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Aboriginal Land Rights in Australia

*by Sandy Wood**

Australia struggles with a legacy of discrimination and racism towards its indigenous population, the Aborigines. For example, the Australian government did not recognize Aborigines' right to citizenship until 1967. For the past few decades, however, Australia has grappled with Aborigines' social, political, and legal rights, particularly the issue of aboriginal land rights. This issue is not limited to Australia, as many other areas of the world are trying to resolve similar indigenous land claim issues within their own judicial and legislative systems.

In recent decades, Aborigines made significant progress in their quest for greater rights. In particular, the 1975 passage of the Racial Discrimination Act by the Australian Parliament and subsequent cases interpreting this law empowered Aborigines by prohibiting racially discriminatory actions. More recently, however, the federal and state governments have taken the opposite approach in the realm of indigenous land rights by passing legislation that curtails the effects of progressive court decisions and limits Aborigines' ability to pursue land claims. Aboriginal claims to traditionally inhabited land, which consist of demands that the majority white culture recognize Aborigines' rights as the original inhabitants, have emerged at the forefront of a national debate.

Many Australians support government recognition of the aboriginal population's traditional land rights, consisting of Aborigines' right to use and enjoy land that they have traditionally inhabited. The hope was that greater recognition of these traditional rights, referred to as "native title" rights, would facilitate a process of reconciliation between Aborigines and white Australians. The Aborigines' land claims, however, present complex legal questions, such as whether native title can be recognized without threatening private interests in the land that have evolved in Australia over the past 200 years. The controversy over native title rights reflects the importance of dealing with the fundamental legal concerns regarding land rights of indigenous people.

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Historical Background

Aborigines have lived in what is now called Australia for at least 40,000 years. When Europeans first began settling this land in the 18th century, Aborigines were scattered across the continent, living under conditions of great diversity. They spoke an estimated 500 languages, and their communities ranged in size from less than 100 people to more than 1,000. The exact nature of different communities' relationship to land varied, but the importance of land as a feature of social relations was universal. In addition to providing sustenance and shelter, land also had a spiritual significance greater than that which it traditionally possessed in Western culture.

After British colonization, the colonial Australian government parceled out land to white colonists, primarily under either freehold title or pastoral lease. Freehold title grants absolute ownership of the land. Pastoral leases, on the other hand, ensure that the government retains control over such land by providing that certain rights to develop the land or extract subsurface resources are retained by the government and that title to these lands reverts back to the government eventually. Both types of land grants often constituted large parcels of land, which were necessary to maintain herds of sheep and cattle and meet agricultural requirements in the inhospitable Australian outback. Because Aborigines' right to own land was not recognized, the land conveyed by these land grants often included traditional aboriginal land. The new landholders were in no way obliged to respect Aborigines' customs or their traditional land uses.

Australia's land management practices, growing out of this colonial history, have been some of the worst among Western nations in their effects on the indigenous population. Although, like the United States and Canada, Australia's commonwealth and state governments resettled Aborigines on remote reservations, the Australian government made no pretense at recognizing indigenous rights through treaties of the sort that Canada and the United States signed with indigenous peoples. Early Australian courts often applied aboriginal customary law to conflicts between Aborigines but never recognized aboriginal law or Aborigines' culturally based claims regarding the use and ownership of land. As a result, Aborigines did not have any legal precedent within the post-colonial judicial system on which to base specific land rights claims.

Domestic Legal Developments

Although a series of recent court decisions expanded aboriginal native title land rights, the legislature has responded by attempting to curb the advances made in these cases. The first major native title case occurred in 1992, when the Australian High Court helped bring Australia out from the shadows of its colonial past. In the landmark case of *Mabo v. Queensland,* the Meriam people of the Torres Strait Islands, located off the coast of northern Queensland, sued the Queensland state government for recognition of their native title to the islands. The *Mabo* court's groundbreaking decision recognized native title to land for the first time in Australian history. Unfortunately, the court did not clearly define this new right. In its reasoning, the court applied Section 9 of the Racial Discrimination Act of 1975 (RDA), which prohibits any action that impairs or nullifies human rights and fundamental freedoms as a result of discrimination. The court found that the state had violated, in a racially discriminatory manner, the Meriam people's freedom to enjoy their traditional land.

By deciding that Australia's annexation of the islands in 1879 did not extinguish native title to the land, the court also abolished the legal fiction of *terra nullius,* or "empty land." As applied by the British Crown and subsequent commonwealth governments, *terra nullius* established a legal justification for the disregard of aboriginal rights by rendering Aborigines incapable of any interest in real property. In effect, Australian law codified the wholesale dispossession of aboriginal lands and the relocation of these people throughout the continent.

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The court's interpretation of the RDA forced states to treat Aborigines' native title claims on equal terms with the property interests of white farmers and private businesses. The *Mabo* decision, however, did not enumerate precisely what types of land grants, if any, were immune to native title claims by Aborigines, nor did it address how conflicting interests could be resolved. In an effort to address the pressing issues left undefined by *Mabo*, aboriginal rights groups, farmers, ranchers, and private businesses all lobbied the government, emphasizing the different consequences that *Mabo* potentially had for their land interests. Aborigines sought to have native title land claims validated and to protect sacred land from being despoiled by mining and other activities. Ranchers and farmers were concerned that native title claims would terminate their pastoral leases or impinge upon their right to use land for grazing and agriculture. Mining companies demanded protection of their ability to prospect and extract mineral wealth.

In 1993, the Australian Parliament responded with the passage of the Native Title Act (NTA). The NTA treated the *Mabo* case as confirming that freehold and other titles equivalent to fee simple were immune to native title claims. The NTA recognized that native title was a compensable property interest in pastoral leases, but established that native title-holders were only eligible for such compensation if their interest in the land had been extinguished after passage of the RDA in 1975. Thus, Aborigines dispossessed and relocated prior to 1975 could not claim title to their traditional lands. Of great importance, both in terms of the amount of land at stake and the amount of money involved, the NTA provided that pastoral grants of mining interests suspended native title until the mining interests expired. The NTA further limited the scope of aboriginal native title rights to include only traditional land uses such as fishing, hunting, and gathering across native lands, rather than outright ownership rights.

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The NTA also established a National Native Title Tribunal (NNTT) to act as a mediating body between aboriginal groups making claims to land and parties with existing interests in the disputed land. The NNTT's goal is to foster agreements between parties, in the hopes that they will reach a resolution outside of court. The NNTT is also responsible for mediating between native title claimants and mining companies seeking to establish grants and exploratory licenses on land subject to native title claims. Whereas agriculture and grazing are no longer as profitable, Australia's mineral resources are an enormous source of potential wealth for corporations, their stockholders, and the government.

Despite its progress in providing a framework within which native title claims could be resolved, the NTA did not address the primary question first raised by the *Mabo* decision: what did native title mean to the validity of pastoral leases granted by the government? As 42% of the country is held under pastoral leases, this question troubled many Australians. It took several years, however, for a case to percolate up to the High Court to allow the question to be addressed.

In December 1996, the High Court handed down the historic decision of *Wik Peoples v. Queensland,* which established that native title was not extinguished by pastoral leases. The court's holding suggested that pastoral leases do not convey exclusive possession of the land to the leaseholder, but instead can co-exist with native title. *Wik* did not question the validity of pastoral leases. Rather, it merely limited the scope of the leaseholder's right to use the land. Under *Wik,* however, native title may only constrict leaseholder rights when the lease activity, such as mining sacred ground, might destroy traditional aboriginal use and enjoyment of the land. This possibility alarmed white farmers and large corporations, particularly mining companies seeking to prospect land held under pastoral leases for mineral resources.

The Native Title Amendment Act 1998

The NTA was ill equipped to deal with the potential consequences that the *Wik* decision posed to the government's and private landholders' ability to exploit the country's natural resources. As a result, throughout 1996 and 1997, the conservative government of current Prime Minister John Howard turned its attention to amending and clarifying the NTA.

The debate that arose regarding proposed amendments to the NTA drew attention to the fears of many white Australians. In particular, rural landholders, fed by sensational media stories and a lack of guidance from courts as to how native title claims would be resolved, feared that they stood to lose their land to aboriginal claims. Their fears provided political ammunition to opposition parties throughout local elections during these years, resulting in a divisive national debate.

The Howard government introduced the controversial Native Title Amendment Bill in September 1997. The bill finally passed in July 1998 as the Native Title Amendment Act 1998 (NTAA). Although the NTAA does not overturn the High Court's *Wik* decision, it does curtail the extent of native title rights: in so far as native title and pastoral leases co-exist, pastoral rights are superior. For example, the NTAA limits the ability of Aborigines making native title claims to negotiate government sanctioned uses of pastoral land such as mining, as well as the right to negotiate terms of compensation for permitting these uses. It also exempts commercial and residential leases from native title claims by Aborigines.

Proponents of the NTAA argue that it reduces much of the confusion resulting from *Wik* by, for example, eliminating native title claims to settled areas and disallowing overlapping claims by multiple groups of Aborigines. NTAA supporters also argue that the significant interests of all involved parties remain protected, emphasizing that Aborigines may still pursue native title claims and negotiation proceedings through the NNTT.

In contrast, aboriginal rights activists criticize the NTAA for a number of reasons. First, the activists argue that the NTAA makes registration of native title claims more difficult by requiring greater proof that Aborigines have maintained traditional and unbroken use of the land. This requirement is significant because unregistered claims are not entitled to

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Clinton signed the bill into law on October 17, 1998. In addition, the U.S. military is revising its wartime strategy to avoid the use of anti-personnel landmines and is expanding funding for humanitarian de-mining operations. According to the U.S. State Department, the United States has invested almost $250 million in humanitarian de-mining efforts since 1993, including $82 million in fiscal year 1998.

Conclusion

Because of its financial, technological, and military advantages, the United States has greater capability than any other country to find alternatives to landmines. Although the United States has legitimate concerns about protecting U.S. soldiers on the Korean Peninsula, a number of U.S. military strategists have concluded that anti-personnel landmines are not essential to U.S. defense in that region. Critics of the U.S. landmine policy suggest that the U.S. decision, therefore, is not based on military concerns but on U.S. aversion to intrusions on its national sovereignty. Even though the United States has contributed significantly to the elimination of landmines, its failure to become part of a unified international effort by signing the Landmine Treaty signals a lack of commitment to the rest of the world. Signing the Landmine Treaty would send a message of good faith and reaffirm the integrity of U.S. anti-mine efforts.

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NNTT negotiation proceedings with leaseholders. Most Aborigines agree that negotiations are preferable to costly court proceedings that may provide results unsatisfactory to both parties. Second, the NTAA returns considerable power to the states, which are considered less receptive than the federal government to native title claims. For example, state governments may now require that negotiations be conducted by state tribunals, which the states may develop in lieu of the NNTT. Aborigines argue that, given their history of biased treatment by state governments, these local tribunals may not be as impartial as the NNTT. Several state governments, in particular the governments of Western Australia and Queensland, are now scrambling to develop local tribunals to replace the NNTT.

The Role of International Law

The role of international law is not always clear as it applies to aboriginal native title rights or indigenous rights in general. Traditionally, indigenous rights fell under more general areas of human rights law. There has been increasing recognition, however, that indigenous rights merit consideration as a unique branch of human rights. The United Nations, for example, has adopted the Draft Declaration on the Rights of Indigenous Peoples. The Draft Declaration includes a number of key indigenous land rights, about which the Aborigines were consulted, including the right to preserve "archaeological and historical sites" (Article 12) and "indigenous sacred places" (Article 13). It also provides for the right to restitution of traditional lands that have been "confiscated, occupied, used or damaged" without indigenous peoples' "free and informed consent" (Article 27).

International law is important to the Aborigines' cases because, although native title legal action takes place under Australian national law, Australian courts and lawmakers have received significant input from international sources. For example, the RDA represented a legislative incorporation of principles established in the UN International Convention on the Elimination of All Forms of Racial Discrimination (Convention), which Australia ratified in 1975. In addition, both the *Mabo* and *Wik* decisions cited the importance of Australia's commitment to international treaties.

Moreover, international human rights organizations, using international law, have challenged provisions in Australian domestic land rights law. For example, in September 1998, the UN Committee on the Elimination of Racial Discrimination (Committee) asked the federal government to explain how the NTAA meets the Convention's requirements. On March 19, 1999, the Committee issued a report calling on the Australian government to delay implementation of the NTAA pending further discussion with aboriginal representatives. The Committee issued findings that several provisions of the NTAA, including restricted negotiation rights for Aborigines, conflict with Australia's obligations under the Convention. Unfortunately, the Australian government responded by rejecting the Committee's non-binding findings.

Conclusion

Given the recalcitrance of politicians and a substantial portion of the public against native title rights, Aborigines face a difficult struggle for full recognition of their claims to native lands. For example, in October 1998, the *Jawoyn* Association, representing a group of Aborigines in the Northern Territory, gave up a claim brought under the 1993 NTA to approximately 2,500 acres of land, in exchange for the Northern Territory government's agreement to provide a renal dialysis facility and an alcohol rehabilitation center. Critics of this settlement argue that the government already is obligated to provide these services under the national healthcare system, and they allege that this case is an example of how state governments are pressuring Aborigines into trading their land claims for essential services.

According to the *Native Title Newsletter*, published by the Australian Institute of Aboriginal and Torres Strait Islander Studies, Australian indigenous leaders plan to fight the NTAA on three fronts: a case-by-case attack in Australian courts, submissions to international organizations, and an Australian High Court challenge to the constitutionality of the NTAA. In this atmosphere of uncertainty and mistrust, it remains to be seen to what extent Aborigines and their supporters will be able to secure additional native title rights under the NTAA and preserve the enjoyment and protection of their traditional lands.

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