

The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

14th EDITION



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Aboriginal People and the Law

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Contents

[2.10]	Historical legacy	[2.240]	Indigenous women and the law
[2.30]	The application of British and Australian law	[2.280]	Land law
[2.70]	Some current points of conflict	[2.290]	Aboriginal land ownership in NSW
[2.140]	Aboriginal people and criminal law	[2.310]	The Aboriginal Land Rights Act
[2.140]	Dealing with the police	[2.350]	Native title
[2.180]	Legal assistance	[2.390]	Resource law
[2.200]	Trial and sentencing	[2.440]	Heritage and cultural protection
[2.230]	Children, women and family law	[2.440]	Protection of heritage
[2.230]	Protecting Indigenous children	[2.480]	Copyright and other protections

Historical legacy

[2.10] To understand the relationship between Indigenous people and the Australian legal system, it is essential to appreciate something of the history of that relationship.

Which law?

There are two legal systems for many Aboriginal and Torres Strait Islander people.

The most obvious is the Australian legal system to which all Australians are subject (with some differences between states and territories). The other body of law that applies to Aboriginal and Torres Strait Islander people is their own systems of customary law, beyond the laws enacted by parliament or developed by the courts. The High Court has only since the *Mabo* decision in 1992 (*Mabo v Queensland (No 2)* (1992) 175 CLR 1) recognised that Indigenous laws survived invasion by the British and continue to the present time. So far this recognition has only been applied to the ownership and use of land and waters, but it could conceivably extend to other areas.

[2.20] The issue of sovereignty

Indigenous people in Australia never ceded sovereignty of the lands comprising the Australian continent to the British Crown – ie, not one of the 600 or more clan groups (defined by dialect) ever gave up sovereignty over their traditional lands.

Indigenous people argue that the Crown's claim to sovereignty is not sustainable under international law. However, in *Coe v Commonwealth* (1979) 53 ALJR 403 the High Court said that Australian courts were not

capable of deciding the issue of sovereignty, which meant that Indigenous Australians would have to seek a ruling in international law on the legality of the way in which the British government gained sovereignty over Australia. The international courts are not, however, designed for what amounts to secessionist action by Indigenous peoples or others seeking to roll back colonialism. They may only hear matters between “nation states”, and no Aboriginal and Torres Strait Islander group in Australia has that status. Indigenous people are left to seek remedies for their dispossession under the domestic laws of Australia and through political actions.

Recourse to the United Nations

Where there has been a breach of an international treaty or convention, Indigenous people may be able to bring an individual or group application before the United Nations Human Rights Committee; for example in 2007 in an application brought to the Committee in relation to the Commonwealth Government's Emergency Intervention in the Northern Territory and earlier in 1998, regarding the effect of the amendment to the *Native Title Act 1993* (Cth) (The Ten Point Plan).

Under the International Covenant on Civil and Political Rights, which Australia has signed, the Committee can hear complaints from Australian citizens where the:

- violation occurred on or after 25 December 1991, and
 - complainant has exhausted all available domestic remedies.
-

The application of British and Australian law

[2.30] Since colonisation, the laws of England have been considered to apply fully to Indigenous Australians. In theory, this meant that Aboriginal and Torres Strait Islander people were entitled to the same protection under the coloniser's legal system as any British subject, and Governor Phillip's *letters patent* (official instructions) told him to "conciliate the affections of the natives and to live with them in amity and kindness".

In practice, there was state-sanctioned physical and cultural violence. The history of NSW is full of examples of this, from massacres that went unpunished to the more subtle acts of state seizure of items of Aboriginal cultural heritage.

[2.40] "Terra nullius" and Aboriginal dispossession

Colonial law was used to sanction the removal of Aboriginal people from their lands. This was reinforced by the application of the doctrine of *terra nullius*, which allowed the colonial administration and successive Australian governments to maintain the fiction that Aboriginal people did not have any rights to land that were recognisable under the common law. The basis for asserting Australia was *terra nullius* was that Aboriginal people were said to have no legal system that could support the ownership and transmission of rights to land. In fact there were systems of Aboriginal law which conferred rights and responsibilities to country, but the legal fictions that the continent was practically unoccupied, and that sovereignty conferred complete ownership of all the land and waters on the Crown, were too strong to be displaced. For over 200 years the law did not recognise Aboriginal connection with the land as a form of property.

In 1992, the High Court of Australia recognised that the application of the doctrine of *terra nullius* in Australia was based on the error of early colonial perceptions of Aboriginal people. In *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at p 109, Justices Deane and Gaudron observed that:

The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment and retreat from those past injustices. In the circumstances, the Court is under a clear duty to re-examine the two propositions. For the reasons which we have explained, that re-examination compels their rejection. The lands of this continent were not *terra nullius* or "practically unoccupied" in 1788.

[2.50] The Aborigines Protection Board

By the early 1880s, most Aboriginal people in NSW had been forced to move from their traditional lands to camps on missions or reserves. People were rounded up like cattle and marched to the camps, or were forced to go to them for survival rations as their traditional food sources were lost.

Regulation of Aboriginal life

In 1909, the NSW government enacted the *Aborigines Protection Act*, which provided for a Chief Protector of Aborigines and an Aborigines Protection Board. Between the powers given to the protector and those given to the Board, every element of Aboriginal people's lives was regulated. From that time until well into the 20th century, Aboriginal people encountered constant restriction and humiliation.

Permission requirements

Aboriginal people on NSW reserves could not marry, work or even leave the reserve without the permission of the Board or its delegate.

Punishment for traditional practices

There was frequent punishment for practising traditional ceremonies or speaking in “lingo” or tribal language.

Requirement for corroboration of evidence

In NSW, when an Aboriginal person gave evidence in court, the facts had to be corroborated by the independent evidence of a white person. When a white person was charged with a crime against an Aboriginal person, this corroboration was rarely forthcoming.

Aboriginal people could not make an affirmation in accordance with their own belief system until the *Evidence Further Amendment Act 1876* (NSW).

The dog licence

An Aboriginal person seeking to escape control by the Aborigines Protection Board, (and from 1940, the Aborigines Welfare Board) had to have an exemption certificate. Aboriginal people still call these certificates “dog licences”. A person seeking exemption had to demonstrate to the Board an ability to assimilate and manage their own affairs. In effect, Aboriginal people had to prove that they could act like whites.

Removal of Aboriginal children

The Board could remove Aboriginal children from their communities if they were deemed to be “neglected” or “in moral danger”.

Bringing Them Home

Many thousands of Aboriginal children were taken from their parents during the operation of the Aborigines Protection Board and the Aborigines Welfare Board. They were the subject of the Human Rights and Equal Opportunity Commission Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, and its 1997 report *Bringing Them Home*.

[2.60] Indigenous people and the Australian Constitution

Discrimination against Indigenous people also existed at the federal level. Section 25 of the Constitution contemplates electoral disqualification based on race.

Until a referendum in 1967, s 51(xxvi) of the Constitution provided that the Commonwealth could make laws for “the people of any race except the Aboriginal race” (effectively leaving them in the hands of the States), and they were not counted in the census (s 127).

The 1967 referendum recognised that the interests and welfare of Australia’s Indigenous people were a national responsibility. Section 51(xxvi) of the Constitution now provides that the Commonwealth may make laws for “people of any race”.

At first, the Commonwealth government enacted only a handful of laws under this provision, but in more recent years legislation has been enacted, some of it controversial, to attempt to improve social and economic conditions for Aboriginal people, and to move towards recognising their place in the Australian polity. Some of the important federal laws which rely on the “race” power are the:

- *Aboriginal Land Rights (Northern Territory) Act 1976*
- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*
- *Aboriginal and Torres Strait Islander Commission Act 1989*
- *Native Title Act 1993*
- *Aboriginal and Torres Strait Islander Act 2005*
- *Corporations (Aboriginal and Torres Strait Islander) Act 2006*
- *Northern Territory National Emergency Response Act 2007*
- *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013*

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* was enacted when the federal government found it was unable to deliver on its promise of national land rights legislation.

Since 1996, there have been attempts to substantially weaken the first four of these Acts. Notably, the federal government abolished the Aboriginal and Torres Strait Islander Commission in 2005 and repealed the *Aboriginal and Torres Strait Islander Commission Act 1989*. The amendments to the *Native Title Act* have drawn criticism both in Australia and internationally, as has the *Northern Territory National Emergency Response Act 2007*, under which the Commonwealth compulsorily acquired leases of Aboriginal land in the Northern Territory to support tough regulation of Aboriginal communities, including alcohol bans and welfare spending restrictions.

The Hindmarsh Bridge case

In the Hindmarsh Bridge case (*Kartinyeri v Commonwealth* (1998) 72 ALJR 722), the High Court considered whether s 51(xxvi) of the Constitution could be used to the detriment of Aboriginal people. The court was divided on the question, but the majority held that the *Hindmarsh Island Bridge Act 1997* (Cth), which placed itself outside the provisions of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), was valid on the general principle that the power to make an Act must include the power to repeal or amend it.

Justice Kirby argued that a greater principle should apply, and Justice Gaudron noted that “it is difficult to conceive of a present circumstance pertaining to Aboriginal Australians which could support a law operating to their disadvantage”. Nevertheless, the constitutionality of the 1997 Act was upheld without recourse to interpretation of s 51(xxvi).

Wurridjal v The Commonwealth [2009] HCA 2; (2009) 237 CLR 309

On 25 October 2007, Mr Wurridjal commenced High Court action alleging that the *Northern Territory National Emergency Response Act 2007* and other Acts that supported it were invalid because they amounted to an acquisition of property without just terms compensation, contrary to s 51(xxvi) of the Constitution. He claimed that although the Commonwealth had given compensation for the acquisition of leases over Aboriginal land, the traditional owners had also been deprived of their rights to access their traditional country because the leases gave the Commonwealth power to deny permission to enter the affected communities. The Commonwealth argued that the claim could not succeed, and should be dismissed without a trial.

The majority found that the legislation had either provided just terms, or did not affect the rights of traditional owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to visit communities and care for sites, and that the claim should be dismissed. The majority did, however overrule a 1969 case, *Teori Tau v The Commonwealth* [1969] 119 CLR 564, and decided that Commonwealth laws passed in relation to the Territories (under s 122 of the Constitution) were invalid if they did not provide just terms compensation for acquisition of property. Justice Kirby dissented on the basis that the interference with the lives of the Aboriginal people in the affected communities was so great that the issues should go to a trial.

In 2011, an expert panel was appointed to lead a national public consultation and engagement program to build consensus on the recognition of Indigenous Australians in the Constitution. In 2012, the panel presented a unanimous report recommending changes to the Constitution which recognise the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples; remove racist elements; and prohibit discrimination on the grounds of race, colour or ethnic or national origin.

On the basis of that report, the Commonwealth enacted the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth). The Preamble states that “The Parliament is committed to placing before the Australian people at a referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples.” In s 3 the Act provides, that the Parliament, on behalf of the people of Australia, recognises the Aboriginal and Torres Strait Islander peoples’ first occupation of “the continent and islands now known as Australia”; acknowledges the relationship of those peoples with their traditional lands and waters, and their continuing culture, language and heritage.

The Act required a review of the readiness of the Australian people to give formal recognition in the Constitution to Aboriginal and Torres Strait Islander people, the means by which that recognition may be achieved, and the level of support for formal recognition, and required a report to the Minister at least six months before 27 March 2015, when the Act was scheduled to cease

to have effect. In March 2015, the Act was extended until 2018. The Joint Select Committee on Aboriginal and Torres Strait Islander Recognition produced an interim report (July 2014) which concluded that to be successful at a referendum, any proposal must recognise Aboriginal and Torres Strait islander people; preserve the ability of the

Commonwealth to make laws about Aboriginal and Torres Strait Islander people; but prevent the Commonwealth, in making any such laws, from discriminating against Aboriginal or Torres Strait Islander people. The final report is now due in September 2017.

Some current points of conflict

[2.70] Pastoralism, mining, conservation

Aboriginal law and custom concerning the interaction between people and land, and communal and individual responsibilities towards the care and nurture of land, are at odds with the European Australian practices of pastoralism and mining and the concept of land as a resource to be exploited. Aboriginal principles of caring for country are not necessarily consistent with conservation laws. Often conservation principles are based on the idea that an ecosystem ought to be preserved, untouched by human intervention, but Aboriginal people have engaged in land management for millennia. Aboriginal people have their own aspirations for development, to improve their economic circumstances while seeking to protect their special relationship with the land. The debate in Queensland and at a national level between Aboriginal people, government and conservationists about the Wild Rivers legislation (since repealed) is an example of this.

[2.80] Traditional marriage

In 2003, charges were brought against a 50-year-old Northern Territory man for having unlawful sexual relations with a girl under 16 (*Criminal Code* (NT), s 331A). The accused, a traditional Aboriginal man, claimed that he and the girl were married according to traditional law – a defence that was provided for in the *Criminal Code*. He was convicted, and although the crime carries a maximum penalty of seven years' imprisonment, was sentenced to one day in jail.

Following this case the Northern Territory government amended the *Criminal Code* to remove the traditional law defence, arguing that it had a responsibility to protect young women from sexual exploitation. The repeal of the traditional marriage defence means that Aboriginal men living according to Aboriginal law and custom may be liable to prosecution. This must be weighed against the protection now afforded young women who may otherwise be subject to sexual exploitation.

The "Child Bride" case

In 2005, another Aboriginal man was convicted of having had sexual intercourse with a girl under 16. Although the man could not raise the fact that the girl was "promised" to him under Aboriginal law as a defence, he was able to raise the matter before the judge in consideration of the appropriate sentence.

The judge, taking the customary law issues into account, sentenced the man to a total of 24 months' imprisonment with 23 months suspended. The Northern Territory

Director of Public Prosecutions appealed the sentence, and the Full Bench of the Northern Territory Court of Criminal Appeal found that it was manifestly inadequate. The court increased the sentence to a total of 3 years 11 months with an 18 month non-parole period (*R v GJ* [2005] NTCCA 20). Subsequently, the federal government passed a law amending the *Crimes Act 1914* (Cth) to remove the capacity of judges dealing with Commonwealth crimes under that legislation to take into account customary law matters when determining sentence.

[2.90] Customary law and criminal law

In *Walker v New South Wales* (1994) 182 CLR 45, the High Court considered whether customary law has application in criminal law where there is no legislative basis. Chief Justice Mason concluded that the criminal law was intended to apply to the whole community and therefore any customary law dealing with criminal matters would necessarily be inconsistent with the common law, and consequently extinguished.

Defending traditional fishing rights

Ben Ali Nona, a traditional owner of the land and waters of and around Murray Island in the Torres Straits, was acquitted in the Queensland District Court of a charge of armed robbery after he took the catch from a commercial fishing boat while armed. Nona successfully argued that he had an honest claim of right – ie, he had an honestly held belief as to his or his people's legal entitlement to the fish (see also *R v Fuge* [2001] NSWCCA 208). In *Yanner v Eaton* (1999) 201 CLR 351, traditional law was a defence to the State's prosecution of Murrandoo Yanner for hunting juvenile crocodiles. Two recent High Court cases on traditional fishing rights, *Akiba v Commonwealth* [2013] HCA 33, (2013) 250 CLR 209 and *Karpany v Dietman* [2013] HCA 47 confirm that Aboriginal and Torres Strait Islander traditional fishing rights are recognised and protected by the *Native Title Act*, and although State and Commonwealth fishing laws might regulate those rights, s 211 of the *Native Title Act* protects their exercise. The decisions also establish that a right to take marine resources under traditional law is not necessarily limited to taking for a particular purpose, such as domestic use, and that where traditional law supports fishing for non-domestic purposes, traditional owners

may exercise rights for commercial and domestic purposes.

[2.100] Finding a way of reconciliation

Such issues are difficult. In the past, where conflict arose between Aboriginal law and custom and Australian law, Australian law prevailed. This is still the case, but when such issues are raised in the press or the courts, there is now a sense that many Australians have an understanding that there must be a place for Aboriginal law and custom within the Australian legal system. The Australian Law Reform Commission's 1986 Report into the Recognition of Aboriginal Customary Laws is still the most accessed of the ALRC's reports.

In NSW, even with a developing awareness, Aboriginal law and custom remains at the fringe.

[2.110] The Northern Territory Intervention

On 15 June 2007, a report entitled *Little Children are Sacred* was released by the Northern Territory government. It identified the extent of child sexual abuse claims in Northern Territory Aboriginal communities and made 101 recommendations to the Northern Territory government regarding the needs of those communities.

In response to the report, the federal government passed the *Northern Territory National Emergency Response Act 2007* (Cth) (NTER). In order to pass the legislation it was necessary to suspend the operation of the *Racial Discrimination Act 1975* (Cth) as the legislation was clearly discriminatory. The NTER provided for the acquisition of Aboriginal land by compulsory lease, income quarantining (issuing food vouchers rather than welfare payments, removing access to welfare payments) and various other measures. A review of the legislation was undertaken by a task force appointed by the federal government, following which the Rudd government determined to continue with the emergency measures.

In his February 2010 report “Observations on the Northern Territory Emergency Response in Australia”, United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, James Anaya found that, “as currently configured and carried out, provisions of the NTER are incompatible with Australia’s human rights obligations”. In 2012, the Bill to extend the NTER to operate for a further 10 years, called the “Stronger Futures” legislation, was passed in the House of Representatives. Its approval, with a few changes, was recommended to the Senate by the Senate Community Affairs Legislation Committee. The terms of the extension of the NTER drew further criticism from many quarters including the Australian Human Rights Commission and a Report from Jumbunna House of Learning at the University of Technology Sydney, particularly in relation to arrangements imposing compulsory income management and punishments for alcohol consumption.

The decision in *Wurridjal*, (see Indigenous people and the Australian Constitution at [2.60]) while holding that the legislation was valid, did highlight concern (expressed by Kirby J in dissent) about the very intrusive and non-consultative interference with the lives of Aboriginal people living in the affected Northern Territory communities.

[2.120] Australia apologises

On 13 February 2008, the Prime Minister, the

Honourable Kevin Rudd MHR, commenced the first sitting day of the new parliament by making an apology to the Indigenous people of Australia who were removed from their families as children, and to their families, on behalf of the Australian government.

The “Apology” is seen as a watershed moment in Australian history. The recognition by the Australian government of the fundamental error and inhumanity in forcibly removing children from their families deeply moved many Indigenous and non-Indigenous Australians.

In NSW on 18 June 1997, the then Premier Bob Carr made an official apology in the NSW Parliament to the members of the Stolen Generations in response to the *Bringing Them Home Report* by the Human Rights Commission.

[2.130] UN Declaration on the Rights of Indigenous Peoples

On 3 April 2009, Australia changed its position and endorsed the United Nations Declaration on the Rights of Indigenous Peoples. The Howard government had previously rejected the declaration adopted by the United Nations General Assembly in September 2007, along with Canada, New Zealand and the United States. The Indigenous Affairs Minister, Ms Jenny Macklin, said the government’s change of heart was “in the spirit of rethinking the relationship between Indigenous and non-Indigenous Australians and building trust”.

Aboriginal people and criminal law

Dealing with the police

[2.140] NSW police powers to arrest, detain, search and issue directions are generally the same for Indigenous people as they are for non-Indigenous people (*Crimes Act 1900* (NSW), Pts 10, 10A and 10B). For an explanation of the law in this area, and many of the terms and procedures referred to in this section, see Chapter 14, Criminal Law.

Rates of arrest and imprisonment

Although the Royal Commission into Aboriginal Deaths in Custody recommended that police seek to avoid arresting Indigenous people wherever possible (Recommendation 87), the arrest rate for Indigenous people remains disproportionately high.

Similarly, the rate of imprisonment remains disproportionately high, even though the key recommendations of the royal commission were directed at reducing the over-representation of Indigenous people in jails, and certain safeguards have been put in place for Indigenous people (see Circle sentencing at [2.220]).

[2.150] Limitations on police powers

There are specific limitations on police powers to arrest, detain, search or issue directions in relation to both Indigenous and non-Indigenous people:

- an Aboriginal person who has been arrested can be detained for questioning for up to two hours. This may be extended to eight hours, with a magistrate's approval, if the offence being investigated is punishable by imprisonment for more than 12 months
- the investigating police must notify an Aboriginal legal aid organisation when an Aboriginal person is arrested. The person is entitled to have a legal practitioner present to give advice during questioning
- if the person is arrested more than once in 48 hours, the investigation period for each arrest is reduced by the period of the previous investigations
- at the end of the investigation period the person under arrest must be released, either unconditionally or on bail, or brought before a magistrate as soon as practicable
- a person who has not been arrested may not be detained against their will
- the person being investigated must be cautioned, in a language in which they can communicate with "reasonable fluency", that they do not have to say anything during questioning. In some circumstances an interpreter is needed. The person must be told of their right to communicate with a friend, relative or lawyer, and be allowed to do so. If practicable, the caution should be recorded
- an Aboriginal person under arrest is entitled to have a friend or support person present during questioning.

Investigating police do not have to notify an Aboriginal legal aid organisation or permit a friend to be present if the detainee's education and understanding means they are not at a disadvantage.

Police questioning before arrest

Prior to arrest, police officers have the power to demand the name and address of any person:

- in relation to certain motor traffic and drug offences
- where the police hold a reasonable suspicion that the person:
 - was a witness to a crime
 - has stolen goods in their car
 - has a dangerous implement, or
 - possesses or is consuming alcohol in a public place.

There are no special provisions in the NSW *Crimes Act 1914* or *Evidence Act 1995* requiring Aboriginal people under arrest to be treated any differently when being interrogated by police.

[2.160] Forensic procedures

Following the introduction of the *Crimes (Forensic Procedures) Act 2000* (NSW), there are clear rules as to how police may obtain bodily samples for forensic purposes.

A distinction is made between *intimate* and *non-intimate* procedures.

Non-intimate procedures

A non-intimate sample might consist of:

- fingerprints
- hair
- nail scrapings
- body moulds
- photographs (s 3(1)).

A non-intimate procedure can be carried out under an order from a senior police officer (*Crimes (Forensic Procedures) Act 2000*, s 17).

Intimate procedures

An “intimate forensic procedure” includes:

- examination of the genitals
- taking a sample of blood, saliva or pubic hair
- taking dental impressions (s 3(1)).

To carry out such procedures the police officer must have either:

- the consent of the person from whom they wish to obtain the sample, or
- a court order (ss 7, 22).

Admissibility

A sample that has not been obtained in accordance with the Act is not admissible as evidence in court (s 82).

Intimate procedures and Aboriginal people

If the police wish to carry out an intimate procedure on an Aboriginal person, an *interview friend* (a support person chosen by the person) must be present when the person is asked for their consent, unless they have expressly and voluntarily waived their right to have an interview friend present.

The police must also inform the person that the relevant Aboriginal legal service will be notified of the proposal to ask for consent (s 10). An interview friend or legal representative must be present when the procedure is being carried out on an Aboriginal person (s 55).

Reasons for the provisions

The special provisions in relation to Aboriginal people arise in part from an inquiry by the NSW Legislative Council Standing Committee on Law and Justice into the *Crimes (Forensic Procedures) Act 2000*.

The Aboriginal and Torres Strait Islander Commission and the NSW Aboriginal Land Council made submissions to this inquiry, pointing out that bodily samples are used by Aboriginal people for spiritual purposes and as a result Aboriginal people may be particularly reluctant to give such samples.

[2.170] Bail

Section 32(1)(a)(ia) of the *Bail Act 1978* (NSW) requires the police custody manager and the court to take into account an Aboriginal person’s extended family and kinship and other traditional ties to place when considering bail.

What Indigenous people should know about the criminal law

There are no criminal offences that apply specifically to Indigenous people. Some laws that relate to criminal

procedure – in particular, sentencing procedure – do have special requirements for Indigenous people.

In general terms, Indigenous people or their legal representatives should be aware of a number of aspects of the criminal justice system:

- all people have a right to silence. No-one has to tell police or other authorities their name and address except under specific circumstances, including where the police believe on reasonable grounds that the person has committed or witnessed a crime (see Police questioning before arrest at [2.150])
- all people have the right to deny police entry to their house unless:
 - the police have a warrant, or
 - the police tell the occupant that they wish to enter the house because they suspect a crime is being committed inside the premises, or a person who has committed a crime is inside the premises.
- all people have the right to have a legal representative present at any interview, whether they have been arrested or not
- Aboriginal people are entitled to have their Aboriginality taken into account by the police custody manager when considering whether police bail should be granted or not
- Aboriginal people are entitled to have their Aboriginality taken into account by the court when considering bail
- Aboriginal people must have an *interview friend* (a support person chosen by the person) present:

- before they can be asked to consent to a forensic procedure (that is, the taking of body samples like hair, saliva or blood), and

- during the carrying out of a forensic procedure (see Forensic procedures at [2.160]).

- in court, Indigenous people are tried in the same fashion as anyone else. Indigenous people are not entitled to be tried by an Indigenous judge or jury
- in certain areas of NSW, an Aboriginal person who has entered a plea of guilty is entitled to request that they be sentenced by the magistrate in consultation with the Aboriginal elders of the area (see Circle sentencing at [2.220])
- when sentencing an Aboriginal person, the court can take into account the hardship and disadvantage caused by their background
- in prison, Aboriginal people are not entitled to be treated differently from the other inmates in respect of classification, segregation, leave of absence or parole. There is usually at least one Aboriginal person on the Parole Board, although there is no specific requirement for this.

Women, children and young people

There are no provisions of the criminal law that relate specifically to Aboriginal women or to people under the age of 18. For information regarding children and the criminal law see Chapter 7, Children and Young People.

Legal assistance

[2.180] Aboriginal legal services

Aboriginal legal services were established in the 1970s largely in response to the over-representation of Aboriginal men in the criminal justice system, in particular due to misuse of the *Summary Offences Act 1988* (NSW) (which covers such things as vagrancy and swearing in a public place).

In 2006, the six Aboriginal legal services in NSW and ACT were amalgamated to form a single service, called the Aboriginal Legal Service (NSW/ACT) Limited (ALS (NSW/ACT)), which continues to be an Aboriginal community controlled organisation. There are 23 offices in NSW and ACT in metropolitan and regional areas.

ALS (NSW/ACT) provides legal advice and court representation for Aboriginal and

Torres Strait Islander men, women and children in criminal law and children's care and protection matters.

Women's legal services

An Aboriginal women's legal service, Wirringa Baiya, was established in 1996 in recognition of women's special legal needs, particularly in relation to domestic violence, sexual assault, care and protection, and custody matters. The Indigenous Women's Legal Program at Women's Legal Services NSW was established in 1996 to respond to Aboriginal women's civil legal needs across NSW (see Indigenous women and the law at [2.240]).

See Contact points at [2.580] for a full list of Aboriginal Legal Services in NSW.

[2.190] Office of the Ombudsman

The NSW Ombudsman has a designated Aboriginal liaison officer to deal with complaints from Aboriginal people.

Trial and sentencing

[2.200] All persons are entitled to be tried in indictable criminal matters by a jury of their peers (*Criminal Procedure Act 1986* (NSW), s 131). The reference to “peers” does not, however, entitle a person to be tried only by people of their own race or religion. The jury rolls are established by the selection of names at random from the electoral rolls (*Jury Act 1977* (NSW), s 12). Aboriginal people are not entitled to trial by an Aboriginal judge or magistrate.

For details about trial procedure, see Chapter 14, Criminal Law.

[2.210] Effect of customary law

Indigenous people cannot plead that they acted in accordance with customary law as a defence to any criminal charge. Although the Australian Law Reform Commission’s 1986 report *Recognition of Aboriginal Customary Law* recommended that a partial customary law defence be created, this has not occurred in any Australian state or territory.

In 2000, a NSW Law Reform Committee, on which Justice Michael Adams sat as chairperson and Judge Bob Bellear sat as a committee member, produced a report (Report 96 (2000) *Sentencing: Aboriginal Offenders*) which recommended that the *Crimes (Sentencing Procedure) Act 1999* (NSW) be amended to provide for customary law matters to be taken into account in the sentencing of Aboriginal offenders. Those recommendations have not been implemented. In December 2006, the federal

government passed amendments to the *Commonwealth Crimes Act 1914* forbidding judges dealing with matters under that Act from taking into account customary law and cultural practices when considering bail or sentencing of an offender. The *NT National Emergency Response Act 2007* (Cth) (NTER) also included measures preventing courts from taking customary law into account in bail or sentencing decisions. The Northern Territory Chief Justice, Trevor Riley, expressed concern over s 91 of the NTER, saying it meant Aboriginal people were not given the same rights as other members of society.

[2.220] Sentencing

The *Crimes (Sentencing Procedure) Act 2000* sets out the matters to be taken into account by the court in determining the appropriate sentence in respect of a given offence. A person’s Aboriginality is neither an aggravating nor a mitigating factor.

The court is, however, required to have regard to “any other objective or subjective factor that affects the relative seriousness of the offence” (s 21A). Among these subjective factors are the specific and unique historical and cultural issues that affect Aboriginal people’s position in Australian society (see *R v Simpson*, Supreme Court of NSW, unreported, 15 December 1981; *R v Gordon*, Supreme Court of NSW, unreported, 5 August 1983; *R v Fernando* (1992) 55 ALB 19; *R v Jackie* (1992) 63 ALB 19). Such factors have been held to be of less or no relevance in the case of Aboriginal people who have only experienced urban life.

Circle sentencing

The NSW Law Reform Commission's Report 96 (2000) *Sentencing: Aboriginal Offenders* recommended that pilot schemes for circle sentencing and adult conferencing should be instituted in consultation and collaboration with Aboriginal communities. Following this, the Aboriginal Justice Advisory Committee, in collaboration with the Aboriginal community in Nowra, commenced a pilot circle sentencing scheme.

Currently the program operates at local courts in Nowra, Dubbo, Walgett, Brewarrina, Bourke, Lismore, Armidale and Kempsey, Nambucca, and Mount Druitt. The scheme currently only applies to adults.

How circle sentencing works

The scheme allows a magistrate to sit with the Aboriginal elders of the area and discuss sentencing options in relation to Aboriginal

offenders. Sentences are passed under the scheme only when the offender requests to be so sentenced. The benefits of the scheme include:

- greater understanding and participation in the administration of justice by the Aboriginal community
- a clearer recognition by the offender that criminal offending is unacceptable to the whole community, and
- a clearer understanding by the offender of the effect of crime on victims (especially when the victim attends).

Circle sentencing is not of itself the application of customary law, but provides an avenue for issues of customary law to be taken into account when determining sentence.

For further information see *Circle Sentencing in NSW: A Review and Evaluation*, 2003, NSW Aboriginal Justice Advisory Council.

Children, women and family law

Protecting Indigenous children

[2.230] In 1997, the Australian Human Rights Commission reported on the Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families. The report, *Bringing Them Home*, proposed a framework of national standards to guide governments and other agencies in the protection of Indigenous children.

Major standards for the care and protection of Aboriginal children in NSW, and their relationship to the standards proposed in the report, are as follows:

- there is an initial presumption that it is in

the child's best interest to remain within the family, community and culture. In deciding whether it is in the child's best interests to be taken into care and protection the court must consider:

- the views of the child and the family
- the need to maintain contact with communities and cultural heritage
- the advice of accredited Aboriginal organisations (standard 1)

(see *Children and Young Persons (Care and Protection) Act 1998* (NSW)).

- in judicial or administrative decisions

- relating to care and protection the child's best interests should remain paramount (standard 2)
- detention of an Indigenous child is a last resort. When deciding whether the danger to the community as a whole outweighs the desirability of keeping a child with family or community, the court must consider imprisonment as a last resort (*Children (Criminal Proceedings) Act 1987* (NSW), s 33(2)) (standard 3)
 - when an Indigenous child or young person is involved in care and protection matters, an Aboriginal organisation should be consulted and involved in every stage of the process (See *Children and Young Persons (Care and Protection) Act 1998*) (standard 4)
 - indigenous children should have representation of their choice (or, where a child cannot make a choice, representation by an Aboriginal organisation) (standard 5)
 - when a child or young person is to be removed from their family the following options should be considered, in this order (standard 6):
 - placement with a member of the family or kinship group, as recognised by the community to which the child belongs
 - placement with a member of the Aboriginal community to which the child belongs
 - placement with another Aboriginal family near the child's usual home
 - placement by Family and Community Services, after consultation with the child's extended family and appropriate Aboriginal welfare organisations.
 - adoption is a last resort (standard 7). In NSW, families where at least one partner is Aboriginal are preferred where an Aboriginal child is to be adopted. A report by the NSW Law Reform Commission on adoption legislation recognises that adoption is at variance with Aboriginal customary law and that Aboriginal children should not be adopted unless there is clearly no other choice
 - certain rules should apply when Aboriginal children come into contact with the juvenile justice system (standard 8).

For details of the recommended rules, see *Bringing Them Home*, available from the Australian Human Rights Commission.

Indigenous women and the law

[2.240] It is often assumed that Indigenous women's legal issues are the same as those of Indigenous men. This is not the case, particularly in the areas of domestic violence and family law.

Previous Indigenous service providers have resourced the perpetrator, leaving the victim without adequate representation and support. Major Indigenous service providers such as Aboriginal Legal Services are now addressing policies and practices which had failed to take account of Indigenous women's legal needs. Governments and funders, too, are just beginning to recognise the need for gender specific services for Indigenous women. However, in light of the current government funding cuts to such services

therefore reducing specialist services, it is essential there is adequate, ongoing and sustainable funding for culturally safe services. Indigenous women are often the backbone of their families and communities, and they may experience extreme levels of violence. Their legal needs are different in many respects.

[2.250] Indigenous women and violence

Until recently, domestic violence was a subject on which Indigenous women were effectively silenced, both in their own community and outside it. Domestic violence is rarely reported in Indigenous communities,

although the reporting rate is increasing. Indigenous women may often bear the heavy responsibility of protecting their partners or family members from police and legal structures, that may have historically operated unresponsively, inaccessibly and prejudicially within their communities.

Barriers faced by Indigenous women

While Indigenous women in violent relationships share some of the needs of other women in this situation (whether they live in urban, rural or isolated areas), they face additional barriers in the form of culturally inappropriate services and limited resources and funding dedicated to their problems. While access to information and services is vital, most services available to victims of domestic violence are non-Indigenous services. This creates physical, cultural and, in some cases, language barriers for Indigenous women.

Why violence is not reported

Indigenous women may be reluctant to go to police or court services because of previous unsympathetic or destructive experiences with these institutions. There is an additional fear, as the report of the Royal Commission into Aboriginal Deaths in Custody points out, to the effect that "if your man flogs you and you call the police and they take him away, he might die in jail or the police might kill him. Do you want that on your conscience?"

This fear is a major contributing factor in not reporting domestic violence. It continues to place the responsibility for the violence on women.

Communicating with police

The lack of female Aboriginal Community Liaison Officers in key NSW police stations has been consistently identified by Indigenous women as a factor in the under-reporting of domestic violence and sexual assault. This is strictly "women's business", and for Indigenous women to talk to men about such intimate and traumatic issues is both embarrassing and shameful. Whilst there are some (mostly non-Indigenous)

female Domestic Violence liaison officers and police officers, the cultural barrier may still remain.

[2.260] Accessing the family law system

The experience of the legal system for many Indigenous women has been a negative, confusing and disempowering one. Many women choose not to engage with the family law system as they are concerned that the Department of Family and Community Services will become involved and take their children away. However, using the family law system, including family dispute resolution and the courts, can be a useful way to take positive steps to make safe arrangements for children without Family and Community Services involvement. Culturally appropriate services are crucial to enable this.

The ability of Indigenous women to access the legal system without professional and ongoing holistic support is limited. Some Indigenous women have had violence inflicted on them by more than one perpetrator, as children and adults. These women are particularly vulnerable and many have moderate to severe post-traumatic stress and associated psychological conditions of varying degrees (eg depression, severe anxiety, personality disorders). Indigenous women may also be disadvantaged by generally having low literacy levels and having significant social, economic, geographic and cultural disadvantage. Many women have other family members experiencing similar disadvantage, as well as also being victims of sexual assault and/or family violence.

Family dispute resolution (FDR) services are located in large regional centres, however they are not in most small towns nor anywhere close to many Aboriginal communities. The lack of private and public transport and costs of travel and accommodation mean attending these services is difficult. FDR services are very much mainstream services which are focused on the nuclear family model and non-Indigenous family raising practices.

The family law courts have developed a Reconciliation Action Plan as part of a strategy to make the courts more accessible.

Access to information

Given the levels of domestic violence and sexual assault Indigenous women experience, information about the Victims Support Scheme is also essential. Relatively few Indigenous women are aware of this scheme and their right to apply for counselling and financial assistance as victims of violent crime. Victims Services has an Aboriginal Contact Line 1800 019 123.

See also Chapter 39, Victims Support and Chapter 19, Domestic Violence.

[2.270] Legal services for Indigenous women

Wirringa Baiya Aboriginal Women's Legal Centre was established in 1996 and is in Marrickville in Sydney. Wirringa Baiya means black women speak. It provides telephone advice about domestic violence, sexual assault, care and protection and

custody matters. It can provide legal representation or refer women to other representation.

Women's Legal Service NSW, a mainstream service provider, established an Indigenous Women's Legal Program in 1997. It provides a state-wide service including a "1800" advice line for family and civil matters, community legal education and training, and contributes to law reform projects.

Family Violence Prevention Legal Services have been established in rural and remote NSW.

Other Indigenous women's programs have been established in women's legal services across Australia, which are funded by the Commonwealth government, to increase access by Indigenous women (see also Contact points at [2.580]).

Other Programs Across Western Sydney Staff of the Indigenous Women's Legal Programs also travel through regional NSW and attend regular outreach advice clinics in greater Western Sydney.

Land law

[2.280] Sovereignty over the land and waters of Australia was acquired by the British on invasion in 1788. That was interpreted legally to mean that the Crown assumed ownership of them. Apart from those lands or waters that have been acquired by the Commonwealth, the States still hold ultimate title to the lands and waters, but since the *Mabo* decision, the legal position in relation to the land occupied on

colonisation is that the State holds "radical" title – that is, the right to control the use and disposition of land, but not necessarily absolute ownership of it. Crown lands in NSW are lands that the Crown has not dealt with, or have come back to the Crown after a grant, for example if lands are resumed. Crown land can only be dealt with in accordance with legislation, principally the *Crown Lands Act 1989* (NSW).

Aboriginal land ownership in NSW

[2.290] About Aboriginal land ownership

In general terms, Aboriginal people and their legal representatives should be aware of the following matters in relation to Aboriginal ownership of land:

- Indigenous people who are private land holders do not have any special form of land holding
 - Indigenous people may have rights or interests in their traditional lands through membership of a nation or clan, to be exercised as determined by traditional law and custom, and the right under the *National Parks and Wildlife Act 1974* (NSW) to put their views about activities that might affect sites or land which is of special significance
 - Aboriginal people may have a right to have a say about the lands owned by a Local Aboriginal Land Council through membership of the Local Aboriginal Land Council either as a resident of that land council area, or as a person with a sufficient association with that area, or as a recognised Aboriginal owner of land within the land council's boundaries
 - land claims under the *Native Title Act 1993* and the *Aboriginal Land Rights Act 1983* (NSW) are two separate and distinct procedures concerning different kinds of rights
 - native title rights and interests held by traditional owners are inalienable. However, lands granted to local Aboriginal land councils are granted as freehold and can only be dealt with subject to specific statutory conditions under the *Aboriginal Land Rights Act*
 - native title may be claimed by individuals in their own right, or on behalf of a traditional community or group. A claim under the *Aboriginal Land Rights Act* may only be made by an Aboriginal Land Council
 - where native title exists, Indigenous people can exercise traditional rights to hunt, gather, and fish, or carry out ceremonial activity, without a determination by the Federal Court. Some native title rights and interests such as the right to have compensation for extinguishment after 1975, require a determination under the *Native Title Act 1993*
 - Aboriginal people can request the Minister for the Environment to place any national park in NSW on the schedule of national parks to be handed back to the Aboriginal owners
 - when any national park is handed back, the National Parks and Wildlife Service must pay rent to the Aboriginal owners.
-

[2.300] Aboriginal land rights and *Mabo*

Land can be dealt with or affected in a number of ways, but the most common way of acquiring private rights to land is through the Torrens title system, the most important feature of which is the concept of *indefeasible title* confirmed by entry on the Register of Titles.

Within this system of title, before the *Mabo* decision, the NSW government made provision for Aboriginal people to make land claims over vacant crown land by enacting the *Aboriginal Land Rights Act*.

In 1994, following the *Mabo* decision in 1992, the State government legislated to allow for native title to be recognised in NSW consistently with the provisions of the *Native Title Act*.

National parks

In 1996 the NSW government amended the *National Parks and Wildlife Act 1974* to make provision for national parks to be transferred to the "Aboriginal owners" and leased back to the government as national parks.

The Aboriginal Land Rights Act

[2.310] The *Aboriginal Land Rights Act* provides for:

- a land claim mechanism
- a land council structure, and
- an income stream.

[2.320] Claims under the Act

The land claim mechanism does not, strictly speaking, grant “land rights”, but provides a means by which Land Councils apply to the government for a transfer of vacant crown lands which are not lawfully used or occupied, or are not needed, or likely to be needed, for residential purposes, or for an essential public purpose. In substance, the title is transferred as of right, as a form of compensation for dispossession, as the minister has no discretion to refuse to transfer the land if it falls within the definition of “claimable Crown land” in the Act (see *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* [2008] HCA 48; (2008) 237 CLR 285). Applications to the minister to grant land must be made by either the NSW Aboriginal Land Council (NSWALC) or a Local Aboriginal Land Council for the area where the land is claimed. Land councils are constituted according to the Act and proclaimed by the governor.

Local Aboriginal Land Council membership can be based on three criteria: on the fact that the Aboriginal person lives within the geographical boundaries of the land council area, has a “sufficient” association (which need not be traditional in character) which is accepted by other members of the land council or the person is an Aboriginal Owner in relation to land within the area of the Local Aboriginal Land Council meaning their name is entered on the Register of Aboriginal Owners because of the person’s cultural association with particular land.

What the Act recognises

There have been significant developments in the law since this Act was passed, but in 1983 it was considered ground-breaking legislation. Many features of the Act have stood the test of time. For instance, the preamble recognises that:

- land was traditionally owned and occupied by Aboriginal people
 - land is of spiritual, social, cultural and economic significance to them
 - it is fitting to acknowledge this importance
 - as a result of past government decisions, Aboriginal land has been progressively reduced without compensation.
-

[2.330] Aboriginal land councils

The *Aboriginal Land Rights Act* originally created a three-tiered system of land councils:

- the NSW Aboriginal Land Council (covering the state)
- 13 regional land councils
- 120 local Aboriginal land councils.

However, amendments to the Act, passed on 4 December 2006, abolished regional land councils.

[2.340] Obtaining land under the Act

Aboriginal people can obtain land or associated rights under the Act through:

- land claims (s 36)
- purchase of lands (ss 12(b), 23(c), 38)
- acquisition of the land by the Minister for Aboriginal Affairs (s 39)
- access to land for hunting and fishing (ss 47, 48)
- rights to minerals (s 45) and royalties (s 46)
- community benefits schemes and social housing schemes provided by local Aboriginal land councils (ss 52A and 52B).

Land claims

Land claims under the Act can be made only by local land councils, or by the NSW Aboriginal Land Council on behalf of one or more local land councils. The claims are limited to vacant crown land not lawfully used or occupied, or required or likely to be required for an essential public purpose or for residential purposes.

Procedure

Claims are normally prepared by the local land council, often with legal advice from solicitors or the NSW Aboriginal Land Council. They are lodged with the registrar appointed under the Act, who certifies that the land claimed is within the boundary of the local land council and then sends the claim to the Minister for Crown Lands (the Minister for Lands) for determination.

The minister's responsibility

The minister gives notice of the claim to relevant government agencies, including local government. These agencies may object, but only on the ground that the land is required or likely to be required for an essential public purpose or for residential purposes.

If the minister is satisfied that the land is vacant crown land and not required for an essential public purpose or residential purposes, the claim must be granted.

Appeal against refusal

If the minister refuses the claim, the local Aboriginal land council may take the matter on appeal to the Land and Environment Court. The claim is then heard from the beginning by a justice of the Land and Environment Court, usually sitting with a commissioner who is Aboriginal.

Either party may appeal from the decision to the NSW Court of Appeal (*Land and Environment Court Act 1979* (NSW), s 57).

When a claim is granted

Once a claim is granted the land is transferred as freehold to the claimant Aboriginal land council.

Leaseback as national park

Section 36A of the *Aboriginal Land Rights Act* allows land to be leased back to the National Parks and Wildlife Service as a national park.

This is a useful option where the lands are recognised by the local land council as requiring protection for natural or cultural heritage values. Under s 71AE of the *National Parks and Wildlife Act 1974* (NSW) the Minister pays rent for the land to the Local Aboriginal Land Council that owns the land. The leased land is managed by a board of management under s 71AN of the Act, under which a majority of the board must be Aboriginal people. The board must also prepare plans of management for the lands under its control. Boards of management have access to funds to perform their functions through s 71AQ of the *National Parks and Wildlife Act*.

Purchase of lands

The *Aboriginal Land Rights Act* provided for the NSW Aboriginal Land Council to be paid 7.5% of the land tax collected each year from 1983, when the Act was proclaimed, until 1998. Half the money had to be allocated to an investment fund, and half to administration and land acquisition.

The investment fund now contains approximately \$500,000,000. The interest is made available to local Aboriginal land councils for administration and, potentially, land acquisition.

Acquisition by the Minister

If the Minister for Aboriginal Affairs believes there are exceptional circumstances justifying the acquisition of land to satisfy the objectives of the Act (s 39), the minister may acquire it.

The power has been exercised only once, when Wellington Common was acquired and then transferred to the traditional owners in 2001 through an Indigenous agreement reached to resolve a native title claim to the Common.

Access for hunting, fishing and gathering

Under s 47 of the Act, local Aboriginal land councils may enter into agreements with

landholders to obtain access onto or across lands for hunting, fishing or gathering of traditional foods. Under s 48, a local land council that has been unable to negotiate an agreement may apply to the registrar, appointed under the Act, who must refer the matter to the Land and Environment Court. The court may then issue a permit.

It is an offence to refuse access after a permit has been issued.

Rights to minerals and royalties

Under the Act, ownership of all minerals except gold, silver, coal and petroleum is transferred from the Crown when land is acquired by a local Aboriginal land council.

The land council can then veto mining (except for the reserved minerals), or consent to mining and receive royalties.

Rights to deal with the land

A land council may only deal with the land under detailed provisions of the Act. "Deal-

ing with" land is very widely defined and includes not just selling or mortgaging it but also making an application to a consent authority to undertake development on the land, such as subdividing or constructing buildings. The NSW Aboriginal Land Council must be satisfied that all the procedural requirements imposed by the Act have been complied with, and that the cultural value of the land has been taken into account when the Local Land Council resolves to deal with the land. In particular, land which is transferred under the Act and which may be subject to native title must be cleared of native title by a determination that native title does not exist. A dealing done by a land council in breach of these provisions is void (s 42C).

Native title

[2.350] Under common law

In *Mabo v Queensland (No 2)*, the High Court held that the common law of Australia recognises Aboriginal and Torres Strait Islander title to land held by them in accordance with traditional laws acknowledged and traditional customs observed by them.

The common law definition

Native title is recognised by the common law as a bundle of rights over land based on the traditional laws and customs of Indigenous people until:

- it is extinguished by an act of the Crown, or
- the people lose their traditional connection with their land.

Many aspects of the common law relating to native title remain unclear. These include the effect on native title of specific Crown grants and other dealings (see *Wik* and other cases at [2.360]).

Extinguishment

Native title is extinguished by legislation passed by the States where there is a clear legislative intention to that effect. This intention must be found by looking at the words of the relevant statute, and its purpose and context, to see whether the rights that the statute vested in the Crown or authorised the Crown to grant to others were inconsistent with *all* native title rights that might subsist in the land.

Where the Crown does grant or vest such an interest in land, native title is extinguished to the extent of the inconsistency (see Extinguishment of native title at [2.360]). The decision of the High Court in *Western Australia v Brown* (2014) 253 CLR 507 shows that the interest granted must be clearly inconsistent with any exercise of native title rights to result in extinguishment. In that case, a mining company was granted rights to mine under the Mount Goldsworthy mining lease and, under the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA), to construct a township to house mine

workers. Even though the land was intensively developed to create the township, there was held to be no inconsistency with all native title rights so as to bring about total extinguishment. This conclusion was supported by the requirement that the mining company had to permit the State and any other person to have access to the area leased except where that access would unduly interfere with the mining operations. That requirement pointed to an intention to recognise rights in third parties to have access to the area of the lease. The fact that some areas might be so developed as to prevent access (by building houses and township facilities) did not mean that the lease as a whole had the effect of extinguishing rights, as it was the nature of the rights granted (and not the way in which they might be exercised) which had to be considered. *Karpany v Dietman* [2013] HCA 47 confirms that legislation to regulate a right is unlikely to result in extinguishment because the regulation of a right assumes that the right continues to exist.

What kind of rights?

In 2002, the High Court handed down its decision in *Western Australia v Ward* (2002) 213 CLR 1, settling the argument as to whether native title rights were *sui generis* rights and interests (ie, different from other kinds), or merely a bundle of rights recognisable at common law. It found that native title was properly recognised as a bundle of rights and interests.

The effect of this decision is debatable: at the very least the finding allows the court to determine native title rights and interests as individual strands rather than as an indivisible whole. The decision in *Akiba v Commonwealth* (2013) 250 CLR 209 suggests, however, that a broadly stated right (for example, to fish) cannot be diminished by separating out the purposes for which the right might be exercised and finding partial extinguishment of the right by legislation which impacts on the

exercise of that right. In that case a native title right to fish included a right to fish for non-domestic or commercial purposes, as State and Commonwealth laws prohibiting commercial fishing without a permit regulated only one aspect of the exercise of the native title right.

[2.360] Under the Native Title Act

The legislative definition

Native title is defined in s 223 of the *Native Title Act 1993* (Cth) as the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land and waters, where:

- the rights and interests are possessed under traditional laws acknowledged, and traditional customs observed, by the people concerned
- the people have a connection with the land or waters by those laws and customs, and
- the rights and interests are recognised by the common law of Australia.

The original *Native Title Act* also contained a section that provided that the common law in respect of native title (as developed in the *Mabo* decision) had the force of a law of the Commonwealth, ie an act passed by Parliament, but that section was found to be unconstitutional in 1995 in the *Native Title Act* case (*WA v Commonwealth* (1995) 183 CLR 373) which held that the decision in *Mabo* which held that the common law could not validly have the same effect as legislation passed by Parliament. In 2002, the *Yorta Yorta* case held that the statute stood alone and had to be interpreted in its own terms.

The Yorta Yorta case

In the 2002 *Yorta Yorta* case (*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422), the High Court held that the test to be applied to determine whether native title existed and could be recognised was to be found in the *Native Title Act* (s 223).

The court also held that the test required applicants to demonstrate that:

- a set of laws and customs in relation to the ownership of the lands and waters in question existed at the time of annexation by the British, and

- the descendants of those people continue to observe laws and customs derived from those original laws and customs.

The effect of the decision is to make proof of native title

very difficult for those Aboriginal people from the southern parts of Australia, where the effects of invasion have been felt longest.

Rights and interests recognised in a native title determination might include hunting and fishing rights (s 223(2)). Native title can exist in the seas and seabed in offshore

areas, and can include the right to fish and to protect sites of cultural significance (*Yarmirr v Northern Territory; Commonwealth v Yarmirr* (2001) 208 CLR 1).

Wik and other cases

The High Court has made observations on the principles to be applied in determining the effect of pastoral leases on native title rights.

Wik

In *Wik Peoples v Queensland* (1996) 187 CLR 1, the High Court held by a majority of four to three that because the pastoral leases in question were not true leases as understood by the common law, and did not confer a right to exclusive possession, they did not necessarily extinguish native title. The court also ruled that where the rights of pastoralists and those of native title holders were in conflict, the rights of pastoralists would prevail.

Freehold and native title

In *Fejo v Northern Territory* (1998) 195 CLR 96, the High Court made clear that a freehold interest extinguishes native title, and that once extinguished native title cannot revive.

Must Aboriginal people live on their land?

In *Yarmirr*, the majority of the High Court found that Aboriginal people did not necessarily need to live on or travel to their lands to maintain the necessary connection with country for native title to be recognised.

This is of particular importance for Aboriginal people from NSW, who have been removed from their traditional lands in the past. It is still necessary, though, that applicants for native title have maintained traditional law and custom in respect of the country they claim (*De Rose v South Australia (No 2)* (2005) 145 FCR 290). Native title can still be recognised even if the grantee of a pastoral or mining lease has the right to undertake extensive development on the area claimed, provided that the rights under the lease are not totally inconsistent with all native title rights: *Western Australia v Brown* (2014) 253 CLR 507.

Right to hunt and fish

In *Yanner v Eaton* (1999) 201 CLR 351, the High Court confirmed that a native title right to hunt, given force in the *Native Title Act*, would not be extinguished by legislation seeking to assert ownership of wildlife as

“property”. A similar conclusion was reached in *Karpny v Dietman* in relation to laws regulating the right to fish, where prohibition on the right to take shellfish without a permit did not extinguish the traditional right to take them.

Risk

Risk v Northern Territory (2007) 240 ALR 75 concerned native title determination applications made on behalf of three groups of the Larrakia peoples in relation to land and waters in and around Darwin in the Northern Territory. The claim area comprises many sections of land and waters within an overall area of about 30 square kilometres. The primary judge (*Risk v Northern Territory* [2006] FCA 404) dismissed the applications because he found the present society of the Larrakia peoples did not now possess the rights and interests possessed at the time of sovereignty, because their current laws and customs were not “traditional” in the sense required by s 223(1) of the *Native Title Act* as explained in *Yorta Yorta*. The judge found that there was no contemporary evidence to suggest that all, or most, of the cultural practices of the Larrakia people which were observed during the latter part of the nineteenth century continued to be practised. During the period from WWII to 1970 the Larrakia people were removed from the claim area, Darwin, to Berrimah and required to hold a permit to enter their traditional lands. The Full Court dismissed the appeal, holding that the applicant group had failed to show continuity in observance of traditional law, and that the laws and customs had been transmitted in a traditional way. Although *Yorta Yorta* accepts that law and custom may adapt to the pressures of colonisation and yet still be traditional, the claim group must demonstrate that observance of law and custom continues and is acknowledged in ways that remain true to the pre-contact normative system of law.

Compulsory acquisition of Native Title

In *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, the High Court held that the Northern Territory government’s compulsory acquisition (extinguishment under s 24MD(2) of the *Native Title Act*

of native title land and rights “for any purpose whatsoever” was a valid exercise of executive power for the purpose of leasing and disposing of that interest into private hands under s 43 of the *Crown Lands Act 1992* (NT). Kirby J (in dissent) refused to take “a purely literal approach” to compulsory acquisition “for any purpose whatsoever” and recounted previous High Court decisions recognising the “spiritual, cultural and social connection” inherent in native title. His Honour said that the decision in *Ward* did not cast doubt on that principle or its significance as a distinguishing feature of native title and also that the acquisition was required to be on just terms. Formerly, the Territory could only compulsorily acquire land for public purposes; however, the term “public” had been removed. Kiefel J, who also disagreed with the majority, was unable to dismiss the relevance of other public purpose cases without express words in the statute confirming the abrogation of the previous law. On this point Kirby J said “legislation depriving individuals of established legal rights must be clear and unambiguous”. The majority, however, had found that the provision was not ambiguous. The later case of

Wurridjal v Commonwealth of Australia (2009) 237 CLR 309 did confirm that Territory laws for the acquisition of property were required to make provision for just terms compensation.

Bodney v Bennell

In *Bodney v Bennell* (2008) 167 FCR 84, the Full Court held that the judge at first instance had applied the wrong test in determining whether the claimants had continued to acknowledge and observe traditional laws and customs from sovereignty to the present and also that continuity of connection to country could be established by evidence of continuity of a society. The trial judge had failed to consider whether the claimants could establish continuing connection to the area under claim. It was not enough for the trial judge to rely on the claimants’ established connection with the area subject to the single Noongar claim as a whole (which was much larger than the claim in respect of Perth) to establish that a connection with the Perth area, observed by their ancestors at the time of sovereignty, had continued substantially uninterrupted since sovereignty.

Purpose of the legislation

The purpose of the *Native Title Act 1993*, which was extensively amended in 1998, is to:

- validate acts that were invalidated by the decision in *Mabo (No 2)*
- establish a process to determine the nature and extent of native title
- regulate how native title can be dealt with in the future
- recognise and protect native title.

Extinguishment of native title

The Act confirms that *previous exclusive possession acts* extinguish native title, and *previous non-exclusive possession acts* extinguish native title to the extent of any inconsistency.

Previous exclusive possession acts include certain interests created before 23 December 1996 (the date of the *Wik* decision), such as:

- freehold estates
- commercial leases
- exclusive agricultural or pastoral leases
- residential leases
- community purpose leases
- interests appearing in Sch 1 of the Act
- any lease conferring a right of exclusive possession.

Acts that do not extinguish native title

Interests granted or created for the benefit of Aboriginal people, and those involving the creation of national parks or involving a Crown-to-Crown grant, are not previous exclusive possession acts.

Disregarding extinguishment

Where members of a claimant group occupy land over which a claim is made, and the land has been granted under legislation for the benefit of Aboriginal and Torres Strait Islander people, the extinguishing effect of past grants must be disregarded under s 47 (pastoral leases held by applicants), s 47A (reserve trusts, freehold land granted for the benefit of Aboriginal people or Torres Strait Islanders), or s 47B (vacant crown land).

Validation of past acts

The *Native Title Act 1993* validates all past Commonwealth acts (s 14), and permits the states to validate their past acts without the threat of invalidity because of inconsistency with the *Racial Discrimination Act 1975* (Cth) (s 19). Validation by the states must conform with the principles in the *Native Title Act*.

A *past act* is a grant of an interest before 1 January 1994, or a legislative Act done before 1 July 1993 that would have been

invalid with respect to native title due to inconsistency with the *Racial Discrimination Act 1975* (Cth).

Interests created by past acts

The interests created by past acts have been categorised into four groups:

- A – freehold, public works, and commercial, agricultural or pastoral leases
- B – other leases, except mining leases
- C – mining leases
- D – all others, including Crown reservations and grants of Aboriginal land.

Validation of interests

The validation of each group of interests has a different effect on native title (ss 15, 229–232).

- The validation of a category A interest extinguishes native title.
- The validation of a category B interest extinguishes native title to the extent of any inconsistency.
- The validation of a category C or D interest puts native title on hold – native title revives when the category C or D past act expires.

“Intermediate period acts”

The *Native Title Act* also provides for validation of “intermediate period acts” – acts between 1 January 1994 and 23 December 1996 that would have been valid but for the existence of native title (Div 2A).

Compensation

Native title holders are entitled to compensation for any extinguishment and impairment of native title arising from validation (ss 17, 20, 22D, 22G). The compensation must be on “just terms” under ss 51 and 53 of the *Native Title Act* and must not exceed the amount that would be payable if the land were freehold, unless the compensation claimants request compensation through the transfer of property or the provision of goods and services or some combination of money and other interests, s 51(6). It is a difficult question whether the “just terms” compensation could exceed the market value of the freehold, because while s 51A provides that the freehold value is a limit on the amount of compensation awarded, it is the

Constitution that provides that the compensation must be on just terms. Just terms requires the compensation for compulsory acquisition to be “fair and just” (*Commonwealth v Tasmania – Tasmanian Dam Case* (1983) 158 CLR 1). Before a determination of compensation is made, the court must make a determination that native title had once existed in the area for which compensation is claimed, and has been extinguished in a manner that gave rise to a right to compensation – ie, if the grant was validated by the *Native Title Act*, or was done by the Commonwealth, state or a territory and engaged the requirement to give “just terms” compensation.

Right to compensation?

In the first successful contested determination of a compensation application, *Griffiths v Northern Territory* (No 3) [2016] FCA 900 (24 August 2016) Mansfield J determined the amounts payable by the Northern Territory Government in compensation to the Ngaliwuru and Nungali Peoples for the impact on their native title of acts attributable to the Northern Territory government which occurred after the commencement of the *Racial Discrimination Act 1975* (Cth) on 31 October 1975. The acts for which compensation were claimed were those which extinguished native title in whole or in part, or impaired or suspended native title where it still exists.

In 2007, the native title rights and interests of Ngaliwuru and Nungali Peoples were determined to exist in areas where they had not been extinguished over the town of Timber Creek, *Griffiths v Northern Territory* [2006] FCAFC 178. The compensation application was filed in 2011 in relation to the effect on the Applicant’s native title rights and interests of approximately 60 land grants and public works done by the Northern Territory. The question of the Northern Territory Government’s liability for compensation was determined in 2014 in *Griffiths v Northern Territory* (No 2) [2014] FCA 256, leaving the assessment of compensation to be determined.

His Honour held that the total compensation comprised three elements:

1. a sum for economic loss (calculated by reference to the freehold value of the land)
2. another amount for non-economic loss (caused by a loss of traditional attachment to the land), and
3. a third amount for interest on the economic loss component of the compensation.

The Commonwealth, State and Territory governments are largely liable for native title compensation, but there may be circumstances either legislative or contractual

where the government has “passed on” liability for compensation to third parties for example in the conditions under which mining or petroleum tenements are granted or in conditions attached to long term leases. Councils, statutory bodies and government owned corporations who compulsorily acquire native title are also liable for native title compensation payable in connection with that acquisition. This aspect is usually settled by the parties prior to the acquisition in the terms of an Indigenous Land Use Agreement.

In the earlier decision of *Jango v Northern Territory* [2006] FCA 318 (31 March 2006), Justice Sackville held that the traditional owners of the lands around Uluru (Ayers Rock) had failed to prove they were the owners of native title rights that had been extinguished or affected. On appeal, the Full Court of the Federal Court noted the necessity to prove continuity of the society and its traditional laws and customs which had not been established by the evidence presented during the hearing. This was the first time a compensation application under the *Native Title Act* had proceeded to hearing by the Federal Court. In *De Rose v South Australia* [2013] FCA 988 Mansfield J made a consent determination in relation to compensation for the extinguishment of the native title rights of the De Rose Hill native title holders (as determined by the Full Court in *De Rose v South Australia (No 2)* (2005) 145 FCR 290). Due to resolution of the compensation application by consent between the native title holders and the State the terms of the agreement remain confidential.

[2.370] Lodging a claim

The *Native Title Act* sets out the process by which native title rights and interests can be determined.

Since the amendments made in 1998, claims are filed with the Federal Court, which has exclusive jurisdiction to hear and determine native title applications. This does not mean that other courts cannot deal with native title issues in particular circumstances (see *Wilson v Anderson* [1999] NSWSC 8, 20 January 1999). Aboriginal people can file applications to:

- determine that native title exists
- revoke or vary a determination of native title
- determine compensation for extinguishment (s 13).

Claims must be lodged in a prescribed manner and comply with Federal Court rules. In NSW, NTSCORP is funded by the Commonwealth government to provide native title services to traditional owners who claim native title rights and interests in NSW.

What the application must contain

Applications must contain:

- a clear definition of the people claiming the native title rights
- information on the extent and nature of the rights and interests claimed
- information allowing boundaries to be easily identified
- a description of the facts that are the basis of the claim
- details of the current activities of the claimant group on the land, and
- the basis upon which the applicants are authorised to make the claim and deal with matters arising in the course of the claim (s 62(2)).

What cannot be claimed

A claim may not cover an area where native title has already been determined or that was the subject of a previous exclusive possession act (see Extinguishment of native title at [2.360]), nor can it be for exclusive possession, occupation and use if the area is the subject of a previous non-exclusive possession act (s 61A).

Where previous extinguishment may be ignored

The previous extinguishment of native title must be disregarded where native title claims are filed over:

- certain freehold interests or pastoral leases held by or for the benefit of Aboriginal people (ss 47, 47A), or
- vacant crown land occupied by Aboriginal people at the time the application is lodged (s 47B).

Registration of native title claims

Some procedural rights conferred by the *Native Title Act*, including the right to negotiate, are available only to native title claimants whose claims are *registered*. When an application is filed in the Federal Court

the court must provide a copy to the National Native Title Tribunal.

The registrar of the tribunal (the Native Title Registrar) then assesses the application against the threshold test provided in the *Native Title Act*. In short, the registrar must be satisfied that:

- the claim has been properly authorised by the claim group
- the area claimed and the people making the claim are adequately described
- the rights and interests claimed are set out
- there is some evidence which, on its face, would demonstrate that native title rights and interests may exist.

If the claim has not been properly authorised, it may be struck out, but the Federal Court has a discretion to permit the claim to progress even if the authorisation requirement is not met (s 84D).

Notification requirements

Whether or not the claim is registered, the registrar must give notice of any application referred by the Federal Court to persons or bodies that may include:

- other native title claimants or bodies
- other bodies representing Indigenous people whose interests may be affected
- relevant Commonwealth or state ministers
- anyone who has a proprietary or other interest in the area affected
- anyone who may have an interest in the proceedings (s 66(3)).

A person is entitled to become a party to a native title claim if their interests may be affected by a determination in the proceedings (s 84).

[2.380] Future acts affecting native title

The *Native Title Act* regulates the way in which native title is to be affected by *future acts*.

A future act is:

- the making, amendment or repeal of legislation after 1 July 1993, or
- any other act after 1 January 1994, which affects native title. To affect native title, an

act must be wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title rights (s 227).

A future act is invalid if it does not comply with the Act (s 24OA). If a future act is invalid, it has no effect on native title rights and interests. The *Native Title Act* (s 7) expressly provides that the *Racial Discrimination Act 1975* applies to the performance of functions and the exercise of powers conferred or authorised by it.

Native title holders and registered native title claimants have different procedural rights, depending on the nature of the future act.

What acts are included?

Some common types of future act that may affect native title rights and interests and the procedural rights expressly provided by the *Native Title Act* are described below. If the future act is not specifically dealt with in a particular section, it is subject to the general requirement of non-discrimination, and native title holders have the same procedural rights as non-native title holders:

- agreements with native title claimants in the form of Indigenous Land Use Agreements (ILUAs), which may relate to activities in particular regions or procedures to apply in a particular region, can override the procedures of the Act. The Act prescribes how ILUAs may be reached and registered (ss 24BA–24FE)
- if native title is found not to exist, or an application is made by a non-native title party, and after three months there is no registered native title claimant, any future act occurring in the area is valid. If native title is later found to exist, the act remains valid (s 24FA) but compensation may be payable for the effect of the act on native title
- most future acts relating to primary production activity are valid. These include cultivating land, keeping, breeding or agisting animals, catching fish, and horticultural and aquacultural activities. Such acts do not extinguish native title rights, and native title holders are entitled to compensation
- legislation dealing with the regulation or

management of water, living aquatic resources and airspace is valid. Aboriginal people must be notified beforehand, and may comment. Native title rights are not extinguished, and native title holders are entitled to compensation (s 24HA)

- the exercise of a legally enforceable right created before 23 December 1996, and the renewal, re-grant or extension of certain licences, leases and permits, are valid (s 24IC). The renewal, re-grant or extension must not create a right of exclusive possession over any of the area covered by the lease, or create a new proprietary interest. Native title holders are entitled to compensation
- acts done by the government in relation to a dedication, reservation, condition, permission, authority or lease of land are valid (s 24JB). Native title is extinguished only if the act comprises a public work. Native title holders are entitled to compensation
- the construction, use, maintenance or repair of facilities for services to the public which do not prevent Aboriginal people having reasonable access to their land are valid. Native title is not extinguished by the act, and compensation is payable. Native title holders have the same procedural rights as other title holders in relation to such acts (s 24KA)
- certain “low impact” future acts are valid if they occur before a determination that native title exists. Native title is not extinguished by those acts (s 24LA)
- other categories of future acts must comply with the “freehold title test” (s 24MA), which generally means that an act is valid if it could be done if the native title holders held freehold title. It does not apply to offshore areas. Native title holders have additional procedural rights in certain compulsory acquisition matters (s 24MD(6B))
- acts in offshore places are valid. Except in the case of compulsory acquisitions, native title is not extinguished. Native title holders have the same procedural rights as other title holders (s 24NA)
- a special right to negotiate applies to future acts involving the grant of certain

mining interests and compulsory acquisitions (ss 25–44).

Native title can be validly extinguished under the future act regime, for example where native title rights and interests are subject to compulsory acquisition, but generally the non-extinguishment principle applies, and the native title holders are entitled to compensation for the impairment of native title. In some cases, the future act will be valid notwithstanding that the procedural requirements might not be observed (for example, under s 24KA – *Lardil Peoples v Queensland* (2001) 108 FCR 453).

Hunting, gathering and fishing

The Act provides for the preservation of hunting, gathering and fishing rights, and cultural activities as long as they are non-commercial and amount to the exercise of native title interests. These activities may occur even if a licence is required for such activities by non-native title holders (s 211 and *Yanner v Eaton* (1999) 201 CLR 351).

The High Court has confirmed that a coastal grant of Aboriginal land in the Northern Territory stretches to the low water mark and includes the intertidal zone. Significantly, coastal native title holders in the Northern Territory have a right to exclude others from an Aboriginal intertidal zone. Recognition of this right greatly enhances the negotiating power of native title holders regarding public access to the intertidal zone and commercial interests in those natural resources (*Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 248 ALR 195 (*Blue Mud Bay* case)). The case did not consider the status of grants under other land rights legislation. In NSW, grants made under the *Aboriginal Land Rights Act* will only extend to the limits of the land claimed, which is usually defined by the deposited plan, but may extend to the mean high water mark. Where native title is recognised in coastal waters, the right will be subject to the general public right to fish and of safe navigation, and native title will not be exclusive: *Commonwealth v Yarmirr* [2001] HCA 56; (2001) 208 CLR 1.

Resource law

[2.390] A number of laws regulate the protection, use, exploitation and management of natural resources in NSW. Many of them make special provision for the involvement of Aboriginal people.

[2.400] Fishing

The *Fisheries Management Act 1994* (NSW) states that it is not intended to affect native title rights (s 287). An amendment in 2000 to introduce a general salt water recreational fishing licence allows exemptions from fee payment for Aboriginal people who are part of the native title claimant group for an area in which there is a registered native title claim.

Exemptions can also be granted to Aboriginal people to fish for cultural purposes under s 37 of the *Fisheries Management Act 1994*. In practice, the exemptions are granted by NSW Fisheries on production of a letter from the relevant local Aboriginal land council. In 2009, the *Fisheries Management Act 1994* was amended to introduce a right to fish for the purpose of Aboriginal cultural fishing (fishing for the purpose of satisfying personal, domestic or communal needs, or for educational, ceremonial or other traditional purposes, and which do not have a commercial purpose) but that amendment has not yet been proclaimed to commence (as at 1 October 2014).

Forests and Crown lands

The *Forestry and National Park Estate Act 1998* (NSW) transfers certain former state forests and Crown lands to local Aboriginal land council ownership.

[2.410] Marine parks

The *Marine Parks Act 1997* (NSW) states that it is not intended to affect native title rights, and provides for Aboriginal representation on the Marine Parks Advisory Council.

[2.420] Land clearing

The *Native Vegetation Act 2003* (NSW) effectively governs land clearing and repeals the *Native Vegetation Conservation Act 1997* (NSW). The Act provides for the certification of property vegetation plans, which must be consistent with the catchment management plan for the particular catchment.

Unlike the previous legislation, the *Native Vegetation Act 2003* contains no requirement for consultation with Aboriginal people or organisations.

[2.430] Catchment management

The *Catchment Management Authorities Act 2003* (NSW) set up 13 catchment management authorities covering the whole of NSW. The authorities had boards of five to seven people, and developed draft catchment management plans for consideration by the Natural Resources Commission. The authorities replaced most of the existing natural resource advisory councils and committees. This legislation was replaced in 2013 by the *Local Land Services Act 2013* (NSW) which revised the boundaries and abolished the catchment management authorities in favour of a statutory authority, the Local Land Service, and local land boards.

The *Local Land Services Act 2013* does not make provision for Aboriginal membership of the authority, or on local land boards, but the authority and the local boards are required to develop a strategy for engaging with the Aboriginal community in the region in relation to local land services. These services are broadly defined to include biosecurity, chemical management, stock movements, agricultural planning and natural resource management. The regulations provide that one of the skills which is relevant for membership of a local land board is the ability to work with Aboriginal

groups and communities, but it is not a mandatory requirement.

The Natural Resources Commission

The Natural Resources Commission, under the *Natural Resources Commission Act 2003* (NSW), replaces a

number of committees that had Aboriginal representation. There is no guaranteed representation for Aboriginal people on the commission, but it does have guiding principles that it must adhere to in making its decisions, which include the “Indigenous knowledge of natural resource management” (s 14(e)).

Heritage and cultural protection

Protection of heritage

[2.440] The three main NSW laws that address aspects of Indigenous cultural heritage are the:

- *National Parks and Wildlife Act 1974* (NSW) (NPW Act)
- *Heritage Act 1977* (NSW)
- *Environmental Planning and Assessment Act 1979* (NSW).

At the national level, the main laws that address aspects of Indigenous cultural heritage are the:

- *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)
- *Protection of Movable Cultural Heritage Act 1986* (Cth).

[2.450] The National Parks and Wildlife Act

Cultural sites and objects

Sites of cultural significance to Aboriginal people can be protected under the *National Parks and Wildlife Act 1974*. These may include:

- sacred sites
- burial places
- rock art
- artefacts or relics
- occupation sites, including axe-grinding grooves.

Aboriginal areas

Under s 30K of the Act, land can be reserved as an *Aboriginal area*. The purpose of the section is:

- to identify, protect and conserve areas associated with a person, event or historical theme, or containing a building, place, object, feature or landscape:
 - (a) of natural or cultural significance to Aboriginal people, or
 - (b) of importance in improving public understanding of Aboriginal culture.

Aboriginal objects and places

An *Aboriginal object* is defined as “any deposit, object or material evidence” relating to Aboriginal habitation, including Aboriginal remains (s 5). An *Aboriginal place* is a place that has been declared by the government to be of special significance to Aboriginal culture (s 84).

Role of the Office of Environment and Heritage

The Director-General of the Office of Environment and Heritage has care and control of Aboriginal heritage items and places. The Director-General can issue permits under s 90 of the Act that allow someone to excavate, destroy or otherwise disturb a site, or place, or object. Under s 86, it is an offence to harm or desecrate an Aboriginal object or place, unless the Director-General has issued a permit under s 90, or the

impact is a low-impact activity prescribed by regulation, or the defendant has exercised reasonable due diligence to determine that no Aboriginal object or place would be harmed by the activity.

A register of Aboriginal objects, places and sites is kept by the Office of Environment and Heritage and is called the Aboriginal Heritage Information Management System. The register can be searched to see if anything is listed on your land. Applicants for permits to destroy Aboriginal cultural heritage must consult with the Aboriginal community about the cultural significance of the sites, objects or places. The views of the Aboriginal community may be taken into account by the Director-General when deciding to grant or refuse the permit. A Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW has been published to guide interest holders in how to deal with Aboriginal cultural heritage issues. Compliance with the guide enables those seeking permits for activities that may affect Aboriginal places and objects, to demonstrate that due diligence has been shown which would be a defence to a prosecution for harm to an object or place. Where an action is likely to significantly affect an Aboriginal object or place, the Director-General:

- may make stop work orders
 - must consult with the person proposing the detrimental action about modifying it.
- The Director-General also has the power to make interim protection orders over land.

Destruction of Aboriginal sites

It is an offence to destroy, deface or damage an Aboriginal object or place, ss 86(2), (4), (5) and (8) NPW Act. Amendments in 2010 to the NPW Act removed the requirement that such harm was caused "knowingly". In *Histollo Pty Ltd v Director-General National Parks and Wildlife Service* (1998) 45 NSWLR 661, the defendant was able to argue that he did not know he had destroyed a particular site even though it was a registered site and he had been told that there were sites on the property.

Ownership of Aboriginal objects

Certain Aboriginal objects are declared to be owned by the NSW government, unless they were privately owned before 1969 or returned to the Aboriginal owner.

Agreements with private landowners

The government can also enter into agreements with landowners to ensure the protection of Aboriginal objects or places of significance on private land.

Sites vested in Aboriginal land councils

Ownership of land can be vested on behalf of the Aboriginal owners in an Aboriginal land council on the basis that it is leased back to the National Parks and Wildlife Service. The Act contains a list of such vested lands.

Lease back of Aboriginal sites

The following lands are vested in a local Aboriginal land council or the NSW Aboriginal Land Council on behalf of the traditional owners, and leased to the Minister for the Environment:

- Biamanga National Park
- Coturandee Nature Reserve
- Gulaga National Park
- Jervis Bay National Park
- Mootwingee Historic Site
- Mootwingee National Park
- Mount Grenfell Historic Site
- Mount Yarrowyck Nature Reserve.
- Mungo National Park.

Hunting and gathering flora and fauna

Aboriginal people are exempt from the provisions of the *National Parks and Wildlife Act 1974* that prohibit a person from hunting fauna or picking or gathering flora in a wildlife district, wildlife refuge, wildlife management area, conservation area, wilderness area or area subject to a wilderness protection agreement. The exemptions only apply where Aboriginal people are hunting or gathering for domestic ceremonial or cultural purposes and do not apply to threatened species or populations or threatened ecological communities within the meaning of the *Threatened Species Conservation Act 1995* (NSW).

[2.460] Other NSW legislation

The Heritage Act

Aboriginal objects and places may also be protected under the *Heritage Act 1977* (NSW). Items that can be listed on the State Heritage Register include places, buildings, work, relics (although relics that relate to the

Aboriginal settlement of an area are excluded from this category), moveable objects or precincts significant to the state. The minister can also authorise a local council to make interim heritage orders in relation to items of local heritage significance (s 25). Once an item is listed on the State Heritage Register, or there is an interim heritage order in relation to it, approval is required for demolition, destruction, excavation or alteration that may affect the item (s 57). The Heritage Council of NSW maintains the State Heritage Register (s 31) and can endorse a conservation management plan for the management of the State Heritage Register (s 38A).

The Environmental Planning and Assessment Act

Aboriginal heritage and sites can sometimes be protected by ensuring that appropriate guidelines are included in the local environment plans that local councils must develop under the *Environmental Planning and Assessment Act 1979* (NSW). An order forcing a particular council or shire to adhere to its local environment plan may then be obtained, if necessary, from the Land and Environment Court.

[2.470] Commonwealth legislation

The Environment Protection and Biodiversity Conservation Act

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) protects sites

listed on the World, Commonwealth and National Heritage Lists. The National Heritage List includes some Indigenous cultural areas. A site can appear on both the state and the national heritage list.

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984

Under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) the federal Minister for Indigenous Affairs can make orders protecting Aboriginal objects and sites from desecration or destruction, provided that state-based laws do not adequately protect the object or area. The minister may also make emergency orders where an area or object is facing a serious or immediate threat.

The Protection of Movable Cultural Heritage Act

The *Protection of Movable Cultural Heritage Act 1986* (Cth) attempts to regulate the export of particular objects of significant cultural heritage, including some Aboriginal objects. EDO NSW is a community legal centre specialising in public interest environmental law. It has publications with further information on heritage and cultural protection, see:

- EDO NSW Fact Sheets on Protecting Heritage: www.edonsw.org.au/legal_help
- EDO NSW Free publication, *Caring for Country* (phone (02) 9262 6989 to order a free copy).

Copyright and other protections

[2.480] Copyright

The *Copyright Act 1968* (Cth) protects the work of Aboriginal and Torres Strait Islander artists and creators in the same way as it does that of other Australians (see Chapter 12, Copyright). However, it has limitations in protecting and recognising Indigenous cultural and intellectual property (ICIP), especially in relation to Aborigi-

nal concepts of custodianship and communal ownership. This has been a feature of a number of court cases (see Recognising communal rights at [2.510]).

[2.490] Moral rights

The *Copyright Act* also protects *moral rights*. These are personal, non-economic rights, which cannot be assigned (transferred), and which give the author (the creator) the right:

- to be identified as the author of a work (the *right of attribution of authorship*)
- not to have authorship of a work falsely attributed (for example, to another author)
- not to have their work subjected to derogatory treatment that prejudicially affects their honour or reputation (the *right of integrity of authorship* of a work).

Moral rights apply to the authors of literary, dramatic, musical and artistic works, and of films, but do not apply to sound recordings. The government introduced moral rights for performers in 2007. These rights apply to live performances or sound recordings of live performances. Moral rights belong to each person who contributed to the sounds of the performance, including the conductor of a musical work. There are still no moral rights for performers of audiovisual performances eg actors and dancers. In 2012, the Beijing Treaty on Audiovisual Performances was adopted which will provide performers with greater intellectual property rights but it is not yet in force internationally and has not been signed or ratified by Australia.

A moral rights case involving musicians

In *Perez v Fernandez* [2012] FMCA 2, the court found that the change made by DJ Suave (aka Jamie Fernandez) to Pitbull Perez' Bon Bon song was a material "distortion" or "alteration" (if not a "mutilation") of the song and that the Mixed Bon Bon Version was prejudicial to Perez's honour and reputation. Perez was awarded \$10,000 damages for the infringement.

Recourse for Indigenous artists

Moral rights provide individual Indigenous authors, creators and performers with remedies for infringement where the requirements of the Act are met. These include situations where:

- the author has not consented to the infringement
- the infringing act occurred after the commencement of the legislation and
- there is no statutory defence to the infringement available.

A moral rights case involving the wrong attribution of a visual artist

There has been only one moral rights case in Australia involving attribution. In September 2006, in *Meskenas v ACP Publishing* [2006] FMCA 1136 (14 August 2006), the court found that the moral right of attribution had been infringed. The court found the infringement analogous to copyright infringement in terms of the compensation that should be given, and awarded damages of \$9100.

Rights of communal owners

Section 190 of the *Copyright Act* states that only individuals have moral rights. This does not adequately recognise communal ownership of Indigenous cultural heritage, and the rights of custodians, according to traditional practices, to maintain integrity and require attribution. Communal ownership of pre-existing designs is not recognised.

[2.500] Breach of confidence

When copyright law is inadequate for protecting secret-sacred knowledge or cultural knowledge, or a contract has not been entered into, the law of confidential information may provide some protection.

A breach of confidence case

In *Foster v Mountford* (1976) 14 ALR 71, members of the Pitjantjatjara Council took action under breach of confidence laws to stop the publication of a book entitled *Nomads of the Australian Desert*. Mountford, an anthropologist, made a trip in 1940 into remote areas of the Northern Territory, where Pitjantjatjara male elders revealed, in confidence, tribal sites and items of deep cultural and religious significance. Mountford later sought to publish the information, with photographs, drawings and descriptions of people, places and ceremonies of the Pitjantjatjara people. It was argued that the dissemination of this information could cause serious disruption to Pitjantjatjara culture and society if it was revealed to women, children and uninitiated men. The court granted an injunction in favour of the Pitjantjatjara Council.

Copyright law could not have been used by the members of the Pitjantjatjara Council to protect their secret-sacred knowledge, as they had not recorded the information in writing or some other material form, and were

thus not the copyright owners according to the Copyright Act.

[2.510] Copyright law and Indigenous cultural and intellectual property

Recognising communal rights

Yumbulul v Reserve Bank of Australia (1991) 21 IPR 481 concerned a morning star pole, a funerary object created by Mr Yumbulul under the authority given to him as a member of the Galpu clan group. The pole was sold to the Australian Museum for public display, a permissible use to educate the wider community about Aboriginal culture.

However, Mr Yumbulul licensed reproduction rights to the Aboriginal Artists Agency, which subsequently approved the Reserve Bank reproducing the pole on the bicentennial \$10 note. Mr Yumbulul was criticised by his community for exceeding his authority under customary laws. According to the traditional custodians, it was not culturally appropriate for such a sacred item to be reproduced on money. Mr Yumbulul initiated action in the Federal Court, alleging that he would not have authorised the licence to the Aboriginal Artists Agency and the Reserve Bank had he fully understood it.

While finding that Mr Yumbulul mistakenly believed the licence would impose limitations on the use of the pole similar to those in Aboriginal customary law, the court considered that "Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin".

Unauthorised reproduction of artworks

In *Milpurrurru v Indofurn Pty Ltd* (1993) 130 ALR 659, the court discussed copyright infringement of Indigenous artworks of cultural significance to the artist applicants and the cultural groups to which they belonged.

The case involved the unauthorised reproduction of Indigenous artworks on carpets made in Vietnam and imported into Australia. Significant aspects of the case included the following:

- a work may be original if there is sufficient detail and complexity reflecting skill and originality, even if it is based on traditional designs
- though not identical to the original artworks, the carpets reproduced centrally important parts. For example, the part taken from Tim Payunka Tjapangati's painting Kangaroo and Shield People Dreaming depicted a sacred men's story – one factor that led the court to conclude copyright had been infringed
- part of the \$188,000 awarded in damages was given in consideration of the personal hurt and cultural harm done to the artists. The court noted that their standing in the community could be affected because of the culturally offensive misuse of the works, regardless of whether they had authorised it.

The court made a collective award to the artists rather than individual awards so that they could distribute it according to their cultural practices.

Collective ownership of artworks

In *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 157 ALR 193, the Federal Court discussed issues of collective ownership and communal copyright. John Bulun Bulun's work *Magpie Geese and Water Lilies at the Waterhole* had been reproduced on fabric imported into Australia by R & T Textiles. The respondents conceded that Mr Bulun Bulun was the copyright owner and reached a settlement with him, leaving the court to consider only the claims the second applicant George M (since deceased) brought as the representative of the Ganalbingu people. Those claims asserted that the Indigenous owners of Ganalbingu country were the equitable owners of Mr Bulun Bulun's copyright in the work, which embodied imagery sacred and important to the Ganalbingu people's cultural heritage.

The Federal Court dismissed Mr M's claims. However, it offered some interesting

comments on the nature of Indigenous cultural heritage, including that:

- the operation of any pre-existing system of Indigenous collective ownership in artistic works had been extinguished with the enactment of the *Copyright Act*
- the provisions of the *Copyright Act* effectively preclude any notion of group ownership in an artistic work, except where the work is one of “joint authorship” within the meaning of s 10(1) of the Act
- the grant of permission by the Ganalbingu people to Mr Bulun Bulun to use their ritual knowledge in his artwork was not enough to create any form of contractual agreement vesting an equitable interest in copyright ownership in Mr M or the Ganalbingu people nor was it sufficient to create a trust obliging him to hold the artwork and copyright on trust for the Ganalbingu people
- however, as a result of the unique relationship between Mr Bulun Bulun and the Ganalbingu people, equity imposed a *fiduciary* obligation on Mr Bulun Bulun not to exploit the artistic work in a way contrary to the law and custom of the Ganalbingu people and, in the event of infringement by a third party, to take reasonable and appropriate action to remedy the infringement. The court considered that Mr Bulun Bulun had done this by taking action against R & T Textiles.

Intellectual property rights and land rights

It was also argued by the second applicant in the *Bulun Bulun* case that intellectual property rights are an incident of native title, and may constitute an interest in land. The court did not have jurisdiction to address this question, as all applications for a determination of native title must comply with the *Native Title Act*. Subsequent recognition under that Act of a form of intellectual property rights in relation to land has, however, been limited.

Applicants for native title have sought to include the protection of cultural rights to property as part of the bundle of rights that makes up a determination of native title under the Act. In *Ward v Western Australia*

(1998) 159 ALR 483, the trial judge concluded that the claimants had a right to maintain, protect and prevent the misuse of their cultural knowledge of the claim area. Such protection had been sought to protect any inappropriate viewing, hearing or reproduction of secret ceremonies, artworks, song cycles and sacred narratives of the claimants. The High Court subsequently overturned the trial judge’s finding (see *Western Australia v Ward* (2002) 213 CLR 1), on the basis that such a right was not necessarily an interest in land capable of recognition under s 223(1)(c) of the *Native Title Act*. At [59] the court explained:

To some degree, for example respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land found in par (b) of the definition in s 223(1) of the *Native Title Act*. However, it is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under par (c) of s 223(1). The “recognition” of this right would extend beyond denial or control of access to land held under native title.

In a series of subsequent cases, claimants have failed to establish any form of a native title right that would entail the restraint of visual or auditory reproductions of what was found in the claim area (see, for example, *Northern Territory v Alyawarr* (2005) 145 FCR 442). Instead the Federal Court has only been prepared to recognise more limited rights to maintain and protect significant cultural sites, or to use land for the purpose of teaching and passing on traditional cultural knowledge. Under the *Native Title Act*, s 82(2) and the *Federal Court Rules* (Cth), rr 34.121–126 the court may take account of the cultural and customary concerns of Indigenous people when giving their evidence but not so as to prejudice unduly and other party, *Sampi v State of Western Australia (No 2)* [2001] FCA 620.

Taking action as a clan

The court also found in the *Bulun Bulun* case that if an artistic work embodying an Aboriginal clan's ritual knowledge was used inappropriately, and the copyright owner failed or refused to take action to enforce the copyright, the clan could take action through the courts.

[2.520] Contracts

A contract is an exchange of promises, sometimes also referred to as an agreement or a deed. Contracts can be in writing or oral, or partly in writing and partly oral. It is always preferable, however, for contracts to be in writing.

Contracts can be used to protect and retain intellectual property rights, and are an important tool for Indigenous creators who are licensing and marketing their arts and cultural goods and services.

Using contracts to protect Indigenous cultural and intellectual property

Contracts can be drafted to protect some forms of Indigenous cultural and intellectual property that may not be protected by current intellectual property laws in Australia. For example, the Arts Law Centre of Australia includes this clause in a contract template for licensing Indigenous artwork:

the parties recognise and agree to respect all ICIP in relation to any Design or Product, and to comply with any restrictions on using and dealing with ICIP

the parties agree to use all reasonable endeavours to adhere to protocols for producing Indigenous Australian visual arts issued by the Australia Council from time to time.

Notice of custodial interest

It is possible to include a clause in the contract that a notice of a custodial interest must be included in the documents provided to the purchaser of any artwork or product created by the Indigenous artist which states:

The images in this [INSERT ARTWORK OR PRODUCT] embody the traditional ritual knowledge of [NAME] community. It

was created with the consent of the custodians of the community. Dealing with any part of the images for any purpose that has not been authorised by the custodians is a serious breach of the customary laws of [NAME] community, and may also breach the *Copyright Act* (Cth). For enquiries regarding permitted reproduction of these images please contact [NAME OF ORGANISATION/ARTIST]

The use of protocols

Protocols, which are not legally binding, can be inserted into a contract, thereby making the parties to the contract bound by them as terms of the contract. For example, a documentary filmmaker entering a community can agree, in a contract with the community, to remove any footage of Indigenous community members who pass away after the footage is taken, and before the film is shown in public.

Protection of intangible cultural material

Contracts can also be used to protect intangible cultural material, such as language, which may not be otherwise protected by intellectual property law in Australia. For example, the Arts Law Centre of Australia has developed model agreements and protocols with the Federation of Aboriginal and Torres Strait Islander Languages Corporation for consultants (for example linguists, anthropologists, information and communication technology specialists and consultants in schools) when developing language materials with Indigenous communities.

[2.530] Misleading or deceptive conduct

The *Competition and Consumer Act 2010* (Cth) (CCA) prohibits corporations from engaging in conduct that is "misleading or deceptive or which is likely to mislead or deceive" (ss 18–19) or making false or misleading representations (ss 29–39; 151–160). This legislation (and its predecessor the *Trade Practices Act 1974* (Cth)) have been used successfully to deal with cases of misleading and deceptive conduct in the Indigenous art market.

The “Aboriginal” art Aboriginal people didn't make

In August 2008, the Australian Competition and Consumer Commission (the ACCC) found that a Queensland art dealer was in breach of s 52 for misleading and deceptive conduct. The art dealer sold art and artefacts made by non-Aboriginal artists and represented them as being made by Aboriginal artists. The Federal Court granted injunctions by consent restraining the art dealers, for a period of five years, from engaging in similar conduct and ordered them to pay the ACCC's costs. The art dealers were further ordered to write to certain purchasers of artworks produced by any of the three non-Aboriginal artists, advising them of the court proceedings. The art dealers also have offered the ACCC a court-enforceable undertaking that they will implement a trade practices law compliance program (ACCC v *Nooravi* [2008] FCA 2021).

In December 2009, in *ACCC v Australian Dreamtime Creations Pty Ltd* 263 ALR 487, Justice Mansfield in the Federal Court found that Australian Dreamtime Creations Pty Ltd (Dreamtime Creations) misled consumers by making misleading representations about artworks using Indigenous art styles. The Court held that Dreamtime Creations breached s 52 of the *Trade Practices Act* which prohibited corporations from engaging in misleading or deceptive conduct. The Court found that the company's sole director, Tony Antoniou, was knowingly concerned in the conduct, and made orders designed to prevent both Dreamtime Creations and Mr. Antoniou from engaging in similar conduct in the future.

In the *Dreamtime Creations case*, the company promoted and sold a large quantity of artworks that were represented to be Aboriginal art painted by an artist called “Ubanoo Brown”. In reality the artworks were not painted by Ubanoo Brown but rather a person of non-Aboriginal descent engaged by Mr Antoniou. Art galleries were supplied with “Certificates of Authenticity” that used terms such as “Authentic Aboriginal Painting”, “Aboriginal Fine Art Canvas” and “Artist: Ubanoo Brown”. Some artworks also had stamps affixed to them that said either “Traditional Hand Painted Aboriginal Art Australia” or “Authentic Australian Aboriginal Art”.

Whilst the CCA will provide assistance in cases where the manufacturer or retailer is making clear assertions that work which was made by non-Aboriginal artists is “Aboriginal” or “authentic Aboriginal art” it will not assist when the circumstances are not so clear-cut. In the *Australian Dreamtime Creations case* a wooden bird that was carved overseas, imported into Australia with the

artwork added here could still be sold as “made in Australia” if the work was sufficiently transformed through the application of painted decoration. Rather than assisting Indigenous crafts persons, some provisions of the CCA make the situation even murkier.

[2.540] Better protection of Indigenous cultural and intellectual property (ICIP) is still needed

In 1997, the Aboriginal and Torres Strait Islander Commission and the Australian Institute for Aboriginal and Torres Strait Islander Studies commissioned a seminal report on Indigenous cultural and intellectual property rights. The independent report by Terri Janke was released in 1999 as *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*. It found that existing cultural heritage and intellectual property laws do not adequately protect Indigenous interests, and argued that:

- Indigenous Australians have a comprehensive view of cultural and intellectual property as including:
 - literary, performing and artistic works
 - scientific, agricultural and technical knowledge
 - language
 - human remains
 - documentation of Indigenous people's heritage in archives, films, photographs and new media
- the principles underlying ownership and control of cultural and intellectual property relating to communal ownership, cultural integrity and consent procedures are consistent across Indigenous groups
- Indigenous Australians are concerned about increasing demands for Indigenous cultural and intellectual property, and that due to these demands and to new technology, their cultures are being exploited beyond their control
- current intellectual property law is inadequate in protecting Indigenous cultural and intellectual property

- a comprehensive and coordinated approach to protection is needed, to be developed in full consultation with, and administered under the control of, Indigenous people.

Our Culture: Our Future lists a range of proposals for recognising Indigenous cultural and intellectual property rights, including:

- developing new and amended legislation
- adapting administrative systems to include monitoring and collection systems
- developing cultural infrastructure, protocols and codes of ethics.

It is available at www.austlii.edu.au/au/journals/AILR/1999/51.html.

Labelling authentic products

In 1999, the then National Indigenous Arts Advocacy Association launched a national certification project. Two trademarks called the *label of authenticity* and the *collaboration mark* were registered under the *Trade Marks Act 1995* (Cth). In 2002, the National Indigenous Arts Advocacy Association's office closed and, in 2008, the trade mark registrations expired. The label of authenticity and the collaboration mark ceased to be regulated by any Indigenous or government bodies. The labels had limited success, possibly because the system involved costs to the Aboriginal artists and required Aboriginal people to prove their work was authentic.

A more recent approach to providing protection to both Indigenous artists and consumers of Indigenous art is the Indigenous Art Code. The development of the Indigenous Art Code was recommended by the Senate Committee which inquired into irregularities and exploitation in the Indigenous art market and reported in 2007 *Indigenous Art – Securing the Future* at www.aph.gov.au/binaries/senate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/report/report.pdf.

Indigenous Art Code

The Indigenous Art Code was launched in November 2010 after extensive development and consultation to encourage fair trade with Indigenous artists. Dealers, artists and

supporters can join to show their commitment to fair and transparent business dealings. Purchasers who deal with members of the Indigenous Art Code can proceed with greater certainty knowing that the artworks they buy come through ethical processes. A list of dealer members is available at www.Indigenousartcode.org/index.php/registered-members.

The Indigenous Art Code requires dealer members to act honestly when dealing with Indigenous artists, and prohibits them from making false or misleading representations when dealing with a person in connection with an artwork. The Indigenous Art Code company can also be contacted if you have a complaint about a dealer who is not a member of the Code and they will notify the Australian Competition and Consumer Commission if it is apparent any laws have been broken. The company can be contacted by telephone on 0438637862, or through the website www.Indigenousartcode.org/index.php/contact.

The Code has had limited success because it is still a voluntary system encouraging rather than mandating fair trade in the Indigenous art market. The Code is currently overhauling its membership requirements to raise the benchmark required of art dealers signing up to the Code.

Artworks that use flora and fauna

Some of the legislation discussed in the Heritage and Cultural Protection section (see Heritage and cultural protection [2.440]) such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) [EPBCA] may impede the ability of Aboriginal artists to create and sell their artworks. In 2013, artists from Elcho Island in the Northern Territory were refused an export permit for an exhibition of artworks using the plant pandanus because it was listed as a threatened species under the EPBCA. A special exemption had to be obtained from the minister so that the exhibition could proceed. Subsequently, pandanus was removed from the EPBCA threatened species list. There are many other art and cultural works where both creation and sale are limited by conservation and heritage laws.

Cultural protocols

Cultural protocols provide another means of promoting appropriate dealings with Indigenous intellectual and cultural property. Cultural organisations and government bodies have developed a number of protocols.

Australia Council protocol guides

The Aboriginal and Torres Strait Islander Arts Board of the Australia Council for the Arts has produced a series of five protocol guides on Indigenous cultural and intellectual property rights, dealing with literature, music, new media, performing arts, and visual arts and craft. The booklets outline cultural protocols to protect Indigenous artistic and cultural intellectual property. They are available at www.australiacouncil.gov.au/aboriginal-and-torres-strait-islander-arts.

Film-making protocols

Screen Australia has developed a cultural protocol for both non-Indigenous and Indigenous people working in Indigenous filmmaking. The protocol provides a framework to assist and encourage recognition and respect for the images, knowledge and stories of Indigenous people. See www.screenaustralia.gov.au/about-us/doing-business-with-us/indigenous-content/indigenous-protocols.

Local government protocols

The council of the City of Melbourne has developed an Indigenous art code of practice for galleries and retailers of Indigenous art. This may provide a template for other city councils around Australia. The Code is available at www.melbourne.vic.gov.au/arts-and-culture/aboriginal-torres-strait-islander-arts/Pages/aboriginal-torres-strait-islander-arts.aspx.

Other policies and protocols

Artists in the Black, the Indigenous service of the Arts Law Centre of Australia (Arts Law) has developed an intellectual property toolkit primarily for Indigenous art centres which contains the following best practice policies: photography and filming, festivals and performances, academic research, and recording stories.

A more complete list of protocols and policies is available on the Artists in the Black website at www.aitb.com.au/working-ethically/protocols.

[2.550] Other developments

Resale royalty rights

A resale royalty is a payment which is made to an artist when his or her artwork is resold by the owner. The resale royalty right refers to money paid to the artist following a transfer of ownership in the physical artwork.

Resale rights are based around the idea that artists should receive a direct benefit as their work increases in popularity and market value. While popular musicians and writers benefit from royalty income when more copies of their CDs and books are produced and sold, creators of artworks, which cannot be reproduced, do not benefit in this same way. Therefore, resale royalty payments enable visual artists (including painters, sculptors, printmakers, craft workers, installation and media artists, and photographers who produce limited edition prints) to continue to receive income from the resale of their artworks.

On 9 June 2010, an Australian resale royalty scheme for visual artists commenced. The Australian visual artists' resale royalty scheme entitles visual artists to receive payment of a 5% royalty on certain resales of their works. To participate in the scheme, artists need to register. Artists can register online at www.resaleroyalty.org.au.

The Australian Government appointed Copyright Agency Ltd to manage the scheme. Information is available on the Copyright Agency's website www.resaleroyalty.org.au.

Dream Shield

"Dream Shield" is an initiative of IP Australia to inform Aboriginal and Torres Strait Islanders on how to protect their intellectual property. IP Australia is the Australian Government agency that administers intellectual property rights and legislation relating to patents, trade marks, designs and plant breeder's rights.

There is a guide for Aboriginal and Torres Strait Islanders to protecting designs, brands and inventions available at www.ipaustralia.gov.au/sites/g/files/net856/f/reports_publications/dream_shield.pdf and a website that includes many examples of success stories and tips for Aboriginal inventors, designers and business owners, in videos and transcripts at www.ipaustralia.gov.au/tools-resources/publications-reports/dream-shield.

[2.560] International developments

The World Intellectual Property Organization

In 2000, the World Intellectual Property Organization (WIPO) established an Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC). In 2009, the member states decided the IGC should undertake text-based negotiations regarding effective protection of genetic resources, traditional knowledge and traditional cultural expressions. The IGC now has until September 2017 to reach agreement on an international legal instrument. See www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_1617.pdf. At this stage there is still a lot of disagreement amongst the member states about the nature and content of the instrument/s. For further information about WIPO's work in this area see www.wipo.int/tk/en/igc.

UNESCO

UNESCO has developed the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The Convention includes principles and articles which deal with promoting and protecting Indigenous cultural expressions. For further information about UNESCO's work on the Convention and cultural diversity go to its website at www.unesco.org/new/en/unesco/themes/2005-convention.

Pacific Islands Forum

The Pacific Islands Forum is a political grouping of 16 independent and self-governing states.

In 2002, the Pacific Islands Forum adopted a Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture which contained a Model Law for the Protection of Traditional Knowledge and Expressions of Culture (Pacific Model Law).

The Pacific Model Law is a draft document establishing a new range of statutory rights for traditional owners of traditional knowledge and expressions of culture and provides a basis for Pacific Island countries wishing to enact such legislation.

In 2009, in order to further the protection of traditional knowledge, the Pacific Islands Forum launched the Traditional Knowledge Action Plan. This has entered Phase 2 with the Cook Islands being the only country to implement traditional knowledge legislation to date although several countries have draft bills – see www.wipo.int/edocs/mdocs/tk/en/wipo_iptk_apa_15/wipo_iptk_apa_15_presentation_qalo.pdf.

[2.570] Further assistance

The Arts Law Centre of Australia

The Arts Law Centre of Australia provides free legal services to artists and arts organisations across Australia as the national community legal centre for the arts.

Artists in the Black (AITB) is a legal service for Indigenous artists, communities and arts organisations established by Arts Law. The AITB services include:

- free telephone legal advice
- document reviews
- workshops/seminars, and
- free information packs.

Website: www.aitb.com.au. This website contains information on working ethically including collaborative projects, negotiation, protocols, income and pricing and enforcement issues www.aitb.com.au/working-ethically.

Other services

More extensive services, such as a contract review service, are available to Arts Law

Centre members. The annual membership fee for an individual is \$160; however, this fee is currently waived for Indigenous artists.

Further information and resources, including Indigenous comics, information sheets and sample agreements, are available online at www.artslaw.com.au or by calling 1800 221 457.

The Australian Copyright Council

The Australian Copyright Council provides information, advice and training about copyright in Australia to artists, arts organisations and people working in educational institutions, libraries, and government departments or agencies. It has a free legal advice service for copyright matters.

The Australian Copyright Council has a free information sheet titled *Indigenous Artists*, and has published two books on legal issues relevant to Indigenous culture and intellectual property. They are:

- *Indigenous Arts and Copyright*, which includes general information on copyright and issues specific to Indigenous people
- *Protecting Indigenous Intellectual Property*, which includes information on important common law developments and international research and organisations.

Further information on these and other publications can be found at www.copyright.org.au.

Contact points

[2.580] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.relayservice.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online see www.tisnational.gov.au.

Aboriginal and Torres Strait Islander Social Justice

www.humanrights.gov.au/aboriginal-and-torres-strait-islander-social-justice

Aboriginal Housing Company

www.ahc.org.au

ph: 9318 0177

Aboriginal Land Council, NSW

www.alc.org.au

ph: 9689 4444

Aboriginal Medical Service

ph: 9319 5823

Artists in the Black

www.aitb.com.au

Arts Law Centre of Australia

www.artslaw.com.au

ph: 1800 221 457 or 9356 2566

Australasian Legal Information Institute (AustLII) (for full text of Wik and Mabo decisions)

www.austlii.edu.au

Australian Copyright Council

www.copyright.org.au

ph: 8815 9777

Australian Institute of Aboriginal and Torres Strait Islander Studies

www.aiatsis.gov.au

ph: 6246 1111

Australians for Native Title and Reconciliation

www.antar.org.au

Council for Aboriginal Reconciliation

www.austlii.edu.au/car

Family Violence Prevention Legal Services

Bourke/Brewarrina ph: 6872 2440

Broken Hill ph: (08) 8087 6766 or 1800 812 800

Forbes: ph: 6850 1234 or 1800 700 218

Kempsey: ph: 6562 5856

Moree ph: 6751 1400

Walgett ph: 6828 3143

Indigenous Cultural and Intellectual Property Rights

www.austlii.edu.au/au/journals/AILR/1999/51.html

Indigenous Land Corporation

www.ilc.gov.au

ph: 1800 818 490

Indigenous Law Bulletin

www.austlii.edu.au/au/journals/ILB

Indigenous Women's Legal Program

Women's Legal Services NSW

www.womenslegalsw.asn.au

Indigenous Women's Legal Contact Line

ph: 1800 639 784 or 8745 6977

LawAccess NSW

www.lawaccess.nsw.gov.au

Law and Justice Foundation of NSW

www.lawfoundation.net.au

Link-Up Aboriginal Corporation

www.linkupnsw.org.au

ph: 1800 624 332 or 4759 1911

National Association for the Visual Arts

www.visualarts.net.au/advicecentre/servicesindigenousartists

National Native Title Tribunal

www.nntt.gov.au

ph: 1800 640 501

Ombudsman, NSW

Aboriginal and Torres Strait Islanders Liaison Officer

www.ombo.nsw.gov.au/atsi.html

ph: 1800 451 524 or 9286 1000

Reconciliation Australia

www.reconciliation.org.au

ph: 6273 9200

Solid Arts: respecting and protecting Indigenous intellectual property

www.solidarts.com.au

"Stolen Children" homepage

www.hreoc.gov.au/social_justice/bth_report/index.html

Wirringa Baiya Aboriginal Women's Legal Centre

ph: 1800 686 587 or 9569 3847

Aboriginal legal services

Aboriginal Legal Service (NSW/ACT) Ltd

www.alsnswact.org.au

Head Office

ph: 8303 6699

Care Unit

ph: 1800 733 233

Criminal Unit

ph: 1800 765 767

Central South Eastern Zone

Canberra

ph: 6249 8488

Moruya

ph: 4474 2400

Nowra

ph: 4422 3255

Redfern

ph: 8303 6600

Wollongong

ph: 4225 7977

Northern Zone

Armidale

ph: 6772 5770

Coffs Harbour

ph: 6640 1400

Grafton

ph: 6640 1400

Kempsey

ph: 6562 5990

Lismore

ph: 6622 7088

Moree

ph: 6752 5700

Newcastle

ph: 4926 1571

Tamworth

ph: 6761 3766

Taree

ph: 6551 3928

Western Zone

Bathurst

ph: 6331 1255

Bourke

ph: 6872 2200

Broken Hill

ph: (08) 8087 3233

Dubbo

ph: 6882 6966

Griffith

ph: 6962 7675

Wagga Wagga

ph: 6921 9230

Walgett

ph: 6828 2039