Aboriginal Title and Indigenous Peoples
Common Law, Statutory Law, and the Political Economy of the Recognition of Indigenous Australian Rights in Land

Nicolas Peterson

The development of Native title in Australia has been widely criticized as a disappointment by Aboriginal people and as legally impoverished by various legal commentators. Rosemary Hunter has argued that recognition of Native title is more about self-legitimation of the courts, the law, and the legal process than it is about returning land to Aboriginal people. More recently, Elizabeth Povinelli has advanced the view that, although the Australian liberal democratic state has at last come to recognizes Aboriginal rights, it has done so in a way that undermines the bona fides of that recognition by imposing a narrow criterion of authenticity. Thus, though the state appears to be accepting of difference, ultimately the kinds of difference embodied by Aboriginal people are unacceptable to liberal moral sensibilities, making the preconditions for recognition high. Most outspoken of all has been Noel Pearson, an indigenous lawyer who has attacked the conceptualization of indigenous ownership by the High Court. Why should indigenous ownership be, he asks, any less comprehensive than that of land holders in the English legal tradition? “What people,” he goes on to say, “do not conceive of their occupation and possession of land as being anything less than what the holder of a fee simple would conceive of?”

In pragmatic terms, at issue here is that, for many areas of Australia, Native title is not returning a great deal of land and sea to Aboriginal people, and when it does recognize people’s rights in land and sea the rights are usually quite limited. In effect, it is only those rights and interests that can be demonstrated to have been continuously activated since sovereignty and not to have been extinguished by valid acts of government. This is inevitably a process of attrition since new rights or interests, or revivals, cannot have their source in the pre-sovereignty system of laws and customs. Although this is not such a high hurdle in many parts of remote Australia, over 72.6 percent of the Aboriginal population lives in urban areas largely in settled Australia. Generally, these people are better educated, have had much longer histories of contact, and are of mixed descent, whereas those in the remote
parts of the continent are, for the most part, poorly educated, often did not settle down until the 1940s, and are of full descent. The general public tends to accept the existence of continuities between past and present practice in respect of land in the case of the latter but is quite skeptical about their existence among the former.

The High Court Mabo decision of 3 June 1992, which recognized the existence of Native title in Australia for the first time, has been described as a magnificent declaration of national recognition and a "redemptive confession and atonement on behalf of the nation," but the decision is undermined in the minds of many commentators because the High Court chose to define Native title in terms of indigenous people's laws and customs rather than as more or less equivalent to fee simple. This definition makes it much more difficult for Aboriginal people in the settled parts of Australia, where their lives have been radically transformed, to have their Native title recognized. The consequence is that the period of large numbers of groups seeking court determinations of the existence of Native title is likely to come to an end soon.

Land rights are, of course, more about sociopolitical issues and relations than about purely legal ones, especially in Australia, where recognition of Native title has been so long in coming. Indeed, it would be surprising if the delay between the first settlement of Europeans in 1788 or 178 years before the granting of even statutory land rights, and 204 years before the recognition of community Native title, did not have some consequences for what was done, how it was done, and for whom it was done. A country that has conducted itself without regard to indigenous rights for so long is clearly in a different position from one that, however neglectful, dishonest, or venal it has been, has often recognized Aboriginal title from the beginning.

Although for Indigenous Australians, recognition of their rights in land is above all an act of natural restorative justice, this is clearly only one of the reasons for recognizing such rights by the community at large. Recognition of rights in land is also expected to make a difference to the lives of Aboriginal people and to go a considerable way toward resolving the social and political problems that come between them and the wider community. Among other things, land rights are expected to promote social harmony by removing, as far as possible, legitimate causes of complaint, to provide an economic base for people who are economically depressed, to sustain indigenous cultural life and links with the land, and to enhance Australia's standing in the world community. In terms of making a difference, perhaps the most important sociopolitical consequence of this recognition has been the effective incorporation of Aboriginal people into local, regional, economic, and political structures. No longer are they simply people to be consulted; they are people who have to be negotiated with. The other side of this coin, however, is that the legal system, in turning reserves and other lands into Aboriginal property, has to define the areas, rights holders, and their rights and interests with the clarity required by a capitalist economy, and in so doing it simplifies and transforms them.

That the wider community has always expected land rights to make a practical difference in Aboriginal people's lives, and to go some way toward solving "the Aboriginal problem," was made explicit in the review of the Northern Territory statutory land rights regime in 1998. The whole thrust of the report was that the Northern Territory's Aboriginal Land Rights (Northern Territory) Act of 1976 needed amending to ensure that land ownership contributed more to the economic well-being of Aboriginal people there. Although there is no one Aboriginal problem, of course, most of the public debate and the calls for public funds are in relation to Aboriginal people's generally poor standing in the areas of health, housing, income, education, and employment.

To understand the way in which Native title in Australia is being recognized, it is instructive to look at the background to the recognition and to place that recognition in its widest sociopolitical context by asking the obvious question: Why did the Australian state start granting statutory land rights after 178 years of failing to do so?

**Statutory Land Rights**

Although no land rights would ever have been granted to Aboriginal people had they not continuously made an issue of land rights from the moment of colonization, in one way or another, and made the significance of land to them unequivocally clear to those who would listen, the proximate causes of the recognition relate to factors indirectly connected to Aboriginal activism. The history of Aboriginals' struggle for recognition of their land rights and of the reservation of land for the use and benefit of Aboriginal people is long and complex. Although many factors contributed to the beginning of a change of heart, two factors, one local and one global, were crucial.

By the early 1960s, Aboriginal people had achieved equal rights, in a formal sense, marked by the right to vote in federal elections in 1962 and in all states by 1965. Except for Queensland, all discriminatory legislation was also removed by the latter date. This formal achievement of equal rights raised, among other questions, the issue of what was to be done with the lands reserved for the use and benefit of Aboriginal people. In South Australia, the position of attorney general and minister of community welfare and Aboriginal affairs in a Labor government was held by a reformist, Donald Dunstan, a long-time campaigner for Aboriginal rights and abolition of the white Australia policy. He was committed to transferring reserved lands to Aboriginal ownership and achieved this, in a formal sense, with the establishment of an Aboriginal land trust in 1966, thus making South Australia the first state to enact statutory legislation and putting pressure on the other
states to do likewise.\textsuperscript{11} Transferring land long reserved for the use and benefit of Aboriginal peoples was, politically, relatively unproblematic.

The Northern Territory Legislative Assembly, dominated by pastoral and conservative interests, went the other way in 1967-68. It prepared legislation to open up Aboriginal land to commercial development. However, all Northern Territory legislation until 1978 had to be approved by the federal government, and such was the outcry that the legislation was vetoed in Canberra.\textsuperscript{12}

Equal rights not only put land issues directly into active consideration by Australian politicians but also, once achieved, led to Aboriginal people looking beyond Australia's borders for recognition of their distinctive status and to becoming involved in the politics of indigenism. Ronald Niezen has suggested four factors that encouraged the promotion of indigenous rights in the post-World War II era from a Canadian perspective. First, the struggle against fascism contributed to a greater receptiveness at the international level to measures for the protection of minorities, leading to the development of the United Nations conventions between 1948 and 1966 that make up the \textit{International Bill of Human Rights}.\textsuperscript{13} Second, the principle of self-determination became a right recognized by the UN. Third, by the mid-twentieth century, it was clear that assimilation policies had failed. And fourth, the rise of an indigenous middle class led to the establishment of specifically indigenous national government organizations that had a powerful advocacy role.

These factors are undoubtedly important in the rise of indigenism, but they do not account for the focus on indigenous land issues, particularly in the First World, during the 1970s. This focus arose out of the unresolved issues relating to what was, in effect, a new phase in the appropriation of indigenous land. The global prosperity of the 1950s underwrote a wave of prospecting and development in remote areas worldwide. This activity not only brought miners into contact with indigenous populations but also caused conflict, which in Australia focused on damage to sacred sites by geologists such as chopping significant stones or destroying ancestrally significant trees. The discovery of resources to develop led to the need for proprietary certainty, which was what set off the new round of land rights settlements.

Thus, the fact that Alaska had been purchased by the United States from Russia in 1867 left unclear the issue of Native title along the path of the pipeline taking oil from the Beaufort Sea to Anchorage. The oil industry, to secure its own property rights, led the drive to create a set of property rights for the indigenous population, which resulted in the \textit{Alaskan Native Claims Settlement Act} of 1971. Hydro development, and the threat of prolonged court cases working out the content of Aboriginal title in Quebec, drove the Quebec provincial government and the Canadian federal government to negotiate the \textit{James Bay and Northern Quebec Agreement} of 1975.

In Australia, it was the development of a bauxite mine in northeastern Arnhem Land in the Northern Territory that led to the test case on Native title, \textit{Millirrpum and Others v. NABALCO and the Commonwealth of Australia}, decided in 1971. The decision went against the Aboriginal people, with Justice Blackburn ruling that communal Native title did not exist.\textsuperscript{14} Although a negative decision, it paradoxically strengthened the moral claims of Aboriginal people since it was widely seen as unjust. Edward Woodward, counsel for the plaintiffs, advised against appealing the decision. In his view, there was a danger that, even if the Aboriginal people won the appeal, they could end up with weaker rights than they could achieve through the political process.\textsuperscript{15} The High Court at the time was unsympathetic to Aboriginal rights and unlikely to have gone beyond Blackburn, who had said some positive things about Aboriginal relations to land – as in finding that there was an identifiable land law. This was both a legal and a political judgment. After twenty-two years, the Conservative federal government that also controlled the Northern Territory was clearly on its last legs, and the Labor Party had made its commitment to land rights legislation part of its platform.

Events proved Woodward right. In the following year, the Labor Party was elected, and Woodward, who in the meantime had become Justice Woodward, was appointed to conduct a royal commission into the appropriate ways to recognize traditional rights and interests in relation to land "and to satisfy in other ways the reasonable aspirations of the Aborigines to rights in or in relation to land."\textsuperscript{16} Priority was given to the Northern Territory because Aboriginal people constituted about 27 percent of the population versus no more than 2.2 percent elsewhere, and the Territory was virtually an internal colony. It was always intended to extend what was done there to the rest of the continent.\textsuperscript{17}

The primary active role for the legal process in the \textit{Aboriginal Land Rights (Northern Territory) Act} of 1976 that resulted from the royal commission was in regard to land claims. Aboriginal people were able to make claims to unalienated crown land outside the existing system of reserves. It was thought necessary to have what were actually inquiries, but conducted as adversarial court hearings, before land was transferred to Aboriginal ownership. There was considerable opposition to land rights, and the public needed to be reassured that there were people with genuine connections to the land. This opposition has to be understood in terms of the common public view that in many areas any Aboriginal people with connections to the land had died out and that so-called carpet-baggers – Aboriginal people from southern Australia – were coming north to make claims.
There were both positive and negative aspects of this claims process, of which four were principal positives. First, substantial resources became available to Aboriginal people to visit often remote and normally inaccessible areas to map them, and in the course of this process a great deal of cultural knowledge about the country that was in danger of dying out was reproduced. Second, much family and local history was documented that otherwise might not have been. Third, people, who for the most part had a slim grasp of the wider legal system within which they were encapsulated, came to be much better informed about it in regard to legal processes, the operation of courts, and the functions of lawyers. And fourth, the legal process brought a moral authority to Aboriginal claims that were tested in a court-like situation.

The negative aspects of the process were several. First, because people had to articulate their rights and interests explicitly, simmering disputes were forced out into the open, in some cases aggravating conflict between individuals and groups. Second, the claims process required testing of the existence of traditional relations to land and led to the incipient codification of the indigenous system through a demonstration that the claimants met a legal definition of traditional ownership. Furthermore, because this legal definition did not match exactly the diversity and complexity of the range of indigenous systems in the Northern Territory, it created some difficulties, although the way in which the legislation was drawn largely prevented any people with interests in areas successfully claimed from being disenfranchised. Third, some Aboriginal people were unable to make claims because their land was alienated, and a small number of people's claims were not recognized. Fourth, and in some ways most important, legal discourse and processes subtly and, perhaps inevitably, led to some undermining of the intentions of the legislation.

The commission had been concerned not to codify indigenous land laws but to place a protective legal carapace around Aboriginal land and leave Aboriginal people to deal with internal relations. The purpose of this approach was to maintain maximum flexibility in the hope that there would be organic development of new arrangements as required by contemporary land use and developments. However, to assist people with administration and development of their land, two land councils were set up, the Northern Land Council for the northern half of the Northern Territory and the Central Land Council for the southern half, each located in the major town of its region. Each was provided with its own senior and junior counsel. Significantly, the senior counsel for the Northern Land Council was Gerard Brennan, later to become chief justice of the High Court and author of the lead judgment in the Mabo case.

The inspiration for these councils came substantially from Canadian indigenous political organizations and the emergence of the National Indian Brotherhood in the years 1968-70. The Australian land councils were not building on any indigenous structures because Australian Aboriginal societies are highly egalitarian, for the most part, without any overarching political structures that would assist in their articulation with the wider society. Indeed, the land councils "went beyond anything natural to Aboriginal social organization." These structures, the commission believed, were needed to help Aboriginal traditional owners represent and protect their interests, as well as manage their land, and were central to the whole conceptualization of the report.

The need for the land councils further entrenched the idea of "traditional owner" in the act as a way of keeping these centralized professional bureaucracies accountable to the actual landowners. Thus, before any action in relation to an area of land could be taken, the Land Council officers had to go out and speak to the traditional owners. The claims process, the permission seeking, and then the distribution of royalty payments all led to the concept of traditional owners having rather more significance than originally intended. This significance was reinforced by the legal process, understandably pushing the rights of rights holders as far as they could and resulting in a kind of creeping codification, although with one exception there has never been any attempt to map clan territories to devolve their titles.

Thus, the Northern Territory legislation, the high-water mark of land rights in Australia, was beneficial legislation for the most tradition-oriented and poorest Aboriginal people, the great majority of whom were actually living on or near the land with which they had traditional connections. It was legislation concerned with the future rather than the past, and it was based substantially on the drafting instructions written by Brennan on the basis of the thinking of the commission.

Native Title
The second test case for the existence of communal Native title, the Mabo case, was well chosen. It was among the Torres Strait Islanders who inhabit the islands between Cape York and the south coast of Papua New Guinea, many of whom practised small-scale horticulture as well as making extensive use of the sea. Subsequently, however, there has been absolutely no national planning or co-ordination among Aboriginal people in the sequencing of Native title applications with an eye to taking the best case to court to establish precedents. This was one of the many failures of the Aboriginal and Torres Strait Islander Commission, which, from early on in the process, had control of the funding for the preparation of Native title applications and hearings.

It is sobering to realize that the success of the Mabo litigation was completely contingent on the passing of the Racial Discrimination Act of 1975,
which enacted, in domestic legislation, the 1966 ratification of the United Nations Convention on the Elimination of Racial Discrimination. Mabo was contingent on this legislation because the Queensland government in 1979 had passed its own act that sought to abolish the possibility of any Native title in Torres Strait. However, this piece of legislation, having been passed after 1975, was found by the High Court to be in conflict with the Racial Discrimination Act, thus keeping the Mabo case alive.

To regulate the relationship between the recognition of Native title and the existing Australian land tenure system, the Native Title Act of 1993 was passed. A main purpose of the act was to try to steer people toward mediation and away from costly and lengthy legal proceedings. However, because many issues were left unclear in the Mabo decision, the reality has been that legal advisers preferred to go to court until litigation provided a clearer picture of how the courts understood the scope and nature of Native title.

The first important decision was the High Court Wik decision in 1996, which ruled that there could be coexistence of Native title on pastoral leases. Subsequent key cases have been Ward v. Western Australia and the Yorta Yorta case finalized in 2002.

Two crucial aspects of the agreement between Aboriginal leaders involved in negotiations over the nature and content of the Native Title Act and the Labor government of the time were the social justice package and the right to negotiate. The social justice package was to fund Aboriginal people who were unable to get their Native title rights recognized because of either their extinguishment by legitimate acts of government or historical factors that had completely disrupted their relations to land. At the time of the Mabo judgment, it was widely predicted that few people in settled Australia would be recognized as Native title holders. From one point of view, this was seen as a fundamental anomaly: those people who had suffered most intensely and for the longest time from the impacts of colonization had the least chance of having their Native title rights survive. From another point of view, many of the people who self-identified as Aboriginal in settled Australia were too like other Australians to justify rights to land on traditional grounds. For example, in Queensland, New South Wales, Victoria, and Tasmania, between 74 percent and 90 percent of all Indigenous couple families have one partner who is not Indigenous.

The right to negotiate allowed anyone wanting to carry out an activity on land that was the subject of an application for the recognition of Native title to negotiate with the applicants, provided that their application had passed the registration test and been accepted by the National Native Title Tribunal registrar, even though the existence of Native title had not yet been determined by the court.

With the conclusion of the Yorta Yorta case, it became clear that the original assessment that few groups would have their Native title recognized in settled Australia was accurate. This outcome has precipitated considerable criticism of the original Yorta Yorta trial judgment from Aboriginal people and their supporters but caused little comment in the wider community. The decision will undoubtedly generate a literature by anthropologists and historians, in particular, on issues such as custom, tradition, continuity, and adaptation.

The positive aspects of the Native title process are similar to the statutory regime. Resources become available for professional researchers to pull together a great deal of historical material that the Indigenous applicants are usually unaware of or that they have been unable to access. Family trees are drawn up and photographic archives uncovered. If the application is litigated, then the court provides a forum in which people can, to some extent, tell their stories and achieve recognition; the whole process, more or less regardless of outcome, brings a moral authority to the people's claim. Because, as a result of the process, the Aboriginal applicants are much better informed about the full scope of their group's history, have often gained access to nineteenth-century ethnographic material about their ancestors previously unknown to them, and heard other applicants speaking, they come away better able to formulate their case in public.

The negative aspects of the legal process evident in the statutory regime of the Northern Territory have been intensified among applicants seeking recognition of their Native title in settled Australia. Making an application, and going through the original hearings, raise people's expectations, increase their historical consciousness, and strengthen their sense of injustice, all of which makes dealing with the loss of a case more difficult. The fully adversarial nature of the Native title court process, in which there may be several hundred objections to an application at the outset, is gruelling but is partially offset by the possibility of avoiding it by opting for the mediation process, which, while still involving the same parties, is increasingly leading to agreements of various kinds before cases reach the courts.

Many Aboriginal people are naive about the extent of documentation and scholarship that exists in relation to them in various archives, so that cherished beliefs and local understandings may be shown to be wrong, often to the embarrassment of particular Indigenous people in a community. They are also rarely aware of the demanding nature of the cross-examination process. Past movement of people away from the area of their land interests, often forced on them several generations ago by governments, differentiates "traditional people" (potential Native title holders) from "historical people" (those from elsewhere), creating enormous tensions. Preparation of a Native title application often radically transforms situations in which such people have been getting along with each other, setting family network against family network.

However, the right to negotiate, even though it was modified in the 1998 amendments to the Native Title Act of 1993, combined with the threat of
extended court proceedings, has given many groups recognition and limited benefits that they did not have before. Increasingly, there is an emphasis on negotiation, both with private interests and local and regional tiers of government and with the state, especially in Western Australia. The increasing significance of negotiation is thus a de facto recognition that dealing with legitimate grievances should be in the political, rather than the legal, domain.

But what constitutes a legitimate Aboriginal grievance in the eyes of the public or government today is complex and changing. On all social indicators, Aboriginal people, collectively, come out poorly, even in settled Australia, and there is widespread support for efforts to improve the situation. Increasingly, the boundary between who is, and who is not, Aboriginal in settled Australia is becoming blurred in the public’s eyes. As in North America, in Australia substantial numbers of people are now choosing to identify themselves on the census form as indigenous who have not done so previously, so that between 1991 and 1996, and between 1996 and 2001, the census population grew by 33 percent and 16 percent respectively, far beyond the rate of natural increase. Whatever the rhetoric, the lives of many of these Aboriginal people in settled Australia are materially not greatly different from those of what are locally known as “Aussie battlers” – or poor ordinary Australians. Because of the absence of radical cultural difference, and because of the decline in physical difference as a result of intermarriage, public support for the claims of Aboriginal people in settled Australia for land rights and other group rights is not strong, and in all probability it is likely to decline.

In the remote regions of northern and central Australia, the grievances are not so much over land, since many communities have rights to considerable tracts of land, but arise from frustration over the lack of a clear vision for the future. Rapidly increasing populations in remote places give rise to enormous social problems in many of the communities, problems that came to a head in June 2007 with the Northern Territory Emergency Response, widely known as the intervention, by the Howard government. The sensible reason for this radical policy change and practical administrative change was the response to a report on the high level of abuse of Aboriginal children, but the underlying issue was the government’s belief that Aboriginal policy needed a huge shake-up. In these regions, issues around self-government, often confused with and spoken of in terms of self-determination, are seen as the major issues by both Aboriginal people and advocates for them.

Conclusion
The long delay in the legal recognition of Aboriginal prior ownership of the continent of Australia has, unsurprisingly, resulted in this recognition being highly constrained by the extent and complexity of non-indigenous land interests and the political reality of indigenous people’s minority status at about 2.2 percent of the population. Given the form that Native title has taken, the rights and interests that successful applicants are going to end up with in settled Australia will be in shreds and patches. What benefit will inalienable, collectively owned, leftover land likely have in the twenty-first century for such people? What many Aboriginal people in such situations want, and what would improve their life circumstances, is real estate – land for housing and business enterprises. Yet communal Native title, at best, can only provide for such needs unsatisfactorily. The future requires the development of creative new policies that work toward negotiated rather than litigated solutions and recognize these contemporary realities.

In the longer run, the major benefit of the recognition of Native title may well be the boost that it is giving to the push for self-government. Unlike in Canada, in Australia there is no recognition of an inherent right to self-government. But the growth in the proportion of Aboriginal people in parts of regional Australia, such as in Cape York, the Northern Territory, central Australia, and the Kimberley, and the fact that Aboriginal people are now the largest land holders in these regions, give a practical sense to the idea of an indigenous order of government alongside state and federal levels. Regional agreements are already firmly on the agenda. In their strongest form, they can lead to all government resources for a region being channelled through a single regional body, as among the James Bay Cree in Canada. This has not happened anywhere in Australia yet but is closest to happening in the Torres Strait, which is something of a special case.

Much academic and indigenous writing not only makes strong forms of self-government/self-determination the ultimate goal in the politics of indigenism but also usually implies or assumes that it will make a radical difference in people’s life circumstances. However, the academic writing on this topic is either thinly disguised advocacy or highly abstract legal or political theorizing that is unrealistic about the political implementation of, and the kinds of beneficial impacts that will flow from, such self-government. Any sophisticated social analysis is completely lacking, with the focus solely on power and legal relations, to the neglect of the economic and the cultural.

There is little reason or evidence to suppose that the social, cultural, economic, and other problems that Aboriginal people are facing today, created and reproduced by the influences of modernity, commoditization and related factors, are going to be much more easily or better addressed by indigenous governments than they have been by existing ones. This is not an argument against self-government, which is probably important. It is, however, a criticism of the utopian benefits implied to flow from such arrangements. Although Native title and statutory land rights are fundamental foundations for the future that have brought, and will bring, increasing
degrees of autonomy and self-government over time, their contribution to the social and economic problems facing Aboriginal people, especially in the remote regions, may be limited. A better future in those regions lies not in the realm of Native title but in a much more complex existential domain.

Notes


2 About a quarter of the Aboriginal population lives on Aboriginal land; see Altman, Sustainable Development Options on Aboriginal Land, 2.

3 At the 1996 census, 72.6 percent of the population was living in urban areas with a population of more than 1,000 people. For the delineation of settled Australia, see Rowley, The Remote Aboriginal, endpapers.

4 H. Wooten, "Native Title in a Long Term Perspective: A View from the Eighties," paper delivered at the Native Title Representative Bodies Conference, Geraldton, Western Australia, 3 September 2002.

5 As at the time of writing, there is likely to be an increase in the number of cases coming before the federal court because it has tightened up on procedures forcing many groups that have lodged applications for hearing, but regularly asked for postponements because they have not completed the research, to appear in court. Many of these cases are not strong, from a legal point of view, also a reason for the continuous delays.


7 Reeves, Building on Land Rights.


9 For New South Wales, see Goodall, Invasion to Embassy, for Queensland, see Anderson, "Queensland," 53-114; and for Victoria, see Felton, "Victoria," 168-221; did, however, sign an indenter on behalf of the state, providing in perpetuity that the Aboriginal Land Trust would be paid all royalties derived by the state from minerals on trust lands. Dunstan, Felicia, 109-11.

12 Rowse, Obliged to Be Difficult, 55.

13 That is, the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social, and Cultural Rights (1966), and the International Covenant on Civil and Political Rights (1966). See Niezen, Origins of Indigenousism, 4-46.

14 I am unclear whether the same sort of force accounted for the establishment of the Waiarangi Tribunal in 1975. The proximate conflict was over land in the centre of Auckland at Bastion Point.

15 McNeill, Common Law Aboriginal Title, 295-96, comments that, since the "plaintiffs in Millirripun lost on almost every issue (of fact as well as law), it is perhaps not surprising that they did not appeal."


17 The first attempt to do so was in Victoria when the Victorian Aboriginal Land Council was formed in April 1975. In opening the meeting, Senator Cavanagh, minister for Aboriginal affairs, said this:

The situation in Victoria is far removed from that applying in the Northern Territory and many of Mr Justice Woodward's recommendations may therefore not be applicable ... The associations which Victorian Aborigines hold for land are of a different nature to the traditional religious ties held by many Aboriginal people in other areas of Australia ... I believe that your Council's best approach will be to seek to identify the land needs of the Victorian Aboriginal Community as it now exists. Broadly, I imagine that these needs will be: land for housing, principally in urban areas; land for community purposes; and land for economic development.

Cited in Moore, "The Victorian Aboriginal Land Council," 241-49 at 243. Disensus within the Aboriginal community prevented them from taking up this offer. It is significant that such disensus are still a problem. The state representative body charged with helping Aboriginal people in Victoria with Native title has not managed to get one case into the courts despite the expenditure of more than $15 million Australian, largely because of these kinds of problems. Although the representative body has chosen to try to reach negotiated agreements, they have, so far, not eventuated.

18 Woodward, "Aboriginal Land Rights Commission," 65. This was the source of a major political campaign against the bill. See Peterson, "Reeves in the Context of the History of Land Rights Legislation," 25-27.

19 This was on the old Flume Nook Mission lease at Hermannsburg west of Alice Springs.

20 The continuing difficulties with the Aboriginal and Torres Strait Islander Commissioner's leadership and with its oversight of funds finally led the government to abolish it in 2005.

21 As of 31 March 2009, 121 court determinations of Native title have been made: 86 that native title exists, and 35 that it does not. There are 367 registered Indigenous Land Use Agreements. For up-to-date official information about the Native title process, summaries of judgments, etc., see http://www.nntt.gov.au/.

22 For copies of the transcripts of the judgments in these cases, see http://www.austlit.edu.au/; until the results of the appeal in what has popularly become to be known as the "Single Noongar Application," but formally as Bennell v. State of Western Australia, [2000] FCAFC 63, handed down on 23 April 2008, it looked as though this case would be groundbreaking. The original case recognized that Native title still survived in some small parts of the Perth metropolitan area, to the surprise of many observers. The appeal, Boden v. Bennell, [2008] FCAFC 63, against this original decision was, however, upheld.

23 Wooten "Native Title in a Long Term Perspective," 3.


25 Although there is no uniform opinion on the basis for inclusion of this provision in the Native title agreement, it was in recognition of the fact that much of Australia would not be subject to Native title, including, it was widely assumed, pastoral leasehold, and that the area open to application should not be further reduced by alienation before people could have the applications dealt with. At the same time, it was also to help reduce delays to development.

26 These agreements include Indigenous Land Use Agreements, which can range from being contractually comprehensive to highly localized and specific, and specific contractual arrangements between Aboriginal people and particular parties.

27 Following a change of government in Western Australia in February 2001, a review was commissioned of the government's position in relation to Native title applications and processes. See Wand and Atanasious, Review of the Native Title Claims Process in Western Australia. This review strongly endorsed the new government's proposed move from litigation to negotiation. For an account of the situation in Western Australia, particularly as it
relates to the position of historians in the application process, see Choo and Holbach, eds., *History and Native Title*.

28 Because the Intervention happened with an election looming, some saw it as an election ploy. However, anybody who had been following the articles published in the conservative *Quadrant* magazine over the previous five years could see that this was not the case. Many articles by authors who had the government’s ear clearly set out the conservatives’ critique of previous governments’ policies and recommended specific action. It was not the election but the moral authority provided by the report, “Little Children Are Sacred,” coming on top of information about other horrific events, that was seized on by the government to enact changes that went way beyond anything recommended in the report.
