and Torres Strait Islander people in Australia were excluded from this new interpretation of the principle of self-determination. Other avenues in the international legal framework had to be sought by many Indigenous peoples wanting to assert their rights, autonomy and independence.

The ICCPR and ICESCR both state that the principle of 'self-determination' applies to all 'peoples'. The exercise of the right is subverted by denying that Indigenous *peoples* fit the description of peoples for that purpose. They continue to find it hard to fit their claims into the international law definition that requires them to show distinct territorial boundaries since much of their lands were stolen during the colonisation process.

6. These principles were enshrined in the Charter of the United Nations. Article 2(4) ensures respect for the 'territorial Integrity' and 'political independence' of member states and Article 2(7) states that 'matters essentially within the domestic jurisdiction of any state' are excluded from United Nations intervention.
7. Hurst Hannum. *Autonomy, Sovereignty and Self-determination: the Accommodation of Conflicting Rights.* Philadelphia: University of Pennsylvania Press, 1996.
8. The International Court of Justice in an Advisory Opinion declared that the nomadic nature of Indigenous peoples did not deprive them of their sovereignty. See *Advisory Opinion on Western Sahara* [1975] ICJR.

Indigenous peoples and the UN

Indigenous peoples, having been excluded from the principle of self-determination, have developed two strategies within the international legal framework:

> to find alternative ways of being recognised under international law, such as through the Declaration of Indigenous Peoples; and

> to develop and transform the notion of 'self-determination' by broadening the definition and using the word as a political slogan with a more encompassing meaning.

Although international mechanisms and norms are not always responsive or effective, the activity of Indigenous advocates within the frameworks of the United Nations and international law highlights the inventiveness of Indigenous peoples in pursuing alternative avenues to seek better protection of their rights.

THE INTERNATIONAL LABOUR ORGANISATION

It was the International Labour Organisation, a specialist agency within the UN in which the issue of Indigenous rights first came to prominence. ILO Convention No. 107 of 1957 (ILO 107) was the first contemporary international human rights document that recognised Indigenous peoples as having distinct issues of international concern. Until this document, policies relating to Indigenous rights were primarily deemed the concern of States and thus an internal matter.

Despite its groundbreaking recognition of Indigenous peoples as entities under international law, Indigenous people were uneasy with ILO 107 because of its underlying ideology of assimilation. At the same time, its recognition of the rights of Indigenous peoples to land made governments uncomfortable with it and meant that countries with Indigenous populations would not ratify it.

Article 2(1) of ILO 107 illustrates the paternalistic nature of the convention. It gives no recognition of a right to self-determination, autonomy or self-government:

> **Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the population concerned and their progressive integration into the life of their respective countries.**

Although the aim of the document was to promote improved social and economic conditions for Indigenous populations this was done within a framework that did not envisage a place for Indigenous people to take control and responsibility for their own issues.

Indigenous peoples gained access to the ILO through labour organisations. Their presence in the arena was felt as early as 1930 when the rights of Indigenous people were raised in relation to working conditions and slavery.[9]

Concern over the ideology of assimilation underpinning ILO 107 led to revision of the document and the introduction of ILO Convention No. 169 of 1989 (ILO 169). Even though ILO 169 moved away from the ideology of assimilation, the convention still refused to recognise the right to self-determination.

Rights recognised in the revised convention included:

> rights to the protection of social, cultural, religious and spiritual values and practices and the institutions of Indigenous peoples;

> rights to participate freely in the dominant culture of the state;

> rights to non-discrimination and freedom from oppression;

> rights to own land which Indigenous peoples traditionally occupy; and

> rights to have spiritual attachments to land respected.

ILO 169 did use the term 'Indigenous peoples' but with the specific proviso that there was nothing to be implied into the use of the term that meant recognition of the right to self-determination, leaving the change devoid of political substance.

9. See the *Forced Labour Convention of 1930* (ILO No. 29).

Conventions of this kind are not declarations of the aspirations of Indigenous peoples. The process by which international instruments are negotiated is one in which compromises and concessions are made by the states debating them. Many Indigenous people and human rights experts argued that the ideological framework on which ILO 169 is based, ignoring the basic right to self-determination as it does, should be rejected.[10]

Despite the short-comings and ideological flaws of ILO 107 and ILO 169, these conventions did create an impetus for Indigenous scholarship and action both in the international arena and domestically. They also produced pressure on the United Nations to further investigate the situation of Indigenous peoples in countries all over the world.

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

One avenue Indigenous peoples have to protect their rights is through the protections set out in international human rights instruments such as the *Universal Declaration of Human Rights* (UHDR), the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[11]

The rights protections set out in these international human rights documents are vested in individuals. Indigenous people are confined to claiming the rights as individuals, rather than as members of their Indigenous groups. The exception to this is the right to self-determination in both Article 1 of the ICCPR and Article 1 of the ICESCR and Article 27 of the ICCPR that is directed at protecting minority groups.

It states:

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

Article 27 recognises the group nature of the right to enjoy cultural and religious practices and language. The article recognises that to enjoy the rights protected by the article, there needs to be an appreciation of the group that is needed to ensure substantive protection. The right is still vested in the individual.

Indigenous peoples have several avenues for complaint within the framework of these instruments. Many international covenants have monitoring and reporting procedures. This usually means that a country will present its report to the appropriate commission. For example, reports can be submitted to the Human Rights Committee and the Committee for the Elimination of All Forms of Racial Discrimination. These reports can counter the reports submitted by States under the reporting requirements. The Committees can then confront States about alleged human rights violations.

Even though the provisions of many international instruments are currently not interpreted in a way that ensures strong protection of the rights of Indigenous peoples, Indigenous advocates have been actively working within the institutions of the United Nations to ensure their presence is noted and their political agendas are taken into account in policy formation whenever possible. This is a way of developing international human rights norms that can, if established, bind even States who are not signatories to international conventions. For example, the right to be free from torture is so well established as a principle or norm of international law that States are required to not engage in it even if they have not ratified the Convention Against Torture.

While the major human rights instruments dealt with Indigenous people incidentally, many Indigenous groups worked hard to carve out a space within the United Nations bodies that dealt specifically with the issues of Indigenous peoples.

THE WORKING GROUP ON INDIGENOUS POPULATIONS

One area in which Indigenous peoples have changed the process within the United Nations was with the development of the Working Group on Indigenous Populations.

In 1994, the Commission on Human Rights Sub-Commission on the Prevention of Discrimination and Protection of Minorities recommended to the ECOSOC that it approve the participation of Indigenous persons and organisations, without regard to consultative status, in meetings of the United Nations, including the Commission itself, during which the draft United Nations declaration was being discussed.[12] This effectively opened up the forum to Indigenous groups and individuals from around the world without requiring them to seek consultative status first. It was one of the first steps towards allowing consultation with and input from groups whose members would be the direct beneficiaries of the resultant international document.

10. Lisa Strelein. The Price of Compromise: Should Australia Ratify ILO Convention 169? in Greta Bird, Gary Martin and Jennifer Nielsen. *Majah: Indigenous Peoples and the Law.* Leichardt: Federation Press, 1996.
11. See *Lovelace v Canada*, Communication No. R6/24, Report of the Human Rights Committee, U.N. GOAR, 36th session, Supp. No. 40.
12. E/CN.4/Sub.2/ 1994/L.60, 24th August 1994.

It was a significant departure to the usual practice where States would be the main parties drafting and refining international human rights documents.

The open access to the United Nations through the Working Group on Indigenous Populations (WGIP) had three consequences:

> it provided a meeting place for Indigenous peoples to discuss issues with other Indigenous peoples. This allowed for information exchange and network building that has strengthened Indigenous rights movements around the world;

> it gave Indigenous people the ability to raise grievances within the United Nations framework, allowing them to make claims and accusations against violating States; and

> it gave confidence to Indigenous peoples who were claiming that their rights have been violated. Their assertions are reinforced by the existence of human rights instruments that articulate the legitimacy of the claims that they are making. This adds to the veracity with which these claims can be asserted against the State.

These advantages that have emerged from the open forum were countered by the fact that the WGIP was a sub-committee of a sub-committee and so was quite low in the United Nations hierarchy. Even so the WGIP did foster Indigenous participation in other relevant areas of the United Nations.

In 1994, the United Nations General Assembly launched the International Decade of the World's Indigenous Peoples (1995-2004) to increase the commitment to promoting and protecting the rights of Indigenous peoples worldwide. As part of the Decade, several UN specialised agencies worked with Indigenous peoples to design and implement projects on health, education, housing, employment, development and the environment that promote the protection of Indigenous peoples and their traditional customs, values and practices.

A Second International Decade of the World's Indigenous People (2005-2015) was proclaimed by General Assembly. The goal of the Second International Decade is to further strengthen 'international cooperation for the solution of problems faced by Indigenous people in such areas as culture, education, health, human rights, the environment and social and economic development, by means of action oriented programmes and specific projects, increased technical assistance and relevant standard setting activities.'

THE PERMANENT FORUM

On 28 July 2000, the Economic and Social Council (ECOSOC) established the Permanent Forum to serve as an advisory body to the Council.[13] On 13-24 May 2002 the first session of the Permanent Forum on Indigenous Issues took place at the United Nations in New York.

The Forum allows Indigenous people to represent their own interests directly to any major body of the UN as it will advise and report directly to ECOSOC, one of the six main bodies of the UN. The Forum is made up of 16 independent experts – eight nominated by governments and eight appointed by the President of the Council, following consultations with governments on the basis of consultations with Indigenous organisations.

It provides a formal setting in which Indigenous peoples will be able to participate and communicate directly with governments and civil society. Its mandate is to discuss Indigenous issues relating to economic and social development, culture, the environment, education, health and human rights. Specifically, to:

> provide expert advice and recommendations on Indigenous issues to the Council, as well as to programmes, funds and agencies of the UN through the Council;

> raise awareness and promote the integration and coordination of activities relating to Indigenous issues within the UN system; and

> prepare and disseminate information on Indigenous issues.

THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

A major achievement of the WGIP was the Declaration on the Rights of Indigenous Peoples. It was adopted by the General Assembly on 13 September, 2007. The Declaration is the most comprehensive statement of the rights of Indigenous peoples ever developed, giving prominence to collective rights to a degree unprecedented in international human rights law. The adoption of this instrument is the clearest indication yet that the international community is committing itself to the protection of the individual and collective rights of Indigenous peoples.

Some of the central principles contained in the Declaration concern:

> non-discrimination and fundamental rights, self-determination (including autonomy and participation rights);

> cultural integrity;

> rights to lands, territories and natural resources;

> other rights relating to socio-economic welfare.

13. Resolution E/RES/2002/22.

One of the key principles in the Declaration, for which Indigenous peoples consistently fought, is Article 3 on the collective right to self-determination. Self-determination is found in both of the major international human rights covenants, the ICCPR and the ICESCR, and the Declaration mirrors their language. Article 3 of the Declaration adopts this language and applies it specifically to Indigenous peoples.

Article 4 states that Indigenous peoples have 'the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'. While Indigenous peoples 'have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions' they retain 'their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State'.

With respect to participation, Indigenous peoples have the right to participate in decision-making in matters that would affect their rights, through their chosen representatives (Article 18). More specifically, law and policy-makers are required to engage in good faith consultation with Indigenous peoples with the aim of obtaining their 'free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them' (Article 19).

In particular, Indigenous peoples are entitled to be 'actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programs through their own institutions' (Article 23). Indigenous peoples are entitled to 'determine the structures and to select the membership of their institutions in accordance with their own procedures' (Art 33(2)).

However, Article 46(1) provides that nothing in the Declaration may be:

> **Construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.**

On the one hand then, the Declaration as adopted by the General Assembly imposes constraints on self-determination; on the other, this simply replicates existing tensions in international law, leaving potential conflicts between the principle of self-determination and that of State sovereignty to be addressed on a case-by-case basis. It remains to be seen how Article 46 will interact with the main provisions on lands and resources (Article 26) and on existing treaty rights (Article 37).

The rights recognised in the Declaration are intended to constitute a minimum standard for the 'survival, dignity and well-being' of Indigenous peoples (Article 43). Further, nothing in the Declaration may be construed as diminishing the rights Indigenous peoples already have now or may acquire in the future (Article 45).

States are required, in consultation with Indigenous peoples, to take appropriate measures (including national legislation) to achieve the goals of the Declaration, and to provide Indigenous peoples with access to financial and technical assistance for the enjoyment of the rights contained in it (Articles 38-39).

Four states voted against the adoption of the Declaration on the Rights of Indigenous Peoples in the United Nations General Assembly: Australia, New Zealand, Canada and the United States. The Rudd Labor Government has changed Australia's position, officially giving support to the Declaration on 3 April 2009.[14]

THE INFLUENCE OF INTERNATIONAL LAW ON AUSTRALIAN LAW

'Standards' or 'norms' established under international law can filter into the domestic law of States in several ways:

- Obligations under international conventions lead to substantive legislative changes and institutional developments within ratifying States. Australia's obligations under the *Convention on the Elimination of All Forms of Racial Discrimination* provided the basis for the government to pass the *Racial Discrimination Act (1975) (Cth)*. Under the Australian Constitution, the Federal Government has the power to make laws in relation to any of the heads of powers set out in section 51. Section 51(29) states that the government has the power to 'make laws for the peace, order, and good government of the Commonwealth with respect to' 'external affairs'. The High Court has found that an obligation under a treaty falls within that section.[15]
- Norms that have developed under international law have been used to interpret laws in Australia. In the case of *Minister for Immigration and Ethnic Affairs v Teoh*[16] the High Court found that the international customary norm of 'the protection of the child' should be invoked by the Court to give guidance on the interpretation of Australia's domestic law. Although the Court said that this norm should be taken into account, the case is difficult in that the norm of 'best interests of the child' is already a part of the Australian law in the *Family Law Act 1975 (Cth)* so it is unclear to what extent the international norm was used in the case.

14. Minister for Indigenous Affairs Jenny Macklin's speech to Parliament is available at www.alp.au/media/0409/speia030.php
15. *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth (Tropical Rainforests Case)* (1989) 167 CLR 232.
16. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353; (1995) 183 CLR 273.

INDIGENOUS CULTURAL HERITAGE

Indigenous lawyer, Terri Janke, developed the following definition of 'Indigenous cultural heritage' in her report, *Our Culture, Our Future*:

> **Heritage consists of the intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems that have been developed, nurtured and refined (and continue to be developed, nurtured and refined) by Indigenous people and passed on by Indigenous people as part of expressing their cultural identity, including:**
>
> - **literary, performing and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry);**
> - **languages;**
> - **scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and sustainable use of flora and fauna);**
> - **spiritual knowledge; all items of moveable cultural property including burial artefacts;**
> - **Indigenous ancestral remains;**
> - **Indigenous human genetic material (including DNA and tissues);**
> - **cultural environmental resources (including minerals and species);**
> - **immovable cultural property (including Indigenous sites of significance, sacred sites and burials);**
> - **documentation of Indigenous people's heritage in all forms of media (including scientific, ethnographic, research reports, papers and books, films, sound recordings).**
>
> **The heritage of Indigenous people is a living one and includes items which may be created in the future based on that heritage.**

As well as being a comprehensive definition, it includes the idea that Indigenous cultures are vibrant and continuing.

Indigenous cultural heritage is recognised in the Declaration on the Rights of Indigenous Peoples. It is also given protection under other United Nations human rights instruments that recognise rights to language, culture and heritage. For example, Article 27 of the International Covenant on Civil and Political Rights states:

> **In those States in which ethnic, religious and 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 language.**

Similarly, Article 8(j) of the Convention on Biodiversity protects Indigenous rights:

> **Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices**

Australia has attempted to legislate to protect some rights of Indigenous people to culture and heritage through the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, the *Protection of Moveable Cultural Heritage Act 1986* and the *Environmental Protection and Biodiversity Conservation Act 1999*.

The United States

Native Americans in the United States are the Indigenous peoples from the regions of North America, including continental United States, Alaska and the islands of Hawai'i.

In 2000, the US Census found that Native Americans on the mainland, including Alaska numbered 2 475 958 (0.9% of the population of the US). The population of Native Hawai'ians was found to be 140 652 (less than 0.1% of the population of the US).

COLONIAL TIMES

During the colonisation of America, the British Crown dealt with Native American peoples as sovereign nations, entering treaties with various tribes. As colonies grew in population they encroached more and more on Native American lands. This period involved prolonged wars with some Native American tribes and the dispossession of many Native Americans. The British Crown tried to take a role in protecting Native American tribes from the excesses of colonists but, from such a distance, this was not successful.

The declaration of American Independence occurred in 1776. Relations with Native Americans became a matter for the new federal government, not individual states. The Articles of Confederation and the United States Constitution vested this power in the federal government. Congress was granted power to 'regulate Commerce with the Indian Tribes' while the President was empowered to make treaties, including Indian treaties, with the consent of the Senate.

The key policy up until the 1820s was to try to separate First Nations and non-First Nations or non-Indian people. Acts of Congress established boundaries of the lands allocated to First Nations people. Non-Indians were not allowed to acquire lands directly from First Nations people and were prohibited from settling on First Nations lands and from grazing and hunting on them. Crimes against First Nations peoples were federal offences. While Congress regulated the relationship between First Nations peoples and other Americans, it did not regulate the First Nations themselves.

THE CHEROKEE CASES

Despite the initial attempts to regulate the relationship between First Nations and the rest of the United States, tensions increased, especially as demands for more land intensified. The US Congress decided to remove Native American tribes to land beyond the Mississippi River. At the same time that Congress hardened its stance against First Nations peoples, the United States Supreme Court established a legal doctrine through three key cases that would define the rights and jurisdiction of First Nations people in the United States.

> *Johnson v McIntosh*[17] – held that the 'discovery' of lands in the New World gave the discovering European power sovereignty and good title against all other European powers and gave them 'the sole right of acquiring the soil from the natives'. The 'Indians' retained the right of occupancy which the discovering nation could extinguish 'by purchase or by conquest'. The sovereign could grant land occupied by First Nations people but it was subject to the right of First Nations people to occupy it. The impact of the decision was to recognise a legal right of First Nations to their lands, good against all third parties but existing at the sufferance of the federal government.

> *Cherokee Nation v Georgia*[18] – The Cherokee nation was considered a 'state', that is 'a distinct political society separated from others, capable of managing its own affairs and governing itself.' However, it was not a 'foreign' state. Chief Justice Marshall described them as *domestic dependant nations.*

> *Worchester v Georgia*[19] – Chief Justice Marshall held that:

> **The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia have no force.**

The impact of these three cases was to give First Nations the status of 'domestic dependant nations' and to exclude states from having any power over their affairs and limited jurisdiction on the lands of the First Nations.

The decisions were not popular with Congress and President Andrew Jackson ignored them and continued with the policy of removing First Nations people from lands east of the Mississippi. All but a few were moved to the West under the program that was said to be voluntary but was in fact coercive. The journeys were hard and many died on the way.

17. Johnson v McIntosh 21 US (8 Wheat.) 543 (1823).
18. Cherokee Nation v Georgia 30 US (5 Pet.) 1 (1831).
19. Worchester v Georgia 31 US (6 Pet.) 515 (1832).

MOVEMENT TO THE RESERVATIONS

As pressure on the federal government increased to release more land to settlers, the policy of restricting tribes to reservations developed. This was usually accomplished by the signing of a treaty. The terms were generally unfair to First Nations who were placed in a position of having to surrender large tracts of their land in exchange for a small amount of it.

In 1871, Congress passed legislation that stated that no tribe would be recognised as an independent nation with which the United States could make treaties. It did not annul existing treaties. While the Constitutionality of this limitation is questionable, it did signal the fact that Congress would not ratify any more treaties with First Nations people. Reservations after that time were established by legislation.

Reservations were originally intended to keep First Nations people separated from the rest of the population, but the federal government came to see them as being capable of being used to 'civilise' First Nations people. Each reservation was placed under the charge of an 'Indian agent' whose job it was to assist with the adaptation to non-Indian ways. When reservation schools were first set up in 1865, they were focused on religion and with 'Christianising' the Indians. Certain religious dances and customary practices as well as intermarriage were outlawed.

In 1883, the Supreme Court held that when one First Nations person murdered another on a reservation, the sole jurisdiction to deal with the matter was held by the tribe.[20] The United States Congress reacted by passing the Major Crimes Act declaring that murder and other serious crimes committed on First Nations land were federal offences, triable in federal court.

ATTEMPTED ASSIMILATION

In 1887, the US Congress passed the General Allotment Act, known as the Dawes Act. Tribes were considered to be a barrier to the economic development of First Nations people, so the legislation gave individuals plots of land to cultivate. Some hoped that this would assist First Nations people to break out of poverty and assimilate into American culture as middle-class American farmers. However, some of the support for the policy came from those who were keen to see the carving up of reservation land.

The effect of the Allotment Act was a decline in the total amount of First Nations held land – from 138 million acres in 1887 to 48 million in 1934. Of the land that remained, most was in desert or semi-desert areas. Many lost their land after they could not afford the taxes on it or were approached to sell it on terms that were disadvantageous. Some reservations established late in the allotment period escaped the carve-up that occurred, but in most areas the effect of the Act was to

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Native American dancers at the Pine Ridge Pow Wow in South Dakota.

Kristin Piljay, Lonely Planet Images.

20. *Ex parte Crow Dog* 109 US 556 (1883).

separate First Nations peoples from their land with none of the economic benefits that had been anticipated.

In 1924 the United States Congress passed legislation that conferred citizenship status on First Nations people born within the United States.

INDIAN REORGANISATION

The Indian Reorganisation Act of 1934 was a sharp change in policy direction. It sought to protect the land base of First Nations people and to allow them to set up legal structures to assist with self-government. Tribes could establish constitutions and by-laws that could be ratified by vote of tribal members and then sent for approval to the Secretary of Interior. It ended the practice of allotment, allowed for the government to acquire land and water rights for tribes and to create new reservations.

TERMINATION AND RELOCATION

In 1953, Congress adopted a policy of 'termination' which was intended to make 'Indians' within the territorial limits of the United States subject to 'the same laws and entitled to the same privileges and responsibilities' as other US citizens. Several tribes were terminated by statute, made subject to state laws, and had their lands sold.

At the same time, the Bureau of Indian Affairs was encouraging First Nations peoples to leave reservations and 'relocate'. It offered grants to people who left for metropolitan areas. The effect was to create populations of First Nations peoples in urban areas that were unemployed, poor and suffering from the problems that accompany entrenched poverty.

Congress also passed Public Law 280 in 1953. It extended state and criminal jurisdiction to reservations in some states including California and Nevada. Alaska was added in 1958. The effect was to leave tribal authorities with a lessened role. It gave states powers on reservations and also over First Nations peoples. However, it did prevent states from taxing the property of First Nations people held in federal trust and prevented states from interfering with treaty hunting and fishing rights. Since enforcing their new responsibilities came at a cost and states could not levy taxes, many neglected their responsibilities to First Nations peoples.

TRIBAL SELF-DETERMINATION

Congress passed the Indian Civil Rights Act of 1968. It required tribal governments to ensure they acted consistently with the Bill of Rights. It also amended Public Law 280 so states could not assume civil or criminal jurisdiction over the lands of First Nations peoples without their consent.

President Nixon formally declared termination to have been a policy failure in 1970. He urged the development of legislation that would better permit tribes to manage their own affairs. In 1975 the Indian Self-Determination and Education Assistance Act authorised federal Secretaries responsible for those matters to enter contracts with the tribes themselves who would then assume responsibility for them.

The Indian Tribal Government Tax Status Act of 1982 accorded tribes many tax advantages similar to those enjoyed by states, including issuing tax-exempt bonds to finance governmental projects. The combination of tax advantages and jurisdiction has been the key for some First Nations to ensure socio-economic and cultural benefits for their members.

One example is the Mashantucket Pequot Tribal Nation in Connecticut who live on one of the oldest, continuously occupied reservations in North America. In 1992 they opened the Foxwoods Resort Casino. The proceeds from the casino have assisted the Mashantucket Pequot Tribal Nation built roads and houses and acquired various businesses including a shipworks company, restaurant, hotel and inns. They have their own Tribal Courts, tribal police, their own schools and, in 1998 opened the Mashantucket Pequot Museum and Research Center on the Mashantucket Pequot Reservation, where many members of the Mashantucket Pequot tribal members continue to live.

PRESIDENT BARACK OBAMA

Barack Obama has promised to be a president for all Americans. As part of his election platform he had a comprehensive policy on Native Americans. He seems to already have understood the special situation of Native Americans and has said:

> **Perhaps more than anyone else, the Native American community faces huge challenges that have been ignored by Washington for too long. It is time to empower Native Americans in the development of the national policy agenda.**

President Obama's agenda includes support for the principle of tribal sovereignty and belief that the government should honour its treaty obligations. An 'American Indian policy advisor' is to be appointed to his senior White House staff so that there is a direct link between Native Americans and the White House.

Obama has also said that he will host a 'Tribal G8' which he has said will be an annual meeting with Native American leaders 'to develop a national Indian policy agenda.' In addition to this, there are some strong commitments to improving Native American health, housing and education outcomes.

The Sami

The Sami people are the Indigenous people who inhabit the Sápmi area – Sweden, Norway, Finland and the Kola Peninsula of Russia. It is estimated that they have been living here for over 2500 years and they are the earliest of the contemporary ethnic groups living in the area.

Their numbers are estimated to be just under 70 000 with the largest population in Norway (estimated at about 40 000). Sweden is estimated to have 20 000, Finland 7500 and Russia only 2000. They are the only Indigenous people of the European Union.

HISTORY

The Sami originally lived in the interior of Scandinavia and on the Lofoten and Vesterålen Islands, supporting themselves with hunting and fishing. They lived very distinctively and separately from the Norwegians, who lived on the outer fjords and engaged in farming.

This fundamentally altered in 1349 with the Black Death. The Norwegians had connections with other parts of Europe through trade routes and were heavily hit by the plague. It is estimated that almost 75 per cent of the northern farms were abandoned. The Sami had less contact with the trade routes, and so were not as affected.

Pressure was placed on the Sami to leave their fishing and settle the farms. This led to a division between the 'sea Sami' who continued to fish and the 'mountain Sami' who hunted and later herded reindeer. The sea Sami remained more numerous and the mountain Sami make up about 10 per cent of the Sami population.

The Sami lifestyle thrived and Sami culture strengthened up until the 1800s as the Norwegian population decreased. In the 19th century Norway experienced improvement in its economic fortunes, and the Sami came under increasing pressure to assimilate into Norwegian language and culture. Sweden and Finland were less aggressive but, overall, the Sami suffered a weakening status and economy.

The attempt to assimilate the Sami increased in Norway during 1900-1940. Anyone wanting to buy or lease lands had to speak Norwegian. This caused the displacement of some Sami people. Destruction caused by World War II also took a heavy toll on Sami culture. The aggressive attempt to assimilate the Sami eased after the end of the war.

While many Sami live in urban centres, some Sami still make their living from fishing, fur trapping, sheep herding and reindeer hunting. Reindeer herding is a traditional activity that, in Norway, only Sami are allowed to engage in. About 10 per cent of Sami are still engaged with reindeer herding.

The Sami are now enjoying increasing self-government in Norway, Finland and Sweden. Each country has established a Sami Parliament to assist with the protection of Sami language, culture and other interests.

SAMI PARLIAMENT IN NORWAY

In 1964, the Norwegian Sami Council, a body appointed by the government, was established to address Sami matters.

It was replaced by the Sami Parliament, founded in 1987 and commencing operation in 1989 and elected by the Sami people.

The responsibilities of the Sami Parliament in Norway are:

> to serve as the Sami's elected political body to promote political initiatives;

> to carry out the administrative tasks delegated from national authorities or by law to the Sami Parliament.

While the original responsibility transferred from the Norwegian government was small, it increased over time to include:

> management of the Sami Development Fund;

> responsibility for the development of the Sami language;

> responsibility for Sami culture including a fund from the Norwegian Council for Cultural Affairs;

> protection of Sami cultural heritage sites;

> development of Sami teaching aids.

In 2005, the *Finnmark Act* (or Finnmarksloven)[21] was passed by the Norwegian parliament. It gave the Sami Parliament and the Finnmark Provincial council joint responsibility for administering land that was previously state property, about 96% of the area. These lands have always been primarily occupied and used by the Sami.

21. Text available online at www.austlii.edu.au/au/journals/AILR/2005/54.html

THE SAMI PARLIAMENT IN FINLAND

The Finnish constitution first recognised the rights of the Sami in 1995. When the new constitution came into effect in 2000, it contained the following:

> ***Section 17 – Right to one's language and culture***
>
> **The Sami as an indigenous people, the Roma and other groups have the right to preserve and develop their own language and culture. The right to use the Sami language when associating with the authorities is legislated.**

This means the Sami have a recognised right to maintain and develop their own language, culture and traditional livelihoods. There is also a law regarding the right to use the Sami language when dealing with the authorities.

The new Finnish constitution also recognises the right of the Sami to self-government:

> ***Section 121 – Municipal and other regional self-government***
>
> **In their native region, the Sami have linguistic and cultural self-government, as provided by an Act.**

A self-government body, the Sami Parliament, was established in 1996. It replaced the Sami Delegation that had operated from 1973-1995.

The main purpose of the Sami Parliament is to plan and implement the cultural self-government guaranteed to the Sami. It represents the Sami in national and international forums and addresses issues concerning Sami language, culture, and their position as an indigenous people.

CELEBRATING SAMI CULTURE IN NORWAY

- **The Sami have had their own flag since 15 August 1986. The design is derived from a shaman's drum and depicting the Sami as the sons and daughters of the sun.**
- **Sami National Day is on 6 February, the date when the first Sami congress was held.**
- **News bulletins in Sami appear on national TV in Norway, Sweden and Denmark and two weekly newspapers are published in Sami.**
- **Education with Sami as the first language takes place in Norway, Sweden, Denmark and Russia.**

THE SAMI PARLIAMENT IN SWEDEN

Even though it has a much smaller Sami population, Sweden still has established a Sami Parliament. It was founded in 1992 and began operating in 1992. It is an elected body but not a body for self-government. It is instead vested with the task of working to protect and promote the culture of the Sami.

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Most of the 200 000 reindeer in Finland are owned by the Sami. Ten percent of Sami people still make their living herding reindeer. Rovaniemi, Finland.

John Borthwick, Lonely Planet Images.

Canada

Canada has three groups of Aboriginal people, each distinct peoples with unique histories, languages, cultural practices and spiritual beliefs: First Nations (or Indian); Métis; and Inuit.

Fifty-three percent are registered First Nation, 30% are Métis, 11% are Non-status First Nations and 4% are Inuit. In the 2006 Canadian census, almost one million people (4% of the population) identified themselves as 'Aboriginal'.

There are 615 First Nation communities in Canada, representing more than 50 nations or cultural groups and 50 Aboriginal languages. Over half (54%) of Aboriginal people live in urban areas. The cities with the largest Aboriginal populations were Winnipeg, Edmonton, Vancouver, Toronto, Calgary, Saskatoon, and Regina.

The Métis are a nation in west central North America that emerged out of the relations between First Nations women and European men.

The Inuit (once called 'Eskimo' by Europeans) number about 45 000 and live in Nunavut, the Inuvialuit Settlement Region of the Northwest Territories, Nunatsiavut (Labrador); and Nunavik (Quebec). Each of these four Inuit groups have settled land claims and their regions cover one-third of Canada's land mass – though it is the most sparsely populated.

In 1995, a Canadian Royal Commission on Aboriginal Peoples[22] undertook an extensive study of the past treatment of Aboriginal people and made conclusions about how to improve their socio-economic position and strengthen their cultures. The Royal Commission noted the poor socio-economic conditions of Aboriginal people compared to other Canadians, concluding that 'the picture it presents is unacceptable in a country that the United Nations rates as the best place in the world to live.'

HISTORY

Inhabited for millennia by First Nations, Canada evolved from a group of European colonies established by the English and the French. France sent the first large group of settlers in the 17th century, but the collection of territories and colonies now comprising the Dominion of Canada came to be ruled by the British until attaining full independence in the 20th century.

The conflict between the British and French increased the attempts by both colonial powers to form alliances with First Nations people. The process of treaty making began as a way of showing friendship. Treaties were also used to secure trade routes by the colonists who were engaged with the lucrative fur trade.

The Royal Proclamation of 7 October 1763 was issued after the Treaty of Paris ended the Seven Years War and was intended to organise the governments of Britain's acquisitions on the mainland of North America. It has been called the 'Magna Carta of Indian Rights'. It recognised the rights of Aboriginal peoples:

> **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.**

However, dispossession of Aboriginal people continued. The American Revolution commenced in 1776 and the extension of Quebec's boundaries was one of the grievances cited in the Declaration of Independence. Two provinces were created in the aftermath of the Revolution – Upper Canada and New Brunswick. Upper and lower Canada united to form the Province of Canada in 1841.

These new provinces, together with their parent colonies of Quebec and Nova Scotia, were the four provinces that entered Confederation in 1867. Only in Ontario, however, had there been a consistent pattern of purchasing Indian lands by treaty prior to Confederation.

22. Available at http://www.ainc-inac.gc.ca/ap/rrc-eng.asp

Canada quickly grew beyond the boundaries of the original four provinces. Manitoba was created in 1870, with Alberta and Saskatchewan following in 1905. It was the union with British Columbia in 1871, conditional upon early completion of a transcontinental railroad, which prompted a new round of treaty negotiations with Indian nations. Eleven of these 'numbered treaties' were signed. They exchanged the taking of Aboriginal title for the promises of reservations and small annuities, the continued exercise of hunting, fishing and trapping rights, ammunition, fishing twine, farm implements and other goods and services. Some treaties promised a school and others a medicine chest.

Canada virtually abandoned its treaty commitments to ensure First Nations' harvesting rights. Not until 1951 was a provision included in the Indian Act to prevent provincial encroachment on treaty rights. If treaty rights were not always secure under Canadian law, Aboriginal rights were virtually non-existent.

Even though there was a clearer understanding that First Nation's people retained rights to their land, to hunt and to fish and to some extent, their own jurisdiction, successive Canadian governments engaged in policies of dispossessing First Nations people from their land and attempting to assimilate them. There was a policy of removing First Nations children from their families and sending them to residential schools.

Aboriginal people began to claim their rights through the courts and over time were successful in developing judicial recognition of their claims. Canadian common law recognised some Aboriginal rights as early as 1885 in a decision which noted that all vacant lands were vested in the Crown which had an exclusive right to grant them.[23] Aboriginal peoples did not have the capacity to alienate their land or to confer title to those lands. Chancellor Boyd referred to a trust-like relationship between the Crown and Aboriginal people.

The treatment of the relationship between the Crown and Aboriginal people as a political trust changed with a 1984 decision of the Supreme Court of Canada.[24] The court concluded that if the Crown breached this duty, it would be liable in the same way and to the same extent as if a trust were in effect. Aboriginal people have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it.

KEY ISSUES

Charter of rights

In 1982, the Canadian Constitution was altered to include a Charter of Rights. At the same time Article 35 was included and sub-section (1) states:

> **35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.**
>
> **...**

Noticeably, the section does not define the term 'aboriginal rights' and the content has been developed by subsequent court decisions that have found that it includes rights to land, fishing, logging, hunting and the enforcement of treaties.

National representation

The Aboriginal people in Canada have a national representative voice for the 630 First Nations Communities. The Assembly of First Nations (AFN) has a structure that is based on the Charter of the Assembly of First Nations, which was adopted in July 1985. It presents the views of the various First Nations through their leaders in areas such as: Aboriginal and treaty rights; economic development; education; languages; health; housing; justice; land claims; and, the environment. The Chiefs meet annually to set national policy and direction through resolution. The National Chief is elected every three years by the Chiefs-in-Assembly. The Chiefs meet between the annual assemblies every 3 to 4 months in a forum called the 'Confederacy of Nations' to set on-going policy directions.

Self government

In 1995, the Canadian Department of Indian and Northern Affairs introduced a policy of self-government for First Nations people. 'The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government' detailed an approach in which agreements were negotiated with Aboriginal groups to enable them to govern their internal affairs and assume greater responsibility and control over the decision making that affects their communities.

Self-government agreements can cover a range of matters including: the structure and accountability of Aboriginal governments, their law-making powers and their responsibilities for providing programs and services to their members.

23. *Regina v St Catherine's Milling and Lumber Co* (1885) 10 OR 196.
24. *Guerin v The Queen* (1984)2 SCR 335.

The policy recognises that different Aboriginal groups will have different needs and different aspirations so negotiates each agreement separately with each different community. This means that there is no uniform model of self-government. This process has seen treaties made over 100 years ago reinterpreted and modernised and new treaties negotiated in areas where they did not exist before.

Although there was a long history of ignoring treaties made with Aboriginal people in Canada, the historic treaties are still important documents. Even where treaties have not been enforced, they provided the basis of a claim when there was no other recognised basis and the notions of rights and sovereignty have permeated the dialogue between Indigenous and non-Indigenous Canadians. When native title was found to exist as part of the common law in Canada, its extension to hunting and fishing rights was readily accepted because the treaties had always emphasised the inter-relationship between land and livelihood in claims against the Canadian state. Some treaties did successfully protect rights to land, hunt and fish. There are, in Canada today, greater mechanisms for enforcement and protection of treaty rights that have developed in part because of constitutional protection, which has only been in place since 1982.

In 1997, in *Delgamuukw v British Columbia,*[25] the Supreme Court of Canada recognised a form of 'Aboriginal title' which encompassed the right to exclusive use and occupation of traditional land. The Court went on to find that these rights were not 'frozen in time' and applied to more modern uses of the resources on the land such as forestry and mining.

The oral evidence of Aboriginal people was given considerable weight. Chief Justice Lamer emphasised the need for flexibility when receiving evidence given by Aboriginal witnesses, especially in cases where rights are being asserted:

> **Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.**

There are several aspects to Canadian Aboriginal title that are similar to native title as it was formulated by the High Court of Australia:

- it is inalienable except to the Crown;
- it is *'sui generis'* which means it is in a class of its own and not equated with private property ownership;
- it is held communally.

However, there were several aspects of Aboriginal title in Canada that were more expansive than the definition in Australia:

- modern uses are proof of Aboriginal title so long as they are not inconsistent with traditional uses;
- when dealing with the Aboriginal title, the Crown owes the title holders a fiduciary obligation;
- Aboriginal title is a right to the land itself, and includes rights to sub-surface minerals.

On 10 May 2006, the Canadian Government announced the approval of a final Indian Residential Schools Settlement Agreement. This agreement established a process that allows former students who suffered sexual or serious physical abuses or other abuses that caused serious psychological effects, to apply for compensation.[26] The agreement also included measures aimed at giving relief more broadly such as a Truth and Reconciliation Commission and funding for the Aboriginal Healing Foundation and other health support programs.

The recognition of a fiduciary obligation owed by the Canadian Crown to Aboriginal people has seen the development of common law recognition of the duty to consult:

- in *R v Jack*[27] the court held that there existed a duty to provide the Indian band with full information on conservation measures and their effect on the band, as well as a duty to inform itself of the fishing practices of the band and the band's views of the conservation measures;
- in *R v Noel*[28] the notion of consultation was extended to require the Government to carry out meaningful and reasonable discussions with the representatives of the Aboriginal people involved. A short time frame for legislative action is not enough to justify the Government pushing forward without proper consultation;
- *R v Nikal*[29] emphasised the need for the dissemination of information. A request for consultation cannot simply be denied by either party. The Court noted every reasonable effort needs to be made to inform and consult with first nation people.

25. *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.
26. Details of the Settlement Agreement are available at www.residentialschoolssettlement.ca/settlement.pdf
27. *R v Jack* (1995) 16 BCLR (3d) 201 CA.
28. *R v Noel* (1995) 4 CNLR 78.
29. *R v Nikal* (1996) 1 SCR 1013.

Mapuche

The traditional land of the Mapuche nation covers the area now occupied by Argentina and Chile. The Mapuche population in Chile is estimated to be about 1 500 000 (about 10% of the total population); in Argentina it is about 200-250 000. They are the third largest Indigenous society in South America.

HISTORY

The Spanish arrived in the lands of the Mapuche in 1541. In 1641 the Mapuche nation signed the Treaty of Quillin, in which the Spanish Crown recognised the territorial autonomy of the Mapuche nation. From this date, for more than two centuries, the Bío-Bío river was respected as a natural frontier and the lands to the south of this boundary as territory of the Mapuche nation in full exercise of its right to self-determination. This treaty was unique in South America and a result of the failure of the Spanish to conquer the Mapuche. The treaty and the 28 treaties subsequently signed with the Mapuche make them the only Indigenous nation in South America whose sovereignty was legally recognised.

With the defeat of the Spanish by the newly formed states of Argentina and Chile in 1810, the original treaties of 1641 were ignored. Under the pretext of promoting civilisation and Christianity, the Mapuche people suffered military aggression and persecution resulting in the destruction of entire communities.

Between 1860 and 1885 military campaigns by both Chile and Argentina saw the occupation of the Mapuche territory. It is estimated that over 100 000 Mapuche were massacred during this time and those remaining were moved to Indigenous reservations. After the defeat of the Mapuche nation in 1885, many people were either killed or forced from their homes to live impoverished lives in small rural communities and in the cities. Indigenous land was redistributed and many Mapuche were left with land that was mountainous and unproductive. For decades thousands of Mapuche were exiled and their traditional authorities persecuted. Many children were taken from their families and given to non-Indigenous people to be trained as servants.

From 1900, there was further pressure to assimilate the Mapuche into Chilean society, particularly through education and religion. However, the Mapuche have resisted attempts at eradicating their cultural identity.

CONTINUING CONFLICT OVER LAND

Land disputes and violent interactions do occur in some Mapuche areas. There are several Mapuche activist groups which use tactics including the destruction of private property, such as burning structures and pastures. Protesters from Mapuche communities have engaged in these tactics against multinational forestry corporations and private individuals that occupy territories originally owned by Mapuche communities.

A government body, the Commission for Historical Truth and New Treatment, issued a report in 2003 calling for changes in Chile's treatment of the Mapuche. Recommendations included the formal recognition of political and 'territorial' rights for Indigenous peoples, as well as efforts to promote their cultural identity.

Despite pressure from the dominant Chilean society on the Mapuche to assimilate, they have managed to preserve their traditional language, their religion and the socio-political structure which regulates life.

While Chile has now recognised the cultural diversity of all of its inhabitants, striving to preserve languages, customs and religious traditions, there is little recognition of the rights of Indigenous peoples. The Mapuche people are not recognised in the Chilean constitution; and the apparent disregard for them shown by land rights laws has recently come under scrutiny.

The Mapuche are the largest Indigenous group in Chile, with a strong cultural identity bound up with their connection to traditional land. A long struggle to recover and maintain the rights to their ancestral land has brought them into conflict with private landowners and national and multinational companies. In particular, commercial forestry plantations and the construction of a large hydro-electric dam have caused huge disruptions in the region. The Chilean government has used counter-terrorism legislation to prosecute Mapuche activists.

UN Special Rapporteur, Rodolfo Stavenhagen, visited Chile in July 2003. He stated: 'the Indigenous population continues to be largely ignored and excluded from public life as a result of a long history of denial, social and economic exclusion and discrimination by the majority in society'. He urged the Chilean Government to search for a negotiated solution to the conflict with the Mapuche, stating: 'the principle of the protection of the human rights of Indigenous peoples should take precedence over private commercial and economic interests'.

New Zealand

Maori oral tradition tells of an ancestral home of Hawaiki, which today is believed to be in the areas of the Southern Cook and Society islands.

Ethnologists have estimated that the date of first Polynesian contact with New Zealand was around 750 AD and the 'great fleet' (which departed from the Tahitian region) arrived in 1350 AD. Recent radiocarbon dating of archaeological sites, DNA analysis, and canoe reconstructions have suggested that New Zealand was settled by people from the Southern Cook and Society islands region.

From New Zealand's 2006 census, 565 329 people identified themselves as being Maori. This is approximately 14% of New Zealand's total population. There are an estimated 70 000 Maori people living in Australia.

Maori people are, on average, poorer than other New Zealanders, with higher unemployment rates, making up almost 50% of the prison population, poorer health, higher suicide rates, lower life expectancy rates and poorer levels of education.

COLONISATION OF NEW ZEALAND

Both the Spanish and Portuguese were active in the Pacific from the early 16th century, but there is no firm evidence of Europeans reaching New Zealand before Dutchman, Abel Tasman in 1642. Captain James Cook sighted New Zealand on 6 October 1769. At Mercury Bay on 15 November 1769, and at Queen Charlotte Sound on 30 January 1770, he made proclamations that attempted to establish British claims over New Zealand. Cook had mapped the entire coastline of New Zealand by the beginning of April 1770, when he left to chart the east coast of Australia.

James Busby was appointed to the position of British Resident and arrived in the Bay of Islands in 1833. His instructions from Governor Richard Bourke of New South Wales were to protect 'well disposed settlers and traders' and prevent 'outrages' by Europeans against Maori. A year later, Busby organised a gathering of chiefs at Waitangi to choose a national flag to fly on New Zealand-built trading ships. Busby regarded this as a first step towards a 'confederation of chiefs'.[30]

A Declaration of Independence of New Zealand was drawn up by Busby in 1835. This asserted the independence of New Zealand, with all sovereign power and authority resting with the hereditary chiefs and tribes. The declaration was eventually signed by 52 Maori chiefs.

THE TREATY OF WAITANGI

In 1839, the British government appointed William Hobson as consul to New Zealand, with instructions to obtain sovereignty with the consent of a 'sufficient number' of chiefs. The Treaty of Waitangi was signed on 6 February 1840 by 40 chiefs and by September, 500 had signed. There were two versions of the Treaty – one in English and one in Maori. The texts were not identical and this gave rise to problems of interpretation.

The Treaty of Waitangi – English Version

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands – Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant-Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the first [Article 1]

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

Article the second [Article 2]

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the third [Article 3]

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

(signed) William Hobson, Lieutenant-Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

30. C Orange. 'Busby, James 1802–1871'. *Dictionary of New Zealand Biography*, accessed 5 March 2009 http://www.dnzb.govt.nz/

TIMELINE

1852	New Zealand Constitution Act (UK) establishes a system of representative government for New Zealand
1854	first parliament meets in Auckland
1858	Waikato chief Te Wherowhero becomes the first Maori King, taking the name Potatau.
1867	four Maori parliamentary seats are created, with universal suffrage for Maori males over 21
1868	first Maori elections are held
1879	universal suffrage is introduced for all males over 21
1893	suffrage extended to women, including Maori – New Zealand becomes the first self-governing country to grant the right to vote to all adult women.
1934	Waitangi Day is formally celebrated for the first time
1940	New Zealand Centennial celebrates the signing of the Treaty of Waitangi as the nation's founding moment, but the celebrations focus mostly on the failure to respect the true intent of the treaty.
1974	voting age is reduced to 18; Waitangi Day becomes a national holiday
1975	the Treaty of Waitangi Act establishes the Waitangi Tribunal
1985	powers of the Waitangi Tribunal increased
1987	Maori becomes an official language of New Zealand

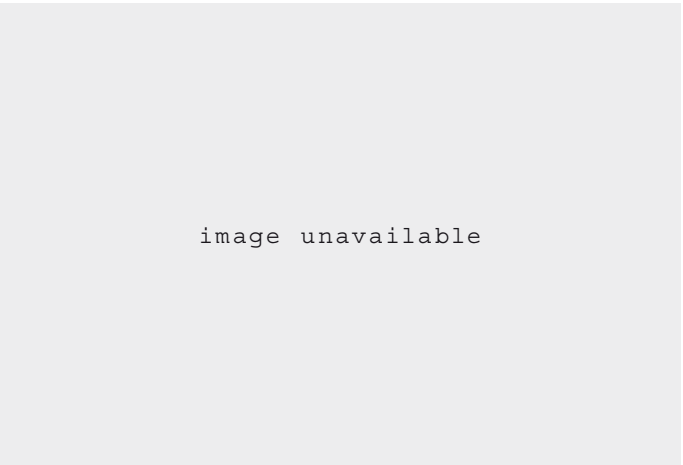
THE WAITANGI TRIBUNAL

In 1975, the Treaty of Waitangi Act established the Waitangi Tribunal to hear grievances against the Crown concerning breaches of the Treaty, especially where the two texts are different. It is required to settle the differences by looking at the 'principles' or the spirit of the Treaty. These powers of the Waitangi Tribunal were increased in 1985 to include the power to investigate Treaty breaches dating back to 1840. In 1978 it released its first report. This and other reports are available at http://www.waitangi-tribunal.govt.nz/reports/

The Waitangi Tribunal has made some important determinations on matters other than land. For example, it helped to progress the fishing rights of Maori people. The Treaty of Waitangi guaranteed Maori rights to fish but over time the New Zealand government began to regulate commercial fisheries. An interim agreement was reached with the government transferring 10 per cent of the fishing quota (60 000 tonnes), with shareholdings in fishing companies and $50 million to the Waitangi Fisheries Commission until a final settlement could be reached. The Waitangi Tribunal provided a forum to evaluate and settle the claim. It produced a report with recommendations which, in conjunction with other reports, established facts and findings that supported the negotiations. These included findings that traditional fishing practices had included commercial elements and that legislation relating to the regulation of fishing since 1840 had breached the Waitangi Treaty principles and had denied some Maori access to their fisheries resources and its benefits. The settlement was finalised in 1992 and saw the Maori allocated 23 per cent of the fisheries quota and entitled to 20 per cent of new species brought under the quota system, more shares in fishing companies and $18 million in cash. It is estimated by the Waitangi Tribunal that the total settlement was worth around $170 million.

MAORI LANGUAGE

In 1983, the Waitangi Tribunal heard a claim in relation to the protection of Maori language. The Tribunal made a range of recommendations in 1986. Maori became an official language of New Zealand in 1987 (English is the other one). A Maori Language Commission was established that year. There has been a resurgence in the use of Maori language and more people speak it today than a generation ago. There are Maori language schools, a Maori radio station and the Maori television service runs a second channel that broadcasts solely in Maori language.



Children in traditional Maori dress celebrate New Zealand's Waitangi Day in Brisbane, 2006.

Indigenous people in Australia

POPULATION

The Australian Bureau of Statistics has estimated that the Indigenous population at 30 June 2006 was 517,200 people, or 2.5% of the total Australian population.

The Indigenous population is estimated to have increased by 58,700 (13%) between 2001 and 2006.[31]

Almost 60% of the total Indigenous population is concentrated in two states – New South Wales and Queensland. In contrast, the Indigenous population of the Northern Territory, while being relatively small in numbers, represents nearly one-third of the territory's total population.

	Percentage of the total Indigenous population living in a state or territory	***Percentage of the state or territory's total population that is Indigenous***
NSW	28.7	2.2
Victoria	6.0	0.6
Queensland	28.3	3.6
South Australia	5.0	1.7
Western Australia	15.1	3.8
Tasmania	3.3	3.4
Northern Territory	12.9	31.6
ACT	0.8	1.2

Source: *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, ABS No. 4705.0.

The majority of Indigenous people live in major cities and inner or outer regional areas of Australia. However, the proportion of Indigenous people that live in remote or very remote areas is much higher than for the non-Indigenous population.

Location of Indigenous peoples by remoteness

Major cities	32%
Inner regional	21%
Outer regional	22%
Remote	9%
Very remote	15%

Source: Experimental Estimates of Aboriginal and Torres Strait Islander Australians, 2006, ABS No. 3238.0.55.001.

HEALTH

Despite some significant health gains being made by Indigenous peoples in the 1970s and 1980s, health inequality with the non-Indigenous population appears to have remained static.

Under the new life expectation formula adopted by the ABS in 2003, Indigenous life expectation was estimated to be 59.4 years for males born in the period of 1996-2001, while female life expectation was estimated to be 64.8 years. A life expectation inequality gap of approximately 18 years was identified, a reduction of approximately three years on estimates produced in 2001 under a now superseded formula. This is well below the 76.6 years and 82.0 years respectively for total males and females, born during the 1998-2000 period.

Around 30 years ago, life expectancy rates for Indigenous peoples in Canada, New Zealand and the United States of America were similar to the rates for Indigenous peoples in Australia. However, significant gains in life expectancy have been made in the past two decades in the Indigenous populations in Canada, New Zealand and the United States of America.

Approximately twice as many low birth weight infants were born to Indigenous women compared to those born to non-Indigenous women over 2001-04.[32]

31. The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, 2008, Australian Bureau of Statistics No. 4704.0.
32. Australian Bureau of Statistics and Australian Institute of Health and Welfare, The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, 2008.

Research has demonstrated associations between an individual's social and economic status and their health. Poverty is clearly associated with poor health. For example:

> poor education and literacy are linked to poor health status, and affect the capacity of people to use health information;

> poorer income reduces the accessibility of health care services and medicines;

> overcrowded and run-down housing is associated with poverty and contributes to the spread of communicable disease;

> poor infant diet is associated with poverty and chronic diseases later in life; and

> smoking and high-risk behaviour is associated with lower socio-economic status.[33]

Research has also demonstrated that poorer people also have less financial and other forms of control over their lives. The perception of control, or lack of control, can be influenced by:

> factors like racism, and other forms of discrimination;

> addiction in the community: this undermines resilience and social support in communities. It has been mostly closely observed in relation to alcoholism; and

> particular traumas: accidents, violence, natural disasters etc.[34]

EDUCATION

Indigenous people have lower levels of education than non-Indigenous Australians. In the 2006 Census, 47% of Indigenous Australians over 15 reported having a non-school qualification compared with 74% of non-Indigenous Australians.

Highest level of schooling completed for over 18s, 2006

	Indigenous (%)	*Non-Indigenous (%)*
Year 9 or below	34	16
Year 10 or 11	42	35
Year 12	24	49

Source: Australian Bureau of Statistics, Census 2006.

Indigenous peoples are also less likely to have a post-graduate degree, bachelor degree, advanced diploma or diploma than the non-Indigenous population.

Highest non-school qualification, Percentage of persons aged 25 years and over, 2006

	Indigenous peoples (%)	*Non-Indigenous population (%)*
Bachelor degree or above	6	23
Diploma	5	10
Certificate	18	21
Total with non-school qualification	30	55

Source: Australian Bureau of Statistics, Census 2006.

INCOME AND EMPLOYMENT

Unemployment rates are higher amongst the Aboriginal and Torres Strait Islander populations than for the rest of Australia.

In the 2006 census, the unemployment rate for Indigenous peoples was 16%, a drop from the 2001 rate of 20%. However, this rate is still more than three times higher than the rate for the non-Indigenous population (5%).[35] Indigenous people living in Inner Regional and Outer Regional areas had the highest unemployment rates (both 18%).

Indigenous people have, on average, a lower income than other Australians. In the 2006 census, the mean household income for Indigenous persons was $460 per week, or 62% of the rate for non-Indigenous persons ($740 per week).

image unavailable

Young Aborginal boy from an Aboriginal community in Napperby, Northern Territory, Australia

S Sadler, © DWSPL.

33. Australian Human Rights Commission website: www.humanrights.gov.au
34. Australian Human Rights Commission website: www.humanrights.gov.au
35. Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006, ABS No. 4713.0.

Indigenous People and Australian Law

No treaties were ever negotiated with Indigenous people in Australia, so Aboriginal and Torres Strait Islander people have had to rely upon the Australian legal system – the Constitution, common law and legislation – to find ways to protect their rights.

At the time the Constitution was drafted, Aboriginal and Torres Strait Islander people were excluded from participating in the process, which reflected their general exclusion from participation in mainstream Australian society at that time. Along with entrenched beliefs about the inferiority of women, beliefs of white racial superiority were rife at the time the Constitution came into force in 1901. Also prevalent was the belief that Aboriginal people would eventually die out as a race. While these views are not openly expressed in the text of the Constitution they have left a legacy.

Other key decisions by the drafters that reflected their values have shaped the system of government Australia has today. The framers of our Constitution believed that the decision-making about rights protections – which ones we recognise and the extent to which we protect them – were matters for the Parliament.

The framers preferred to leave the Constitution mostly silent on matters of rights. A non-discrimination clause was proposed by Andrew Inglis Clark through the Tasmanian Parliament[36] that, in part, stated:

> **... nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.**

This clause would have entrenched some rights in the Australian Constitution, but it was rejected for two reasons. First, it was believed that entrenched rights provisions were unnecessary, and second, it was considered desirable to ensure that the Australian states would have the power to continue to enact laws that discriminated against people on the basis of their race.

The power to make laws that were discriminatory was considered necessary to enable state parliaments to continue to make laws that would specifically discriminate against Indigenous people and were also believed necessary in order to implement legislation that would discriminate against other races. There were special rules that regulated the movement of Chinese Australians that had become general practice during the gold rushes. There was also a strong desire to be able to control who was allowed to come to our country. The first laws passed by the new Australian parliament were immigration legislation that passed the White Australia Policy into law.

For Indigenous people, the Australian Constitution, as it was originally drafted symbolised three things:

- the modern Australian state was founded without any involvement of Indigenous people in the process and therefore represented the way in which they were marginalised within Australian society;
- there was no recognition within the Constitution of the unique position of Indigenous people as the traditional owners of the country; and
- by leaving the Constitution silent about rights, Australians were content to rely on governments to protect them. For Indigenous Australians, this trust in the benevolence of government would leave them vulnerable to exploitation and the breach of their human rights.

It is not surprising that reform of the Constitution is a continuing aspiration for Aboriginal and Torres Strait Islander people engaged in the broader political agenda for achieving social justice.

1967 REFERENDUM

The referendum in 1967 was one of only eight successful attempts at changing the Australian Constitution. In all, there have been 18 referenda held. The 1967 change to allow for the inclusion of Aboriginal people in the Census was endorsed by over 90 per cent of voters and was approved in all six states. At a time when many parts of Australia were actively practicing segregation, this was an extraordinary result. This support reflected a moment in Australian history that was a high water mark for the relationship between Aboriginal and non-Aboriginal people.

36. See George Williams. *Human Rights Under the Australian Constitution*. Melbourne: Oxford University Press, 2000.

The referendum also enjoyed bipartisan support for a 'yes' vote, a pre-requisite to ensuring its success. Political leadership was shown across the spectrum to support the Constitutional change that would grant more power to the federal parliament. It can be inferred that the relatively uncontentious nature of the changes – including Indigenous people in the census and increasing federal government power over them – assisted in obtaining this bipartisan support. A more radical change, one that more directly called for the entrenchment of Indigenous rights, would probably not have enjoyed this popular support.

Perhaps because of the focus on 'citizenship rights' in the decades leading up to the referendum, and because the rhetoric of achieving equality for Aboriginal people that was used in 'yes' campaigns, mistaken perceptions about the constitutional change were inevitable. The 'yes' vote did not give citizenship to Aboriginal people, nor did it give them the right to vote.

When voting 'yes' in the 1967 referendum, Australians voted to make two changes to the Constitution:

1. **to allow for Indigenous people to be included in the census; and**
2. **to give federal parliament the power to make laws in relation to Indigenous people.**

It was thought by those who advocated for a 'yes' vote that the changes to section 51(xxvi) (the 'races power') of the Constitution to allow the federal government to make laws for Indigenous people was going to herald in an era of non-discrimination for Indigenous people. There was an expectation that the granting of additional powers to the federal government to make laws for Indigenous people would see that power used benevolently, and would mean an end to the discriminatory way that they had been treated by state governments.

However, the faith in federal governments using that additional power only for the benefit of Indigenous people was to prove misplaced. One example of the way in which federal governments have failed to use the power benevolently was in the passing of the *Native Title Amendment Act 1998 (Cth)*, legislation that prevented the *Racial Discrimination Act 1975 (Cth)* from applying to certain sections of the *Native Title Act 1993 (Cth)*. Similarly, the legislation that implemented the Northern Territory intervention in 2007 suspended the operation of the *Racial Discrimination Act 1975 (Cth)* so that it didn't protect Aboriginal people who were at risk of losing their land or being discriminated against in relation to their welfare payments.

Consideration as to whether the races power can be used only for the benefit of Aboriginal people, as the proponents of the 'yes' vote had intended, was given some attention by the High Court in *Kartinyeri v Commonwealth* (the Hindmarsh Island Bridge case).[37] This case arose when, in order to resolve a dispute between Aboriginal people and developers over the construction of a bridge, the federal government passed legislation that stopped heritage protection legislation from applying to the contested area. That is, the government simply repealed the protections contained in the heritage protection legislation so that the Aboriginal people who claimed the contested area was sacred to them had no ability to attempt to protect it from being destroyed by the construction of the bridge.

It was argued by the legal representatives of the Aboriginal people as part of the case that, when the 1967 referendum was passed, it was with the clear intention that the federal government should only use the power to protect Aboriginal people. Therefore, they reasoned, the federal government was not given the power to act in a way that would disadvantage Aboriginal people.

Only Justice Kirby argued that the 'races power' did not extend to legislation that was detrimental to or discriminated against Aboriginal people. Justice Gaudron said that while there was much to recommend the idea that the 'races power' could only be used beneficially, the proposition in those terms could not be sustained. Justices Gummow and Hayne held that the power could be used to withdraw a benefit previously granted to Aboriginal people and thus to impose a disadvantage.

When analysing the failure of the amendment of the races power to ensure benevolent and protective legislation as its proponents envisaged, it is easy to be reminded of the intention of the drafters of the Constitution to leave decisions about the protection of rights to the legislature. They trusted that parliament would be the best arbiter of how to protect rights. Those who campaigned so hard to change the constitution in 1967 made the same assumption.

Aboriginal people quickly became disillusioned by the lack of changes that followed from the referendum and the continual discrimination facing Indigenous people and the poor socio-economic conditions of their communities.[38] They rejected the notion of assimilation but embraced the idea of equal rights and equal opportunities for Aboriginal people.

37. *Kartinyeri v Commonwealth (*the *Hindmarsh Island Bridge* case) (1998) 195 CLR 337; see http://www.austlii.edu.au/au/cases/cth/HCA/1998/52.html
38. See Heather Goodall, *From Invasion to Embassy: Land in Aboriginal Politics in NSW from 1770 to 1972*, Allen & Unwin, 2006.

AFTER THE 1967 REFERENDUM

The new momentum in the political activism of Aboriginal people who continued to campaign for changes to the legal system that would create equality for Aboriginal people and recognise and protect their rights highlighted how the 1967 referendum had failed to change the way in which the Constitution, as it was originally drafted, failed to recognise the unique status and place of Indigenous people in Australia and continued to leave the recognition and protection of their rights to the benevolence of government. This continual reliance on the benevolence of government left many Aboriginal and Torres Strait Islanders vulnerable to the whims of government policy.

An instructive example of this vulnerability can be seen in the 1997 High Court case of *Kruger v the Commonwealth*[39] assists in making this point. This was the first case to be heard in the High Court that considered the legality of the formal government assimilation-based policy of removing Indigenous children from their families.

In *Kruger*, the plaintiffs had brought their case on the grounds of the violation of various rights by the effects of the Northern Territory Ordinance that allowed for the removal of Indigenous children from their families. The plaintiffs had claimed a series of human rights violations including the implied rights to due process before the law, equality before the law, freedom of movement and the express right to freedom of religion contained in section 116 of the Constitution. They were unsuccessful on each count, a result that highlighted the general lack of rights protection in our system of governance and the ways in which, through policies like child removal, there was a disproportionately high impact on Indigenous people as a result of those silences.

The *Kruger* case illustrated the way in which the issue of child removal – seen as a particularly Indigenous experience and a particularly Indigenous legal issue – can be expressed in language that explains what those harms are in terms of rights held by all other people – the right to due process before the law, equality before the law, freedom of movement and freedom of religion.

Kruger also highlights how the rights that many Australians would assume are protected by our legal system are not. It is a reminder of the silences about rights in our Constitution and that these silences were intended. It gives us a practical example of the rights violations that can be the legacy of that silence.

THE CONTINUAL AGENDA FOR CONSTITUTIONAL CHANGE

Given the way in which the Constitution has failed to provide recognition of Indigenous people and protection of their rights, it is not surprising that the agenda for Constitutional reform remains a key part of the agenda for legal reform that seeks to achieve social justice for Indigenous people.

In *Securing a Bountiful Place for Aborigine and Torres Strait Islanders in a Modern Free and Tolerant Australia*,[40] the Constitutional Centenary Foundation raised the following possible options for constitutional change in relation to Indigenous people as it sought to raise discussion about the Constitution in the lead up to the Centenary of Federation:

> seek to recognise Aboriginal and Torres Strait Islander peoples, their history and their culture in the Constitution;

> enshrine the principle of non-discrimination;

> grant the Commonwealth primacy over Indigenous affairs;

> negotiate an instrument of reconciliation; and

> recognise Indigenous people's entitlement to self determination; grant self government to remote communities; and recognise the inherent sovereignty of Indigenous peoples.

Some of these suggestions are influenced by the way that other countries have recognised the rights of Indigenous people in their constitutions. They highlight the three key areas that continually arise as underlying reasons to look at Constitutional reform as a way of achieving social justice for Aboriginal and Torres Strait Islander people:

> the appropriateness of acknowledging the unique place and role of Aboriginal and Torres Strait Islander people in Australia in our founding document;

> the need to modernise or update the Constitution so that it provides stronger protection of human rights, fixing the silences that were deliberately left in the Constitution by the original drafters; and

> providing an opportunity, by working in an inclusive way to achieve constitutional change, engage in a nation-building process that was not undertaken when the Constitution was first drafted.

39. *Kruger v the Commonwealth* (1997) 190 CLR 1; available at http://www.austlii.edu.au/au/cases/cth/HCA/1997/27.html
40. Frank Brennan. *Securing a Bountiful Place for Aborigine and Torres Strait Islanders in a Modern Free and Tolerant Australia.* Canberra: Constitutional Centenary Foundation, 1994.

Land Rights and Native Title

Achieving native title to traditional country can lead to the enhancement of self respect, identity and pride for Indigenous communities ... native title can also be seen as a means of Indigenous people participating in a more effective way in the economic, social and educational benefits that are available in contemporary Australia.

Justice Merkel, *Rubibi* case

Aboriginal law and life originates in and is governed by the land. Aboriginal identity and sense of belonging comes from our connection to our country.

Galarrwuy Yunupingu

The struggle for land rights has always been a central part of the political platform for Indigenous people.[41] Dispossession and theft of traditional land has been a hallmark of the colonisation process, so it is not surprising that the focus for political movements by Aboriginal people would be on reclaiming that land.

The claim for land has always been more than just a desire to reclaim soil. Aboriginal people have cultural and spiritual attachments to land and have always had a desire to be able to exercise their traditional obligations to the land. But there has also been an understanding that land is the source of life and of sustainability.[42]

In Australia, many Aboriginal and Torres Strait Islander leaders have understood the connection between the claim to land and its capacity to provide the basis for both economic self-sufficiency and greater independence. When Indigenous people seek to reclaim land either through native title or land rights regimes it is for the furtherance of the goals of sustainability and self-determination as well as to reclaim land for cultural significance.

In Australia, the legal system provides two mechanisms through which Aboriginal and Torres Strait Islander people can claim land:

> through a native title claim; or,

> in the states that have passed them, through land rights acts.

NATIVE TITLE

The failure to recognise Indigenous rights to land was confirmed by the case of *Milirrpum v Nabalco*[43] (the Gove land rights case). Justice Blackburn, a single judge of the Northern Territory Supreme Court, determined that Australian common law did not recognise native title and that the plaintiffs did not have rights that could be recognised as property rights.

In 1982, Torres Strait Islanders from the Murray Islands began proceedings in the High Court for a declaration stating that their traditional rights to land, sea, seabeds and reefs had not been extinguished.

A decade later, the High Court delivered its judgment which by a majority found that the Murray Islanders held native title to their islands. The *Mabo* case[44] found that Australia was not unoccupied on settlement and that the Indigenous inhabitants had, and continue to have legal rights to their traditional lands unless they have been validly extinguished.

It was anticipated that this landmark case would generate a large number of claims and so the Keating Government passed the *Native Title Act 1993* (Cth). The Act established the National Native Title Tribunal for determining claims that could be mediated or conciliated, and gave the Federal Court authority to determine litigated claims. It defined native title in section 223:

(1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

41. Larissa Behrendt and Nicole Watson. 'Shifting Ground: Why Land Rights and Native Title have not delivered Social Justice'. *Journal of Indigenous Policy* Issue 8, 2007. 94-102.
42. Loretta Kelly and Larissa Behrendt. 'Creating Conflict: Case Studies in the Tension between Native Title Claims and Land Rights Claims'. *Journal of Indigenous Policy* Issue 8, 2007. 73-93.
43. *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (1971) FLR 141.
44. *Mabo v Queensland* [No.2] (1992) 107 ALR 1; available at www.austlii.edu.au/au/cases/cth/HCA/1992/23.html

(c) the rights and interests are recognised by the common law of Australia.

(2) Without limiting subsection (1), rights and interests in that subsection includes hunting, gathering, or fishing, rights and interests.

In 1995, the Indigenous Land Corporation was established as the second part of the government's response to the *Mabo* decision. The corporation was set up to administer a fund to buy land on behalf of Indigenous people in recognition of the fact that many Aboriginal people would, due to the impact and processes of colonisation, be unable to prove that they maintained a native title interest over their traditional land in the way the law described and defined it. The government had also promised a social justice package as the third part of its response but this was never delivered.

When the Howard Government was elected into office in 1996 they adopted a hostile stance towards Indigenous rights. This hostility materialised into a derogation of Indigenous rights in many spheres including with respect to native title. The government immediately proposed to amend the *Native Title Act* to make registration of claims more difficult and to increase the interests of miners and pastoralists. It made the registration of native title claims more difficult for claimants and reduced the right of native title holders to negotiate with respect to mining interests and limited native title claimants rights to information and comment with respect to other dealings related to their claims.

These amendments received criticism from the United Nations Committee on the Elimination of All forms of Racial Discrimination. It found that several aspects of the amendments breached the International Convention on the Elimination of all Forms of Racial Discrimination in a number of respects, including the provisions with respect to the validation of non-Indigenous interests, deemed extinguishment of native title, the expansion of pastoral interests and the abolition and diminution of the right to negotiate.

While *Mabo* established native title in the case brought by the people of the Murray Islands, it left open other questions that were subsequently settled by other court decisions:

> *Wik Peoples v Queensland*[45] – in 1996 the High Court held that native title could still exist even if there were other interests in the land, such as a pastoral lease, so long as the exercise of native title was not inconsistent with that other interest. If there was a conflict, native title would be extinguished;

> *Yanner v Eaton*[46] – native title could extend, in some circumstances, to hunting and fishing rights; and

> *Commonwealth v Yarmirr*[47] – native title rights could extend to the sea and seabed up to and beyond the low water mark.

Over more than a decade of native title cases, an increasingly conservative court has narrowed the definition of native title; and it is judges, not Aboriginal people, who have the largest role in recognising the existence and defining the content of native title.

Perhaps most famously through the decision in the *Yorta Yorta* case[48] where the court found that the culture of the claimants had been eroded by the history of colonisation and taken with it the native title interests of the Yorta Yorta nation, Aboriginal people across Australia came to realise the extent to which Australian courts and parliaments can recognise an Aboriginal right or interest but seek to override it through narrow interpretations of facts and with a Eurocentric view of Aboriginal history, experience, culture and life.

LAND RIGHTS

Land rights legislation has been passed in some states, each with different features. The federal government passed the legislation that established a land rights regime in the Northern Territory. To date, this legislation is as follows:

> The *Pitjantjatjara Land Rights Act 1981* and *Maralinga Tjarutja Land Rights Act 1984* were passed in South Australia and vested land in traditional owners. Prior to that, the *Aboriginal Lands Trust Act 1966* turned reserves into perpetual leases but did not vest the land in Aboriginal communities;

> Victoria has used legislation to vest specific land in Aboriginal communities such as Framlingham, Lake Condah and Robinvale: *Aboriginal Lands Act 1970, Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Commonwealth)*, *Aboriginal Lands Act 1991*, *Aboriginal Land (Manatunga Land) Act 1992*, *Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982* and *Aboriginal Land (Northcote Land) Act 1989*;

> Queensland vested former reserves under a special form of freehold, held in trust by community councils for their residents, various amendments were made to the *Land Act 1962* (Qld) between 1982-1988 that introduced a limited land rights scheme on the basis of traditional/customary affiliation: *Aboriginal Land Act 1991* and *Torres Strait Islander Land Act 1991*;

> Tasmania vested 12 areas in the ownership of a land council in trust for Aboriginal people: *Aboriginal Lands Act 1995*;

45. *Wik Peoples v Queensland* (1996) 187 CLR; available at http://www.austlii.edu.au/au/cases/cth/HCA/1996/40.html
46. *Yanner v Eaton* (1999) 166 ALR; available at http://www.austlii.edu.au/au/cases/cth/HCA/1999/53.html
47. *Commonwealth v Yarmirr* (2001) 184 ALR 113; available at http://www.austlii.edu.au/au/cases/cth/HCA/2001/56.html
48. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58; available at http://www.austlii.edu.au/au/cases/cth/HCA/2002/58.html

> The Commonwealth passed the *Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth)* and it vests 'scheduled' areas of land in Aboriginal Land Trusts. The *Pastoral Land Act 1992 (Northern Territory)* enables parts of pastoral leasehold areas known as 'Community Living Areas' to be claimed on the basis of 'need' and held by Aboriginal corporations. The Commonwealth also passed the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Commonwealth)* that allows for areas of land to be vested in the ownership of the Wreck Bay Aboriginal Community Council; and
> Western Australia has not passed land rights legislation.

The New South Wales *Aboriginal Land Rights Act* was passed in 1983 and is the most generous of all the land rights regimes established in Australia. The Act recognises dispossession and dislocation of NSW Aboriginal people. It was intended as compensation for lost lands and for Aboriginal people to establish an economic base.

The beneficial intention of the NSW land rights regime is stated clearly in the preamble of the Act:

> **Land in the State of New South Wales was traditionally owned and occupied by Aborigines. Land is of spiritual, social, cultural and economic importance to Aborigines. It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land. It is accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation.**

The Act sets up a state land council – the NSW Aboriginal Land Council – with regional representatives and 121 Local Aboriginal Land Councils, all of which are governed by elected Boards. The New South Wales Aboriginal Land Council is the State's peak body, and in the post-ATSIC era, it is the largest elected, representative body in Aboriginal Affairs. At the beginning of 2009, it had an asset base of over $2 billion in land holdings and over $680 million in cash assets. With this asset base, it aims to protect the interests and further the aspirations of its members and the broader Aboriginal community through social housing, scholarship schemes and community projects.

The NSW Land Council is empowered by legislation to:

> acquire land on its own behalf or on behalf of, or to be vested in, Local Aboriginal Land Councils;
> determine and approve/reject the terms and conditions of agreements proposed by Local Aboriginal Land Councils to allow mining or mineral exploration on Aboriginal land;
> make claims on Crown lands, either on its own behalf or at the request of Local Aboriginal Land Councils;
> conciliate disputes between Aboriginal Land Councils or between Councils and individuals or between individual members of those Councils;
> make grants, lend money or invest money on behalf of Aborigines;
> hold, dispose of or otherwise deal with land vested in or acquired by NSWALC; and
> advise the Minister on matters relating to Aboriginal land rights.

Under the regime, land can be claimed by the NSWALC or a Local Land Council. The Act establishes a regime for the claiming of land as a mechanism for achieving the aims of the legislation in section 36. Section 36(1) contains the definition of 'claimable Crown lands' and includes:

> land vested in the Crown which can be sold, leased or reserved or dedicated for any purpose under the *Crowns Lands Consolidation Act 1913* or the *Western Lands Act 1901*;
> land which is not lawfully used or occupied;
> land which, in the opinion of the Crown Lands Minister, is not needed or likely to be needed as a residential land or for an essential purpose; and
> land that is not covered by a registered native title determination application by a claimant or by an approved native title determination that native title exists.

Claims for land rights start with the relevant Land Council lodging its claim with the Aboriginal Land Rights Registrar and the claim is then forwarded to the Minister responsible for the *NSW Crown Lands Act* consideration. The Minister then must grant the claim if, at the date of lodgement, the land is:

> Crown land;
> not lawfully used or occupied;
> not needed for an essential public purpose; and
> not needed as residential land.

Land that is acquired under land rights regimes may be used for a number of reasons; it may be used for any community purpose including such things as commercial enterprises and community housing; Land Councils now appear to be the last voices left in the land claims wilderness. A right of appeal against a Minister's decision to refuse a land claim lies with an appeal to the Land and Environment Court.

COMPARING LAND RIGHTS AND NATIVE TITLE

Although native title and land rights both relate to the recognition of Indigenous people's rights to land, they are very different from both a socio-political and a legal perspective. Land rights legislation and native title legislation were enacted with quite dissimilar political motivations. Land rights legislation, in the various Australian jurisdictions, was enacted in response to a

broad social and political movement, which evolved from the 1960s to the 1980s to include people from a broad spectrum of society – both Indigenous and non-Indigenous people; the politically conservative and the radical.

Native title legislation, on the other hand, had its impetus in the courts – with the judicial recognition of native title in *Mabo (No 2)* in 1992. It was not a *political* recognition of Aboriginal rights to land; it was *judicial* recognition.

NSW Aboriginal Land Rights Act	Commonwealth Native Title Act
Applies only in NSW	Applies across all of Australia
A claim under ALRA triggers government decision	A claim under the NTA triggers legal proceedings
Claims under the ALRA are for: > 'claimable crown lands'; > there is no need to prove any traditional association with the lands; > previous tenure of the lands doesn't matter; > lands are granted in freehold.	Claims under the NTA are based on: > native title rights and interests; > traditional laws, customs, practices and association with the land must be proven in court or accepted by all non-claimant parties (in a consent determination); > there is a spectrum of native title rights to different parcels of land (some may equate to freehold and others merely to a licence).
LALC boundaries are not necessarily consistent with any Aboriginal traditional boundaries	A native title group can only claim rights and interests in its traditional boundaries
Any Aboriginal person living in the LALC boundary is entitled to be a member and benefit from LALC services	Only Aboriginal people who have a traditional (ie pre-invasion) connection with the land can be a member of a claim group; but they do not have to live on country to benefit from any recognised rights or interests
An individual can benefit from LALC services	Native title rights and interests belong to the whole group, not just an individual or family

Source: *Larissa Behrendt and Loretta Kelly. Solving Indigenous Land Disputes* (The Federation Press, 2008).

image unavailable

Photo: Kerry Trapnell

TIMELINE – INDIGENOUS POLICY IN NEW SOUTH WALES

It is estimated that Aboriginal people lived in Australia 40 000 years before Europeans arrived. It is also estimated that there were over 500 different Aboriginal nations across Australia at the time Captain Cook arrived. The Aboriginal population is estimated at between 750,000 to one million at the time.

1770	Lieutenant James Cook claims to take possession of the whole east coast of Australia by raising the British flag at Possession Island off the northern tip of the Cape York Peninsula
1788	The First Fleet of British convicts, soldiers and officials arrives on January 26. Captain Arthur Phillip raises the Union Jack at Sydney Cove. He estimates 1,500 Aborigines are living in the Sydney region. Resistance and conflict between Europeans and Aboriginal people begins almost immediately.
1789	A smallpox epidemic wipes out at least half of Sydney's Aboriginal people. Aboriginal people have no resistance to European diseases and even the common cold is fatal.
1795	Open warfare breaks out along the Hawkesbury River between Aborigines and Government troops.
1797	Aboriginal warrior Pemulwuy leads the George's River and Parramatta tribes in an attack on the settlement at Toongabbie. A punitive party pursue Pemulwuy and about 100 Aborigines to Parramatta. Pemulwuy is wounded and captured, but later escapes.
1802	On June 30, a proclamation is made stating: 'His Majesty forbids any act of injustice or wanton cruelty to the Natives, yet the settler is not to suffer his property to be invaded or his existence endangered by them, in preserving which is his he is to use the effectual, but at the same time the most humane means of resisting such attacks'. Shortly after this Pemulwuy is shot by two settlers.
1813	Colonists, assisted by Aboriginal people, cross the Blue Mountains. New hostilities develop as they pass through Aboriginal lands.
1819	The British Government decides to encourage the Australian wool industry by reducing the import duty on Australian wool. Big pastoral companies are formed and granted land. The Australian Agricultural Company is granted one million acres (404,000 hectares) of land in the Hunter Valley.
1827	John Oxley leads an expedition to the Liverpool Plains west of present day Tamworth, NSW. This area is settled in the 1830s. The Kamilaroi people are dispossessed of their land. Squatters occupy land without consulting authorities.
1835	The Dunghutti people of north coast NSW are now confined to 40 hectares of land on the Bellwood Reserve, near present day Kempsey.
1836-1837	A select committee of the British House of Commons says that Aborigines have a 'plain right and sacred right' to their land. The committee reports genocide is happening in the colonies.
1838	The 'Myall Creek Massacre' takes place on June 10. Twelve heavily armed colonists round up and brutally kill 28 Aborigines from a group of 40 or 50 people gathered at Henry Dangar's Station, at Myall Creek. The massacre is believed to be a payback for the killing of several hut keepers and two shepherds, but most of those killed are women and children. On 15 November, 11 Europeans are charged with murder but are acquitted. A new trial is held and seven men are charged with murder of one Aboriginal child. They are found guilty and hanged in December.
1845	About 50 Aboriginal people remain from the Sydney and Botany Bay area.
1883	The Aboriginal Protection Board is established in NSW and takes over the administration of reserves. By the end of the 1880s several reserves have been established in NSW. Reserves are set up far enough away from towns so that contact with Europeans is limited.

1909	The Aboriginal Protection Act of 1909 introduces powers to move people away from towns and reserves and leads to the institutionalisation of Aboriginal people. It also begins moving Aborignal children from their families.
1911	The Aboriginal Protection Board ceases to defend tenure on reserves, and by 1915, is seizing reserve land to lease to whites. Of the 27,000 acres of reserve land, 13,000 are lost by 1927.
1938	On January 26 a rally by Aboriginal on Australia Day call for a 'Day of Mourning' and protests over discrimination against Aboriginal people.
1940	A new policy of 'assimilation' is introduce. The Protection Board is abolished and replaced by the Aborigines Welfare Board. The removal of Aboriginal children from their families continues. The Australian Citizenship Act gives Aboriginal people the right to vote in Commonwealth elections if they are enrolled for State elections or have served in the armed services. Aboriginal men can vote in NSW. However, few Aboriginal are made aware of this so few vote.
1962	All Aboriginal people are given the vote in Commonwealth elections. The Menzies Liberal and Country Party Government give the Commonwealth vote to all Aborigines. Western Australia give them the State vote in the same year. Queensland follows in 1965.
1965	The 'Freedom Ride', led by Charles Perkins, tours rural NSW in a bid to highlight segregation and racism in country areas.
1967	Australian vote YES in a referendum to count Aboriginal people in the census and give the Commonwealth the power to make laws for Aboriginal people. Indigenous policy becomes a responsibility for both state and federal governments.
1979	NSW legislates to establish an Aboriginal Lands Trust comprising members of the Aborigines Advisory Council. The Trust was given freehold title to most former reserves and the power to sell and acquire land.
1982	The NSW Government establishes the Ministry of Aboriginal Affairs.
1983	The NSW Aboriginal Land Rights Act is passed.
1988	As Australians celebrate 200 years of European settlement on Australia Day, over 40,000 Indigenous people and supporters take part in the 'Invasion Day' march.
1990	The Hawke government creates the Aboriginal and Torres Strait Islander Commission (ATSIC) to deal with some matters related to Indigenous affairs. It is an elected body.
1992	The High Court hands down the *Mabo* case.
1993	Federal Parliament passes the Native Title Act. The Act requires that claimants prove ongoing cultural links with their land. Aboriginal people in New South Wales who had been forcibly removed and those living in urban areas have great difficulty proving such links. It is estimated that 70 per cent of Aboriginal people in New South Wales are unable to claim native title.
2000	The 'Australian Declaration towards Reconciliation' and the 'Roadmap for Reconciliation' are presented to Prime Minister John Howard as a part of the Corroboree 2000 Summit in Sydney. Over 300,000 people join the 'Walk for Reconciliation' across Sydney Harbour Bridge.
2004	ATSIC is abolished. Indigenous affairs is mainstreamed at the federal level.
2008	On February 13, Prime Minister Kevin Rudd delivers an apology to the members of the Stolen Generations.

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Adopted by the UN General Assembly on 13 September 2007.

Article 1	Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.
Article 2	Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.
Article 3	Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
Article 4	Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
Article 5	Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
Article 6	Every indigenous individual has the right to a nationality.
Article 7	1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.
Article 8	1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. 2. States shall provide effective mechanisms for prevention of, and redress for: (i) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (ii) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (iii) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (iv) Any form of forced assimilation or integration; (v) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.
Article 9	Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.
Article 10	Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
Article 11	1. Indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12	1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.
Article 13	1. Indigenous peoples have the right to revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons. 2. States shall take effective measures to ensure this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.
Article 14	1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning. 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination. 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.
Article 15	1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information. 2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.
Article 16	1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination. 2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately-owned media to adequately reflect indigenous cultural diversity.
Article 17	1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law. 2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment. 3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.
Article 18	Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
Article 19	States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20	1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. 2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.
Article 21	1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security. 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.
Article 22	1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration. 2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.
Article 23	Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.
Article 24	1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services. 2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realisation of this right.
Article 25	Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
Article 26	1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
Article 27	States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognise and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28	1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
Article 29	1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.
Article 30	1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned. 2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.
Article 31	1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. 2. In conjunction with indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.
Article 32	1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.
Article 33	1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.
Article 34	Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.
Article 35	Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36	1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders. 2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.
Article 37	1. Indigenous peoples have the right to the recognition, observance and enforcement of Treaties, Agreements and Other Constructive Arrangements concluded with States or their successors and to have States honour and respect such Treaties, Agreements and other Constructive Arrangements. 2. Nothing in this Declaration may be interpreted as to diminish or eliminate the rights of Indigenous Peoples contained in Treaties, Agreements and Constructive Arrangements.
Article 38	States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.
Article 39	Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.
Article 40	Indigenous peoples have the right to have access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.
Article 41	The organs and specialised agencies of the United Nations system and other intergovernmental organisations shall contribute to the full realisation of the provisions of this Declaration through the mobilisation, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.
Article 42	The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialised agencies, including at the country level, and States, shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.
Article 43	The rights recognised herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.
Article 44	All the rights and freedoms recognised herein are equally guaranteed to male and female indigenous individuals.
Article 45	Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.
Article 46	1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorising or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States. 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

Further information

INDIGENOUS PEOPLE AND INTERNATIONAL LAW

United Nations Permanent Forum on Indigenous Issues:
http://www.un.org/esa/socdev/unpfii/

Working Group on Indigenous Populations:
http://www.iwgia.org/sw8632.asp

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Timeline: Legal developments affecting Indigenous people www.austlii.edu.au/au/other/IndigLRes/timeline/

Australian Indigenous Law Library on the AustLII website www.austlii.edu.au/au/special/indigenous/

UNITED STATES

Bureau of Indian Affairs: http://www.doi.gov/bia/

National Congress of American Indians: http://www.ncai.org/

Mashantucket Pequots: http://www.foxwoods.com/TheMashantucketPequots/Home/

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Assembly of First Nations: http://www.afn.ca

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CHILE (MAPUCHE)

http://www.mapuche-nation.org

NORWAY (SAMI)

http://www.galdu.org

NEW ZEALAND

Treaty of Waitangi: http://www.nzhistory.net.nz/politics-and-government

Maori leadership: http://www.nzhistory.net.nz/category/tid/267

Waitangi Tribunal: http://www.waitangi-tribunal.govt.nz/

Indigenous Peoples and the Law, Victoria University of Wellington, NZ www.kennett.co.nz/law/indigenous/. This site contains information on New Zealand and international indigenous peoples.

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