

**THE POLITICAL ACCOMMODATION OF NATIVE TITLE IN  
CANADA AND AUSTRALIA:**

**A CRITICAL COMPARATIVE ANALYSIS OF CANADA'S  
'COMPREHENSIVE CLAIMS POLICY' AND AUSTRALIA'S  
'NATIVE TITLE ACT'**

**KAREN E. LOCHEAD**  
SIMON FRASER UNIVERSITY  
kel@sfu.ca

---

**Paper Prepared for presentation at the annual general meeting of the Canadian Political Science Association (CPSA), University of Manitoba – Winnipeg, MB (3-5 June 2004).**

## INTRODUCTION<sup>1</sup>

Much of the popular and academic commentary on the recognition of native title at common law in Canada (1973)<sup>2</sup> and Australia (1992)<sup>3</sup> has portrayed the act of recognition as an important, if not monumental, accommodation of indigenous rights and/or restructuring of Indigenous-state relations.<sup>4</sup> At the same time, however, many Indigenous People and increasing numbers of Indigenous studies scholars have criticised ('post')colonial legal and political institutions' handling of the native title issue.<sup>5</sup> Specifically, the native title decisions of ('post')colonial justices and the native title claims processes designed by ('post')colonial policy-makers have been criticised for unduly limiting the concept of native title and consequently restricting Indigenous Peoples' ability to successfully assert and defend their continuing native title claims. Running against the grain of established wisdom on the native title issue, this critique invites a deeper exploration of the native title issue; one that goes beyond simplistic evaluations of the relative merits and demerits of native title recognition versus non-

---

<sup>1</sup> This paper forms part of a much broader study, which compares the historic and contemporary legal and political accommodation of native title in Canada and Australia using the neo-institutional lens of path dependence as an explanatory analytic framework. In sum, characterizing native title's legal and political accommodation of native title as a 'self-reinforcing sequence' or 'process of increasing returns', this broader study argues that the different degrees of recognition and accommodation afforded native title by the legal and political institutions of 'post-colonial' Canada and Australia can be meaningfully explained with reference to these countries' different (and historically contingent) recognition and accommodation of indigenous rights to land during the earliest years of colonial settlement.

<sup>2</sup> *Calder v Attorney-General of British Columbia* [1973] SCR 313 (confirmed in *R v Guerin* [1985] 1 CNLR 120; *Roberts v Canada* [1989] 1 SCR 322; *R v. Sparrow* [1990] 1 SCR 1075; *Delgamuukw v British Columbia* [1998] 3 SCR 1010; and others).

<sup>3</sup> *Mabo v Queensland (No. 2)* [1992] 66 ALJR 408 (confirmed in *Western Australia The Commonwealth* [1995] 128 ALR 1; *Wik and Thayorre Peoples v State of Queensland* [1996] 141 ALR 129; *Commonwealth v Yarmirr* [1999] 168 ALR 426; *Members of the Yorta Yorta Community v State of Victoria* [2001] FCA 45 (Unreported, Black CJ, Catz and Branson JJ, 8 February 2001); *Western Australia v Ward* [2002] HCA 28, and others).

<sup>4</sup> See for example: Michael Asch (1999), "From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973-1996" in Paul Havemann (ed), *Indigenous Rights in Australia, Canada and New Zealand*, (Auckland: Oxford University Press); C Radha Jhappan (1991), "Natural Right vs Legal Positivism: Indians, the Courts and the New Discourse on Aboriginal Rights in Canada", *British Journal of Canadian Studies* 6:1, pp. 60-100; Dara Culhane (1998), *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby: Talon); Lorna Lippman (1994) "'The Mabo Decision'" in *Generations of Resistance* (3<sup>rd</sup> ed; Melbourn: Longman), ch 10; Frank Brennan (1993), "Reconciliation in the post-Mabo era", *Aboriginal Law Bulletin* 3:61, pp. 18-21; Gordon Brysland (1992), "Rewriting History", *Alternative Law Journal* 17:4; and Richard H. Bartlett (1996) "The Landmark Case on Aboriginal Title in Australia: *Mabo v. State of Queensland*" in Corrigan and Sawchuk (eds), *The Recognition of Aboriginal Rights: Case Studies 1, 1996* (Brandon: Bearpaw Publishing).

<sup>5</sup> See for example: Union of BC Indian Chiefs (1997?), "Certainty: Canada's Struggle to Extinguish Aboriginal Title", (Vancouver: Union of BC Indian Chiefs); Antonia Mills (1994), *Eagle Down is Our Law: Witsuit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press); Brian Thorn, "Aboriginal Rights and Title in Canada After *Delgamuukw*: Anthropological Perspectives" (January 1999; publication forthcoming); Aboriginal Provisional Government (1992), "The Mabo Case: The Courts Gives and Inch but Takes another Mile", *APG Papers* 1 (July), pp. 33-44; Rob Riley (1993) "Reconciliation", *Good Weekend*, Aug 21, p. 24; Peter Poynton (1994), "Mabo: now you see it now you don't", *Race and Class* 35:4, pp. 41-56; Mick Dodson (1997) "The Struggle for Recognition of Collective Rights" (unpublished manuscript); and, Janice Gray (1997) "The Mabo Case: A Radical Decision", *The Canadian Journal of Native Studies* 17:1, pp. 33-74.

recognition and draws attention to the manner in which native title has been practically accommodated by existing legal and political institutions.

This paper takes up this invitation by offering a critical comparative analysis of some of the major features of Canada's comprehensive claims policy<sup>6</sup> and Australia's *Native Title Act*<sup>7</sup>. This comparative analysis reveals four important findings: (i) Canada's comprehensive claims policy and Australia's *Native Title Act* represent two significantly different political responses to the recognition of native title at common law; (ii) Canada's comprehensive claims policy and Australia's *Native Title Act* represent two significantly different approaches to the contemporary accommodation of continuing native title; (iii) the practical ability of Indigenous Peoples to successfully assert continuing native title claims in the wake of native title's recognition at common law is notably greater under the terms of Canada's comprehensive claims policy than it is under the terms of Australia's *Native Title Act*; and, (iv) neither Canada's comprehensive claims policy nor Australia's *Native Title Act* has significantly improved Indigenous Peoples practical ability to exercise judicially defensible native title rights and interest in the wake of a native title's recognition at common law. These finding belie the popular notion that native title's recognition at common law represents an important, if not monumental, accommodation of indigenous rights and/or restructuring of Indigenous-state relations and suggest that the contemporary political accommodation of native title in Canada and Australia represents little more than a re-articulation of the Indigenous land acquisition practices adopted by colonial governments during these countries' earliest years of colonial settlement.

## I - THE NATURE AND GOALS OF CANADA'S COMPREHENSIVE CLAIMS POLICY AND AUSTRALIA'S NATIVE TITLE ACT

### a) *Canada's Comprehensive Claims Policy*

Introduced in 1973<sup>8</sup> following the Supreme Court of Canada's recognition of native title at common law in *Calder Calder v. Attorney-General of British Columbia* [1973]<sup>9</sup>, and subject to relatively minor amendments in 1986<sup>10</sup> and 1995<sup>11</sup>, Canada's

---

<sup>6</sup> The terms of this policy are embodied in the following policy statements/guides: Canada, Indian and Northern Affairs Canada (1981), *In All Fairness: A Native Claims Policy, Comprehensive Claims* (Ottawa: Minister of Supply and Services Canada); Canada, Indian Affairs and Northern Development (1987), *Comprehensive Land Claims Policy* (Ottawa: Minister of Supply and Services); Canada, Indian Affairs and Northern Development (1995), *Federal Policy Guide, Aboriginal Self-Government: The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Indian Affairs and Northern Development, and, Canada, Indian and Northern Affairs (1993), *Federal Policy for the Settlement of Native Claims*, (Ottawa: Minister of Public Works and Government Services Canada, reprinted 1998).

<sup>7</sup> Commonwealth of Australia (1998), *Native Title: Native Title Act 1993 and Regulations with Commentary by the Australian Government Solicitor* (2<sup>nd</sup> ed; Canberra: Office of Legal Information & Publishing, Australian Government Solicitor).

<sup>8</sup> See: Canada (1981).

<sup>9</sup> *Calder v. Attorney-General of British Columbia* [1973] SCR 313, 7 CNLC 91 (SCC).

<sup>10</sup> See: Canada (1987).

comprehensive claims policy outlines a non-statutory native title claims process that permits Indigenous Peoples to negotiate extra-judicial ‘modern treaty’ settlements of their continuing native title claims with the federal government and other relevant parties. As explained in the Department of Indian Affairs’ most recent (1998) comprehensive claims policy statement:

The primary purpose of comprehensive claims settlements is to conclude agreements with Aboriginal groups that will resolve the legal ambiguities associated with the common law concept of Aboriginal rights. The process is intended to result in agreement on the special rights Aboriginal peoples will have in the future with respect to lands and resources. The objective is to negotiate modern treaties which provide clear, certain and long-lasting definition of rights to lands and resources. Negotiated comprehensive claims settlements provide for the exchange of undefined Aboriginal rights for a clearly defined package of rights and benefits codified in constitutionally protected settlement agreements.<sup>12</sup>

In essence, this policy is designed to achieve two mutually compatible goals: (i) to reconcile the unlawful dispossession of traditional Indigenous territories with the historic recognition of Indigenous Peoples as lawful land owners<sup>13</sup> and the contemporary judicial confirmation of native title as an existing *sui generis* common law real property right; and, (ii) to facilitate the equitable resolution of continuing native title claims outside of judicial channels.

### ***b) Australia’s Native Title Act***

Introduced in 1993, following the recognition of native title at common law in *Mabo v State of Queensland (No. 2)* [1992]<sup>14</sup> and significantly revised in 1998 in response to important legal developments<sup>15</sup>, the *Native Title Act*, is a statutory land use regulation regime that attempts to reconcile 200 years of unhampered colonial settlement with the contemporary revelation that Indigenous Peoples did (and in fact may still do) have legally defensible rights in respect of their traditional territories. To achieve the former, the *Native Title Act* recognizes and protects continuing native title and introduces formal processes designed to facilitate the identification, determination, and registration of continuing native title claims. To achieve the later, the *Native Title Act* validates past

---

<sup>11</sup> See: Canada (1995).

<sup>12</sup> Canada (1998), p. i.

<sup>13</sup> The historic recognition of Indigenous Peoples as lawful land owners was embodied in the terms of the *Royal Proclamation of 1763*, which compelled colonial authorities (and later, the Dominion Government of Canada) to negotiate formal ‘land surrender’ treaties with Indigenous Peoples in advance of colonial settlement.

<sup>14</sup> *Mabo v State of Queensland (No. 2)* [1992] 66 ALJR 408, 107 ALR 1, 175 CLR 1, 5 CNLR 1.

<sup>15</sup> Namely, the ruling in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 that extra-judicial determinations made by statutory bodies can not be given the force of law through their mere registration with the Federal Court; and, *The Wik Peoples and the Thayorre People v. State of Queensland* (1996) 71 ALJR 173 which confirmed that pastoral leases do not necessarily extinguish native title and that the rights of native title holders can co-exist with the rights of common law leaseholders.

grants of land made and other actions taken without reference to the existence of continuing native title, and implements a formal process for future land dealings that have the potential to effect continuing native title. As explained in s. 3 of the *Native Title Act*<sup>16</sup>:

The main objects of this Act are:

- (a) to provide for the recognition and protection of native title [defined in s.223(1) as: “the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in relation to land or waters, where: (a) the rights and interests are possessed under the traditional laws acknowledge by and the traditional customs observed by the Aboriginal peoples or Torres Strait Islands; (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and, (c) the rights and interests are recognised by the common law of Australia]; and
- (b) to establish ways in which future dealing affecting native title [i.e. ‘future acts’] may proceed and set standards for those dealings; and
- (c) to establish a mechanism for determining claims to native title [i.e. through applications made to the Federal Court followed by consent, mediated or litigated determinations of the nature, contents and incidents of continuing native title and the registration of continuing native title claims and determinations with the Native Title Registrar]; and
- (d) to provide for, or permit, the validation of past acts<sup>17</sup> and intermediate period acts<sup>18</sup>, invalidated because of the existence of native title.

The *Native Title Act* is a complicated and confusing statute, which John Prescott (Chief Executive of BHP) has justly described as something akin to ‘reading porridge’.<sup>19</sup> In its current form, the Act now runs a remarkable 443 pages (not including the Rules and Regulations) and is comprised of 15 Parts, 41 Divisions, 32 Subdivisions, 253 Sections, 191 Subsections and a Schedule comprised of 7 Parts and 46 Sections. Given the tremendous complexity of the *Native Title Act*, the remainder of this paper will focus attention on the Act’s ‘determination of native title applications’ procedures in order to provide some manageable basis for comparison with Canada’s comprehensive claims policy.

---

<sup>16</sup> Commonwealth of Australia (1998).

<sup>17</sup> ‘Past’ is defined in s. 228 the *Native Title Act* (NTA) as falling between the coming into effect of the *Racial Discrimination Act, 1975* and the *Mabo (No. 2)* decision (1 July 1993). Actions taken without regard for native title prior to 1975 are considered to have been legal.

<sup>18</sup> ‘Intermediate period acts’ are defined in s. 232A of the NTA as falling between the coming into force of the NTA (1 January 1994) and the *Wik* decision (23 December 1996).

<sup>19</sup> Geoffrey Ewing (1994), “The Australian Mining Industry Perspective”, *Native Title and the Trans Tasman Experience Conference*, Sydney, p. 3.

## II – NEGOTIATION VS RECOGNITION AND PROTECTION: THE COMPREHENSIVE CLAIMS PROCESS VS THE NATIVE TITLE DETERMINATION PROCESS

### *a) Canada's Comprehensive Claims Process*

The comprehensive claims process embodied in Canada's comprehensive claims policy is a relatively straightforward process, comprised of seven consecutive stages:

1. *Submission of a 'Statement of Claim'*: when an Indigenous group signals its intent to negotiate a full and final settlement of its continuing native title claim and provides documented evidence in support of the lawful merits of its continuing native title claim.
2. *Assessment and Acceptance/Rejection of the Claim*: when the Department of Indian Affairs and Northern Development (DIAND) evaluates the lawful merits of an Indigenous group's continuing native title claim and accordingly accepts or rejects the claim for negotiated settlement.
3. *Preparation for Negotiations*: when all relevant parties to the claim are identified and directed to undertake any pre-negotiation activities (research, consultations, land surveys, etc.) that might be required to proceed with productive comprehensive claims negotiations, and the relevant principles (i.e. the claimant group, the federal government and the relevant provincial/territorial government) designate their official negotiation teams.
4. *Initial Negotiations*: when the official negotiation teams negotiate a 'Framework Agreement' that establishes the scope, process, topics and parameters of the negotiations to follow<sup>20</sup>.
5. *Substantive Negotiations*: when the official negotiation teams negotiate an 'Agreement in Principle' (AIP) on all settlement issues identified in the Framework Agreement (Stage 4). The negotiated AIP is then presented to the Indigenous group involved as well as to the relevant government Ministers (i.e. the federal and provincial/territorial Ministers responsible for Indian Affairs) for formal approval. If approval is not granted, substantive negotiations will likely continue (although the principles may also direct their negotiation team to negotiate a new Framework Agreement or withdraw from comprehensive claims

---

<sup>20</sup> In order to facilitate more effective and equitable comprehensive claims negotiations, the federal government's 1986 policy statement on its comprehensive claims policy adopted a recommendation made by the 1986 Coolican Report that 'framework agreements' be used at the outset of negotiations to ensure that all parties share an adequate consensus about: (i) the major contents of a potential final settlement agreement; (ii) the approximate timetable for concluding a final settlement agreement; and, (iii) the processes that will govern both immediate comprehensive claims negotiations and eventual final settlement implementation.

negotiations altogether). If approval is granted, the negotiation teams proceed to Stage 6.

6. *Finalization*: when the official negotiation teams formalize the terms of the AIP to produce a Final Settlement Agreement (including an implementation plan<sup>21</sup>). The negotiated Final Settlement Agreement must then be approved by the relevant government Ministers, formally ratified by the Indigenous group involved and officially enacted into law via final settlement legislation. If approval, ratification or enactment are not successful, the principles may direct their negotiation teams to attempt to revise the original Final Settlement Agreement, attempt to negotiate a new AIP, attempt to negotiate a new Framework Agreement, or withdraw from comprehensive claims negotiations altogether. If approval, ratification and enactment are successful, the Final Settlement Agreement comes into effect upon receiving Royal Assent from the Governor General of Canada (and/or in accordance with the terms of the Final Settlement Agreement itself) and is afforded constitutional protection under the terms of s.35 of the *Constitution Act, 1982*<sup>22</sup>.
7. *Implementation*: when the terms of the Final Settlement Agreement are carried out by all parties in accordance with embedded implementation plan.

This process begins in earnest once an Indigenous group's formal 'Statement of Claim' is favourably assessed by the Comprehensive Claims Branch (CCB) of DIAND (in consultation with the Department of Justice), as: (i) meeting the criteria of a *comprehensive claim* (i.e. based on a lawful claim of continuing native title to a specific tract(s) of land); and, (ii) being 'sufficiently developed' to initiate 'productive' negotiations geared towards achieving a final settlement of the outstanding native title claim.

To pass the first hurdle, Indigenous land claimants are required to establish that the native title they claim can be recognized at common law. Following the four-part test first outlined by the Federal Court (Trial Division) in *Hamlet of Baker Lake v. Minister of*

---

<sup>21</sup> The inclusion of implementation plans in Final Settlement Agreements was introduced in 1986 when the federal government revised its comprehensive claims policy in response to the Coolican Report. At this time, a major problem with the comprehensive claims policy as it had been applied in *James Bay and Northern Quebec Agreement, 1975* and supplementary *Northeastern Quebec Agreement, 1987* was that it lacked any clear provisions for implementation of Final Settlement Agreements. As a result, numerous 'complementary agreements' had been required to resolve disputes and facilitate the implementation of Canada's first two 'modern treaties'. This problem was directly addressed in the federal government 1986 policy statement on comprehensive claims which unambiguously stated: "Final agreements must be accompanied by implementation plans." [Canada (1987), p. 25].

<sup>22</sup> *Constitution Act, 1982*, s. 35: (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed ... (3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.

*Indian Affairs and Northern Development* [1979]<sup>23</sup> and subsequently adopted by the Supreme Court of Canada, this requires Indigenous land claimants to prove:

1. That they were, and are, an ‘organized society’;
2. That their traditional use and occupancy of the territories in question was sufficiently established at the time sovereignty was asserted by European nations to be considered a fact;
3. That their occupation of the territories in question was largely to the exclusion of other organized societies; and,
4. That they continue to use and occupy the territories in question for traditional purposes.<sup>24</sup>

It also requires Indigenous land claimants to prove that no lawful act of government (i.e. the conclusion of a treaty) has effectively extinguished the aboriginal title they claim in the past. In contrast to a litigated settlement of continuing native title claims, however, this assessment process is conducted outside of formal judicial channels and thus is not bound to comply with established rules governing formal adjudication, such as *res judica*. As was explained in the federal government’s 1987 statement on its comprehensive claims policy: “the unique circumstances of each claim will be taken into account by the government in applying the policy in individual cases.”<sup>25</sup>

To pass the second hurdle, Indigenous land claimants are required to establish that they are both willing and ready to participate in ‘productive’ treaty negotiations. This requires: proof of ‘substantive community support’ for treaty negotiations; a demonstrated ‘institutional capacity’ to proceed with treaty negotiations; and, the identification of ‘reasonable’ treaty goals. The standard to which evidence of the aforementioned is to be held, however, has not yet been explicitly stated.<sup>26</sup>

Once a ‘comprehensive claim’ has been accepted for negotiation by the federal Minister for Aboriginal Affairs<sup>27</sup> (stage 2), the relevant parties to the negotiations (see section IV below) proceed through stages 3 to 6 with the goal of agreeing upon a wide range of issues that will eventually be embodied in a Final Settlement Agreement (see section V below). It is important to note, however, that “the comprehensive claims process is intended to lead to agreement on the special rights Aboriginal peoples have with respect to lands and resources [in the future]. It is not an attempt to define what rights they may have had in the past.”<sup>28</sup> As a result, once a comprehensive claim has been accepted for negotiation, the parties involved are required to pay little, if any, formal

---

<sup>23</sup> *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* [1979] 3 CNLR 17.

<sup>24</sup> Canada, Indian and Northern Affairs Canada (1996), ‘Comprehensive Claims (Modern Treaties) in Canada’, *Information Sheet* (March), available at: [www.ainc-inac.gc.ca/pr/info/trty\\_e.html](http://www.ainc-inac.gc.ca/pr/info/trty_e.html).

<sup>25</sup> Canada (1987), p. 7.

<sup>26</sup> For insight into this aspect of the comprehensive claims policy see: Canada (1985), *Living Treaties: Lasting Agreements*, Report of the Task Force to Review Comprehensive Land Claims Policy (Ottawa: Minister of Supply and Services) (the ‘Coolican Report’).

<sup>27</sup> The Minister is expected to accept or reject a claim within 12 months of DIAND’s receipt of the original a ‘Statement of Claim’.

<sup>28</sup> Canada (1987), p. 5.



attention to the judicially defensible nature and content of the continuing native title at issue. This means that they are free to come to a mutually acceptable agreement on the range of rights, interests, benefits and obligations that will impart to the Indigenous claimant group upon the conclusion of a Final Settlement Agreement, rather than limit their negotiations to what the Indigenous claimant group may or may not be able to achieve through a litigated settlement of the continuing native title claim at issue.<sup>29</sup>

Once a Final Settlement Agreement is formally ratified, it becomes a constitutionally protected ‘aboriginal land claims agreement’, which means that it can not be unilaterally amended, changed or revoked by any party. As a result, because all Final Settlement Agreements are required to include a clause by which Indigenous land claimants either (i) ‘cede, surrender and release’, finally and forever, all claims to native title and other aboriginal rights whatever they may be, or (ii) agree that their judicially defensible native title and aboriginal rights will only continue to exist insofar as they are not ‘inconsistent’ with the terms of their Final Settlement Agreement, the comprehensive claims process provides for the full and final resolution of continuing native title claims.

### ***b) Australia’s Native Title Determination Process***

The native title determination process set down in the *Native Title Act*, by contrast, is intended to lead to a definite determination of the precise nature, content and incidents of *judicially defensible* native title so as to facilitate a ‘certainty’ of title throughout Australia. This process originally involved the submission of a ‘native title determination application’ to the National Native Title Tribunal (a statutory body created by the Act), which would then make a ‘determination of native title’ and register this determination with the Federal Court in order to give it the full force of law. This process, however, was brought into question when the High Court of Australia ruled that an analogous process used by another statutory body – the Human Rights and Equal Opportunity Commission – was unconstitutional.<sup>30</sup> As a result, when the *Native Title Act* was amended in 1998 a new native title determination process was introduced.

According to this new process, all ‘native title determination applications’ (see below) must now be submitted to the Federal Court, which is responsible for: (i) assessing the merits of all ‘native title determination applications’; (ii) determining the manner in which all meritorious ‘native title determination applications’ will be processed (i.e. by ‘consent’ – if the application is unopposed – or through ‘mediation’ or ‘litigation’ – if the application is opposed); and, (iii) ruling on the final outcome of all ‘native title determination applications’ (i.e. by either approving, amending or rejecting consent and mediation determination, or by ruling on litigated determinations).

---

<sup>29</sup> It should be noted, however, that all native title claims accepted for negotiation are presumed to be judicially defensible and that an Indigenous group’s approved ‘Statement of Claim’ and supporting documentation are always taken as the starting point for the negotiation of a Framework Agreement.

<sup>30</sup> *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. The effect of the 1995 *Brandy* decision on the constitutional validity of the *Native Title Act, 1993* was confirmed in *Foumille v Selpan Pty Ltd* (1998) FC 1 (FFC).

There are four categories of ‘native title determination applications’ set out in the *Native Title Act*: ‘claimant applications’, ‘non-claimant applications’, ‘revised native title applications’ and ‘compensation applications’. ‘Claimant applications’ refer to those applications for a determination of native title made by an authorized member(s) or representative(s) of a native title claimant group<sup>31</sup>. These application are assessed by the Federal Court in accordance with a registration test set out in s. 190B of the *Native Title Act* which required native title claimants to:

1. identify the area subject to the claim of continuing native title;
2. identify all members of the native title claimant group;
3. identify all native title rights and interests subject to claim; and,
4. provide evidence that:
  - (a) the native title claimant group have, and the predecessors of those persons had, an association with the area under claim;
  - (b) that there exist traditional laws acknowledged by and traditional customs observed by, the native title claimant group, and that those acknowledged laws and observed customs give rise to the native title rights and interests identified in the claim;
  - (c) that the native title claimant group have continuously held the native title rights and interests under claim in accordance with acknowledged traditional laws and observed traditional customs; and,
  - (d) that at least one member of the native title claimant group either:
    - (i) currently had or previously had a traditional physical connection with any part of the land or waters covered by the application; or
    - (ii) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters).

If the Federal Court determines that the application satisfies all aspects of this test, the native title claim in question is registered with the Native Title Registrar (another statutory body created by the *Native Title Act*), which provides those persons identified in the ‘native title determination application’ with the ‘right to negotiate’ in respect of any future land dealings that might affect the area and/or the rights and interests under claim.<sup>32</sup> If the Federal Court determines that the application does not satisfy all or some aspects of this test the native title claim in question is not registered (and as a result the ‘right to negotiate’ does not operate), but the application itself can still be the subject of a consent, mediation or litigation native title determination.

‘Non-claimant applications’, by contrast, are those ‘applications for a determination of native title’ made by either: a person who holds a non-native title interest in an area; a

---

<sup>31</sup> NTA s. 61(1). “The person(s) authorised is the ‘applicant’ (s. 61(2), who has particular functions and responsibilities (s. 62A)” [Native Title Unit, Office of General Counsel, Australian Government Solicitor (1998), “Commentary on the Native Title Act 1993” in Commonwealth of Australia (1998), p. 49].

<sup>32</sup> This right does not, however, apply to either mining grants or compulsory acquisitions.

Commonwealth Minister, in respect of any area; or, a State/Territory Minister, in respect of any area within the limits of his/her State/Territory<sup>33</sup>. Such applications are designed to determine whether or not continuing native title exists in respect of a particular area where no ‘claimant application’ for a determination of native title has been filed with the Federal Court and/or where no native title determination has yet been made by the Federal Court.

Standing apart from ‘claimant applications’ and ‘non-claimant applications’ for a determination of native title are ‘revised native title determination applications’. This type of application can be made by a registered native title body corporate (an incorporated body which officially holds native title and manages approved native title rights and interests on behalf of successful native title claimants<sup>34</sup>), the Commonwealth Minister, the State/Territory Minister, or the Native Title Registrar<sup>35</sup> if events that have taken place mean that the previous determination of native title made by the Federal Court is not longer correct or the interests of justice otherwise require a revised native title determination<sup>36</sup>. As a result, if confirmed native title holders lose their connection to their traditional territories (i.e. through the abandoning of traditional laws and customs) or amendments to the *Native Title Act* redefine the nature of statutory native title recognition and/or protection, a new determination on the nature, content and incidents of native title may be made by the Federal Court. As a result, native title determinations made under the auspices of the *Native Title Act* do not represent a full and final resolution of continuing native title claims.

The *Native Title Act* does, however, permit registered native title holders to submit ‘compensation applications’<sup>37</sup> to the Federal Court in the event that native title is extinguished (i.e. by surrender, by compulsory acquisition or by non-compulsory acquisition) or unlawfully infringed (i.e. when an act affects native title in such way that were it to be performed on freehold title it would attract the right to compensation).<sup>38</sup>

The rules for processing and making determinations in respect of ‘claimant’, ‘non-claimant’, ‘revised’ and ‘compensation’ native title determination applications are set out in Part 4 of the *Native Title Act*. According to these rules:

---

<sup>33</sup> NTA s. 61(1).

<sup>34</sup> “The NTA establishes a framework for the holding and management of native title. It requires the use of corporations that stand in a relationship of ‘trust’ or ‘agency’ to the members of the native title group. The trust or agency relationship is statutory in character. Delegated legislation made under the NTA specifies the characteristics and functions of native title corporations and lays down procedures to be followed by the corporation in decisions relating to native title matters. The corporate trustee and agency device allows non-native title interests dealing with the group to channel their transactions through a single legal person with perpetual succession. This is intended to avoid the problem of fixing obligations on the ever-fluctuating membership of a group of natural persons lacking legal personality.” [Cristos Mantziaris and David Martin (2000), *Native Title Corporations: A Legal and Anthropological Analysis* (Leichhardt: The Federation Press), p. 114].

<sup>35</sup> NTA s. 61(1).

<sup>36</sup> NTA s. 13(5).

<sup>37</sup> NTA s. 61(1).

<sup>38</sup> NTA s. 48-54 and 62(3).

- the Federal Court has jurisdiction to hear and determine applications filed in the Federal Court that relate to native title and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court<sup>39</sup>;
- the Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise determines<sup>40</sup>;
- in conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings<sup>41</sup>;
- the Commonwealth Minister may, at any time, on behalf of the Commonwealth, by giving written notice to the Federal Court, intervene in a proceeding before the Court in a matter arising under [the *Native Title Act*]<sup>42</sup>; and,
- unless the Federal Court orders otherwise, each party to a proceeding must bear his or her own costs<sup>43</sup>.

How this statutory regime for the judicial determination of continuing native title will effect, be effected by and/or otherwise interact with ‘ordinary’ judicial processes, however, remains to be seen.

### III - FINANCING COMPREHENSIVE CLAIMS AND NATIVE TITLE DETERMINATIONS

#### *a) The Canadian Case*

As explained in the Canadian Government’s 1981 policy statement on comprehensive claims, “potential claimant groups requiring assistance in the preparation of a claim will be given straightforward indications of the many aspects of settlement that may need to be considered and upon which the government is prepared to proceed.”<sup>44</sup> Further provisions of the policy, however, assert that although “[c]laimant groups should have enough money to develop and negotiate their claims” spending restraints and limits on the federal government be “kept in mind” with respect to federal government funding of comprehensive claims activities.<sup>45</sup>

In practice, most federal government funding of comprehensive claims activities is provided to Indigenous land claimants in the form of government loans. Such loans are provided interest free until an Agreement-in-Principle is initialed by all relevant parties and are subject to repayment after a Final Settlement Agreement has been successfully concluded (repayment terms being specified in the terms of the Final Settlement

---

<sup>39</sup> NTA s. 81.

<sup>40</sup> NTA s. 82(1).

<sup>41</sup> NTA s. 82(2).

<sup>42</sup> NTA s. 84A(1).

<sup>43</sup> NTA s. 85A(1).

<sup>44</sup> Canada (1981), p. 27.

<sup>45</sup> *Ibid.*

Agreement itself<sup>46</sup>). If an Indigenous group withdraws from comprehensive claims negotiations, however, its outstanding loans must be repaid immediately and with interest.

### ***b) The Australian Case***

In the Australian case, by contrast, funding for ‘claimant applications’ is provided by the Commonwealth government through a statutory body known as ATSIC (the Aboriginal and Torres Strait Islander Commission). This funding, is then distributed to a series of regionally based Native Title Representative Bodies (NTRBs) (incorporated Indigenous representative bodies recognised, but not created, by the *Native Title Act*), for use in fulfilling the following statutory functions:

- (a) facilitat[ing] the researching, preparation or making of applications, by individuals or groups from among Aboriginal peoples or Torres Strait Islanders, for determinations of native title or for compensation of acts affecting native title;
- (b) assist[ing] in the resolution of disagreements among such individuals or groups about the making of applications;
- (c) assist[ing] such individuals or groups by representing them, if requested to do so, in negotiations and proceedings relating to:
  - (i) the doing of acts affecting native title; or
  - (ii) the provision of compensation in relation to such acts; or
  - (iii) indigenous land use agreements or other agreements in relation to native title<sup>[47]</sup>; or
  - (iv) rights of access conferred under this Act or otherwise; or
  - (v) any other matter relevant to the operation of this Act;
- (d) certif[ing], in writing, applications for determinations of native title relating to areas of land or waters wholly or partly within the area in relation to which the representative body has been determined to be a representative body;
- (e) certif[ing], in writing, applications for registration of indigenous land use agreements relating to areas of land or waters wholly or partly within the area in relation to which the representative body has been determined to be a representative body; and
- (f) becom[ing] a party to indigenous land use agreement.<sup>48</sup>

---

<sup>46</sup> Outstanding debts are normally deducted from any resource royalties and/or financial compensation owing to the band [see: Canada (1987), p. 15].

<sup>47</sup> “The NTA provides for a range of alternative procedures to settle native title claims, including provision for agreements rather than litigation or mediation ... Under the original legislation of 1993 these were known as Regional Agreements and provided for claimants, non-claimants and governments to solve native title issues and register these agreements with the National Native Title Tribunal. Under the 1998 amends these agreements are known as Indigenous Land Use Agreements (ILUAs).” [D.P. Pollack (2001), “Indigenous Land Use in Australia: A Quantitative Assessment of Indigenous Land Holdings in 2000”, CAEPR Discussion Paper No. 221 (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University), p. 17].

In sum, it is NTRBs who ultimately control the amount of funding provided to native title claimants.

Although this funding is not required to be repaid by native title claimants, “[t]he chronic under-funding of [NTRBs] is leading to Aboriginal people being deprived of their rights and almost certainly to the extinguishment of native title.”<sup>49</sup> For example, in 1999 the Love Rashid Report on Native Title Representative Bodies concluded that ‘NTRBs will not be capable of professionally discharging their functions within the current funding framework’ and that ‘there is a national level of under-funding of about 30 million per annum’.<sup>50</sup> As a result, “NTRBs find themselves caught in a deadly crossfire of underfunding and over-regulation.”<sup>51</sup> The certain losers are Indigenous land claimants. As Julie Finlayson explains: “NTRBs are not required to process all claims in their regions; [as a result] their involvement in any claim ... must be weighted up against their own organisational capacity to respond.”<sup>52</sup> As a result, at least some Indigenous land claimants will undoubtedly be unable to access the resources necessary to prepare a native title determination application and/or defend their continuing native title claim in mediation and/or litigation.

#### **IV - PARTIES TO COMPREHENSIVE CLAIMS NEGOTIATIONS AND NATIVE TITLE DETERMINATIONS**

##### ***a) The Canadian Case***

Relevant parties to comprehensive claims negotiations include: the indigenous claimant group; the province/territory in which the claim is situated; ‘third parties’ whose interests are directly connected to the claim area and/or to the issues subject to negotiation; and, members of the general public. Only the federal government, the relevant provincial government, and the Indigenous claimant group, however, are directly involved in comprehensive claims negotiations as will now be explained.

In areas of exclusive federal jurisdiction (i.e. the Northwest Territories and the Yukon) formal comprehensive claims negotiations are conducted between the Indigenous claimant group and the federal government owing to the fact that territorial lands and resources fall under the jurisdiction of the federal government.<sup>53</sup> Provisions for territorial governments’ ‘involvement’ in such negotiations, however, has been provided in all

---

<sup>48</sup> NTA s. 202(4).

<sup>49</sup> David Ritter (2001), “You get what you pay for”, *Indigenous Law Bulletin* 5:9, p. 14.

<sup>50</sup> ATSIC, Native Title Program (1999), *Review of the Native Title Representative Bodies*, p. 43, as referenced in Ritter (2001), p. 14.

<sup>51</sup> Ritter (2001), p. 14.

<sup>52</sup> J. Finlayson (1997), “Native Title Representative Bodies: The Challenges of Strategic Planning”, CAEPR Discussion Paper No. 129 (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University), p. 12.

<sup>53</sup> Federal jurisdiction in respect of the territories is provided for in section 91(1A and 29) of the *Constitution Act, 1982*.

incarnations of the comprehensive claims policy. As explained in federal government's 1986 policy statement on the comprehensive claims process:

Negotiations in [the territories] will be bilateral in nature leading to a federally-legislated settlement complimented by territorial legislation as required. Territorial governments will participate fully in the application of land claims policy and in negotiations, under the leadership of the federal government.<sup>54</sup>

In areas of non-exclusive federal jurisdiction (i.e. where continuing native title claims are located within provincial, rather than territorial, boundaries), however, the negotiation of comprehensive claims settlements proceeds between the federal government, the Indigenous claimant group, and the relevant provincial government. This is owing to the fact that “most of the land and resources that are the subject of negotiations and that are required for the settlement of comprehensive claims are owned by the province[s] and are under provincial jurisdiction.”<sup>55</sup> Although provincial governments are under no *legal* obligation to participate in comprehensive claims negotiations, “[i]t is the position of the federal government that provincial governments must participate in comprehensive claims negotiations and must contribute to the provision of claims benefits to Aboriginal groups.”<sup>56</sup> As a result, “the participation of provincial governments in the negotiation of claims within their jurisdiction will be strongly encouraged [by the federal government] and is [considered] essential to any negotiation of settlements involving areas of provincial jurisdiction or provincial lands and resources.”<sup>57</sup> If a provincial government refuses to participate in such negotiations, however, there is little recourse for Indigenous land claimants to resolve their continuing native title claims outside of the courts.<sup>58</sup>

It is important to note, however, that excepting the fact that the province of British Columbia refused to participate in the comprehensive claims process from its introduction in 1973 until 1990 (asserting its long-standing position that continuing native title did not exist within its territorial jurisdiction), provincial participation in comprehensive claims negotiations has not been difficult to secure. This can be attributed to the fact that comprehensive claims negotiations have the potential to afford provinces greater input into the nature, scope and content of Indigenous land claims settlements than does the litigation option.

---

<sup>54</sup> Canada (1987), p. 19. See also: Canada (1981), p. 27; and, Canada (1993), p. 7.

<sup>55</sup> Canada (1993), p. 6. Provincial ownership and control of lands and resources is provided for in sections 92(5) and 109 of the *Constitution Act, 1982*.

<sup>56</sup> Canada (1993), p. 7.

<sup>57</sup> Canada (1987), p. 19.

<sup>58</sup> Although Indigenous land claimants may proceed to negotiate settlement issues that do not involve lands and resources within provincial jurisdiction with the federal government (i.e. community self-government, participation in federal resource management programs, etc), such negotiations will not result in a full and final settlement of the continuing native title claim at issue.

### ***b) The Australian Case***

In the Australian case, by contrast, although relevant parties to native title determinations always include the applicant<sup>59</sup> and a State/Territory Minister (unless a Commonwealth Minister notifies the Court to the contrary)<sup>60</sup>, a large number of other parties may also be formally involved in the determination of continuing native title claims. This is owing to the fact that the *Native Title Act* has been designed to ensure a 'balance' between the newly recognized native title rights of Indigenous Peoples and the previously confirmed statutory rights of non-indigenous Australians. As a result, potential parties to native title determinations can include any or all of the following:

- any other person claiming to hold native title to any of the area covered by the application;
- any registered native title claimant in relation to any of the area covered by the application;
- any registered native title body corporate in relation to any of the area covered by the application;
- any representative Aboriginal/Torres Strait Island body for any of the area covered by the application;
- any person who, when the application was filed in the Federal Court, held a proprietary interest, in relation to any of the area covered by the application, that is registered in a public register of interests in relation to land or waters maintained by the Commonwealth, a State or Territory;
- the Commonwealth Minister;
- any local government body for any of the area covered by the application;
- if the Register considers it appropriate in relation to the person – any person whose interests may be affected by a determination in relation to the application; and,
- any other person whose interests may be affected.

As a result, it is very hard to imagine a case in which an application for the determination of native title would proceed to the Federal Court for final determination unopposed by any party identified above. In fact, as of March 2004, only 11 native title determinations (out of a total of 49) were 'unopposed determinations'. Somewhat surprisingly, however, a further 26 native title determinations were 'consent determinations' (achieved when the parties involved came to an agreement about native title's nature, contents and incidents through mediation). The remaining 12 were 'litigated determinations' (made when an application for the determination of native title was contested and the parties involved had to argue their cases in a trial process).

---

<sup>59</sup> NTA s. 84(2).

<sup>60</sup> NTA s. 84(4).



## V - SCOPE OF NATIVE TITLE ACCOMMODATION

The scope of native title accommodation embodied in the comprehensive claims policy and the *Native Title Act* owes significant allegiance to the judicial characterization of native title at common law. Although a detailed description of this characterization is beyond the scope of this paper, the following references should provide sufficient insight into the judicially determined source, nature and content of native title to permit an informed understanding of the scope of native title recognition afforded by the comprehensive claims policy and the *Native Title Act*.

### a) *The Canadian Case*

According to the Supreme Court of Canada, native title is properly characterized at common law as a *sui generis* proprietary (i.e. ‘ownership’) right to land arising from Indigenous Peoples’ occupation of their traditional territories prior to the assertion of Crown sovereignty. As a result of this general judicial characterization, native title’s nature and content are considered to be matters of *law* in the Canadian case, determined according to the interaction of the common law and traditional Indigenous law(s). This has led to the following general characterizations of native title’s nature and content:

#### Nature of Native Title:

1. native title is a *right to the land itself*<sup>61</sup>;
2. native title is ‘personal’ only in the sense that it is *inalienable except by surrender to the Crown*<sup>62</sup>;
3. native title is a *burden on the Crown’s radical title*<sup>63</sup>;
4. native title is a *communal landholding* that cannot be held by individuals<sup>64</sup>;
5. native title is *subject to an inherent limit* that prevents native title holders from using native title lands in a manner that is irreconcilable with the nature of their attachment to those lands; and<sup>65</sup>,
6. native title *likely can not be revived once validly extinguished* (i.e. by a valid government action) but is *likely capable of revival if temporarily ‘lost’* (i.e. through a broken chain of continuity between present and pre-sovereignty occupancy)<sup>66</sup>.

<sup>61</sup> See: *Delgamuukw v British Columbia* [1997] 3 SCR 1010, *per* Lamer CJ, and Cory, McLachlin and Major JJ; Lamer at para 113 and 138; and, *per* La Forest and L’Heureux-Dubé.

<sup>62</sup> See: *Delgamuukw*, Lamer CJ at para 113.

<sup>63</sup> See: *Delgamuukw*, Lamer CJ at para 145.

<sup>64</sup> See: *Delgamuukw*, *per* Lamer CJ and Cory, McLachlin and Major JJ; and Lamer CJ at para 115.

<sup>65</sup> See: *Delgamuukw*, *per* Lamer CJ and Cory, McLachlin and Major JJ; and, Lamer CJ at paras 111, 125, 130 and 131.

<sup>66</sup> Although the Canadian courts have not directly considered the matter of revival of native title following extinguishment, the legal reasoning applied by the High Court of Australia in *Mabo (No. 2)* and *Wik* on the issue of revival is equally applicable to the Canadian case in principle: When native title is extinguished (by valid acts of government) the Crown’s radical title expands to a *plenum dominium*. Subsequent to this

Content of Native Title:

1. native title encompasses the proprietary right to *exclusive use and occupancy* of the land held pursuant to that title for a variety of purposes<sup>67</sup>;
2. native title encompasses the proprietary right to *choose to what uses land can be put* (the use and occupancy of land held pursuant to native title are not restricted to aspects of Indigenous practices, customs and traditions which are integral to distinctive Indigenous cultures)<sup>68</sup>;
3. the right to choose to what uses land held pursuant to native title can be put is subject to native title's *inherent limit*<sup>69</sup>;
4. native title encompasses *mineral rights* and the lands held pursuant to native title are capable of exploitation (subject to native title's inherent limitation)<sup>70</sup>;
5. lands held pursuant to native title are recognized by the common law as having an *inescapable economic component*<sup>71</sup>; and,
6. lands held pursuant to native title are recognized by the common law as having *non-economic* or *inherent value* in and of themselves<sup>72</sup>.

As a result of this general judicial characterization of native title, the range of issues currently amenable to negotiation under the auspices of Canada's comprehensive claims policy includes:

- full ownership of (i.e. 'ordinary' common law title to) defined tracts of land<sup>73</sup>;
- preferential and/or exclusive wildlife harvesting rights (including harvesting rights in offshore areas);
- guaranteed participation in land, water, wildlife and environmental management (through membership on advisory committees, boards

---

expansion of the Crown's title the common law recognises all interests in land as with held *by* the Crown or *of* the Crown by virtue of a grant.

By virtue of the reasoning proffered in *Delgamuukw* that "[a]n *unbroken chain* of continuity need not be established between present and prior occupation" (emphasis added) [*per* Lamer CJ and Cory, McLachlin and Major JJ at p. 1016], however, the Supreme Court of Canada left open the possibility that native title can be revived after or, more precisely, cannot be 'lost' due to temporary gaps in physical occupation (the fact of which ground native title in common law, at least in part).

<sup>67</sup> See: *Delgamuukw*, *per* Lamer CJ and Cory, McLachlin and Major JJ; and Lamer at paras 117 and 166.

<sup>68</sup> See: *Delgamuukw*, *per* Lamer CJ and Cory, McLachlin and Major JJ; and, Lamer CJ at paras 111, 117 and 166.

<sup>69</sup> See: *Delgamuukw*, Lamer CJ at paras 111, 117, 125-128, and 166.

<sup>70</sup> See: *Delgamuukw*, *per* Lamer CJ, and Cory, McLachlin and Major JJ; and, Lamer CJ at para 112.

<sup>71</sup> See: *Delgamuukw*, *per* Lamer CJ, and Cory, McLachlin and Major JJ; and, Lamer CJ at paras 166 and 169.

<sup>72</sup> See: *Delgamuukw*, *per* Lamer CJ, and Cory, McLachlin and Major JJ.

<sup>73</sup> "Lands selected by beneficiaries for their continuing use should be traditional terrestrial lands that are currently used and occupied." [Canada (1987), p. 12].

- and similar bodies or through participation in government bodies that have decision-making powers);
- subsurface rights;
  - financial compensation (for lost lands and resources)<sup>74</sup>; and,
  - resources revenue-sharing arrangements<sup>75, 76</sup>.

This range of issues reflects the fact that negotiated Final Settlement Agreements (i.e. ‘modern treaties’) are intended to facilitate a “fair and equitable resolution of [continuing native title] claims”<sup>77</sup> that will “resolve the debates and legal ambiguities associated with the common law concept of Aboriginal rights and title.”<sup>78</sup>

Because Canada’s comprehensive claims policy is also designed to “encourage self-reliance and economic development as well as cultural and social well-being [on the part of Indigenous land claimants]”<sup>79</sup>, however, the comprehensive claims policy also permits the following issues to be the subject of comprehensive claims negotiations:

- specific measures to stimulate economic and social development;
- defined roles in the management of heritage resources and parks;
- local or municipal-styled administrative rights; and,
- constitutionally protected aboriginal self-government provisions (where appropriate).<sup>80</sup>

### ***b) The Australian Case***

In the Australian case, by contrast, native title has been characterized as a *sui generis* personal interest (i.e. ‘use right’) in land that reflects the lawful entitlements of Indigenous Peoples in accordance with their traditional laws and/or customs. As a result of this general judicial characterization, native title’s nature and content are considered to

---

<sup>74</sup> “Monetary compensation may comprise various forms of capital transfers, including cash, resource revenue-sharing, or government bonds ... The amount of compensation may be adjusted depending upon other arrangements negotiated in settlement agreements. For example, the amount of cash compensation may be reduced in accordance with arrangements concerning resource revenue-sharing. Outstanding debts owed by the claimant group to the federal Crown [i.e. loans made to the claimant group to facilitate comprehensive claims negotiations] will be deducted from final settlements.” [Canada (1987), p. 15].

<sup>75</sup> “Resource revenue-sharing arrangements will not imply resource ownership rights, and will not result in the establishment of joint management boards to manage subsurface and sub-sea resources. In addition, the federal government will maintain responsibility for resource revenue instruments and must maintain its ability to adjust the fiscal regime. Resource revenue-sharing may be subject to limitations either by (i) an absolute dollar cap; (ii) a time cap of not less than fifty years from the first payment of the royalty share (which arrangements will be renegotiable); or (iii) a reducing percentage of royalties generated.” [Canada (1987), p. 14].

<sup>76</sup> See: Canada (1981); Canada (1987); Canada (1993); and, Canada (, Indian and Northern Affairs Canada, “Comprehensive Claims (Modern Treaties) in Canada”, *Information Sheet* (March 1996), available at: [http://www.ainc-inac.gc.ca/pr/info/trty\\_e.html](http://www.ainc-inac.gc.ca/pr/info/trty_e.html).

<sup>77</sup> Canada (1987), p. 5.

<sup>78</sup> Canada (1993), p. 5.

<sup>79</sup> Canada (1987), pp. 9-10.

<sup>80</sup> See: Canada (1981); Canada (1987); Canada (1993); and, Canada (1996).

be matters of *fact*, in the Australian case, determined by reference to the traditional laws acknowledged by and traditional customs observed by Indigenous Peoples. Accordingly, there has been no general judicial statement on the content of native title in the Australia case. As Mantziaris and Martin explain:

Every instance of native title is different. A title might confer exclusive occupation and use of land, or more limited rights of occupation and use. It might include the right to occupy, maintain and manage an area of land, the right to hunt, fish and gather, the right to access the land, the right to make decisions about access to land, the right to preserve sites of significance, the right to engage in trade, and the right to conserve and safeguard the natural resources of an area. Different titles might be exercised with different degrees of exclusivity in relation to non-native title interests in a given geographical area. Furthermore, the identity of native title group members, and the manner in which they may exercise their native title rights and interests, may be defined in different ways.<sup>81</sup>

Furthermore, because native title owes its origins to traditional Indigenous laws and customs, the nature of this *sui generis* real property right has been characterized in only the most general of terms (in order to distinguish it from ‘ordinary’ common law real property interests):

#### Nature of Native Title:

1. native title is *not a right to the land itself* (it is a *sui generis* personal interest, with possible proprietary aspects, and is properly characterized as a ‘bundle of rights’<sup>82,83</sup>);
2. native title is a *burden on the Crown’s radical title*<sup>84</sup>;
3. native title is *inalienable* except by surrender to the Crown<sup>85</sup>; and,

<sup>81</sup> Mantziaris and Martin (2000), p. 44.

<sup>82</sup> “The characterisation of native title as a separable ‘bundle’ of individual and unrelated rights allows for the removal of individual rights from the ‘bundle’ by Crown acts that are inconsistent with that particular exercise of native title. This ‘bundle’ may then be progressively reduced by the cumulative effect of a succession of different grants [see: *Western Australia v Ward* [2002] HCA 28, Gleeson CJ, Gaudron, Gummow and Hayne JJ at paras 76 and 95] Over time, this process may lead to such extensive extinguishment that ‘a bundle of rights that was so extensive as to be in the nature of a proprietary interest, by partial extinguishment may be so reduced that the rights which remain no longer have that character’ [Ibid]. The result of this approach is that native title is extremely susceptible to every small incursion and may only ever decrease in strength.” [Phillipa Hetherington (2000), “2001: A Native Title Odyssey”, *Indigenous Law Bulletin* 5:4 (Nov/Dec), p. 16-17.]

<sup>83</sup> See: *Mabo (No. 2)*, Brennan J at pp. 31-432; and, Deane and Gaudron JJ at pp. 443 and 452; *Wik*, Kirby J at p. 257; and, *Western Australia v Ward* [2002] HCA 28, Gleeson CJ, Gaudron, Gummow and Hayne JJ at paras 76 and 95.

<sup>84</sup> See: *Mabo (No. 2)*, per Brennan J and Mason CJ and McHugh J at p 409; per Deane and Gaudron JJ at p. 409; Brennan J at p. 426; and, Toohey J at p 496.

<sup>85</sup> See: *Mabo (No. 2)*, Brennan J at pp. 426 and 430; and, Deane and Gaudron JJ at pp. 442 and 452.

4. native title is *not capable of revival* once extinguished (i.e. by a valid act of government)<sup>86</sup> or ‘lost’ (i.e. by the abandoning of Indigenous laws and customs; through a loss of connection to traditional territories; and/or, upon the death of the last member of the Indigenous group concerned)<sup>87</sup>.

As a result of this general judicial characterization, the *Native Title Act’s* recognition and protection of native title<sup>88</sup> extends only to:

the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognized by the common law.<sup>89</sup>

As Mantziaris and Martin have recently argued, however, “[d]espite the growth in native title case law and the deluge of academic writing ... there is still no solid account of the nature and methods by which [native title’s] content is defined.”<sup>90</sup> As a result, what is recognized and protected by the *Native Title Act* is ultimately dependent upon the terms of formal orders made by the Federal Court upon a positive determination of native title.<sup>91</sup>

## VI - COMPREHENSIVE CLAIMS, NATIVE TITLE DETERMINATIONS AND THE VULNERABILITY OF NATIVE TITLE

Variations in the judicial characterization of native title’s source, nature and content, described in the previous section of this paper, have had important implications for the vulnerability of native title at common law, with native title being much more

<sup>86</sup> See: *The Wik Peoples and the Thayorre People v. State of Queensland* (1996) 71 ALJR 173, Brennan J at pp. 155, 157 and 160.

<sup>87</sup> See: *Mabo (No. 2)*, Brennan J at p. 430.

<sup>88</sup> NTA, s. 3(a).

<sup>89</sup> NTA, s. 223(1).

<sup>90</sup> Mantziaris and Martin (2000), p. xviii.

<sup>91</sup> According to s. 225 of the NTA such orders must identify: (a) the persons, or each group of persons, holding the common or group rights comprising the native title; (b) the nature and extent of native title rights and interests to the determination area; (c) the nature and extent of any other interests in relation to the determination area; (d) the relationship between rights and interests in (b) and (c) (taking into account the effect of the NTA); and, specify (e) the extent to which the native title rights and interests identified in (b) confer possession, occupation, use and enjoyment of the land or waters on the native title holders to the exclusion of all others.

susceptible to lawful extinguishment and infringement in the Australian case than it is in the Canadian case (see Figure 1). As will now be explained, this has had a significant effect on the degree of political accommodation afforded native title in the comprehensive claims policy and *Native Title Act* respectively.

**Figure 1: Native Title’s Vulnerability to Extinguishment and Infringement in Canada and Australia**

	<b>Canada</b>	<b>Australia</b>
<b>Native Title’s Vulnerability to Extinguishment and Infringement</b>	<p><b><u>Sovereignty to 1982:</u></b> Native title could be extinguished/infringed by:</p> <ul style="list-style-type: none"> <li>• voluntary surrender</li> <li>• ordinary federal legislation evincing a ‘clear and plain’ intent to extinguish and/or infringe native title</li> </ul> <p><b><u>1982 to Present:</u></b> Native title can be extinguished by:</p> <ul style="list-style-type: none"> <li>• voluntary surrender</li> </ul> <p>Native title can be Infringed (but not extinguished) by:</p> <ul style="list-style-type: none"> <li>• ordinary legislation (federal or provincial), subject to a two-pronged justification test</li> </ul>	<p><b><u>Sovereignty to Present:</u></b> Native title can be extinguished/infringed by:</p> <ul style="list-style-type: none"> <li>• voluntary surrender</li> <li>• laws or acts with clear and plain intention to extinguish/infringe native title</li> <li>• inconsistent statutory grants to third parties (but pastoral leases do not necessarily extinguish native title)</li> <li>• Crown appropriations</li> <li>• Loss of connection to the land through the abandoning of laws and customs based on native title</li> <li>• Extinction of the relevant clan or group</li> </ul>

### ***a) The Canadian Case***

As was explained earlier, the process of negotiating an extra-judicial settlement of continuing native title claims in the Canada case is initiated when an Indigenous claimant group presents a formal ‘Statement of Claim’ to the Comprehensive Claims Branch of DIAND. This statement must provide evidence that the Indigenous group in question continues to hold lawful native title to the lands in question and accordingly must not include areas over which native title has already been extinguished. Given native title’s relatively robust resistance to lawful extinguishment during both the pre- and post-1982 periods, however, the potential for continuing native title where no treaty agreements have previously been concluded is relative great. As a result, the areas amenable to comprehensive claims negotiations are relatively large (see Figure 2).

Figure 2: Map of Historic Indian Treaties



(Source: Assembly of First Nations website – [http://www.afn.ca/Programs/Treaties%20and%20Lands/map\\_of\\_treaties.htm](http://www.afn.ca/Programs/Treaties%20and%20Lands/map_of_treaties.htm))

It is important to remember, however, that because the federal government is committed to achieving a full and final settlement of continuing native title claims through the process of comprehensive claims negotiations, all Final Settlement Agreements must contain a clause in which Indigenous land claimants either: (i) ‘cede, surrender and release’ finally and forever, whatever native title and aboriginal rights they might have in exchange for the rights, interests and benefits contained in their Final Settlement Agreement’; or, (ii) agree that any native title and aboriginal rights that they might have will only be defensible insofar as they are not inconsistent with the terms of their Final Settlement Agreement itself.<sup>92</sup>

<sup>92</sup> See: Canada (1987), p. 11-12; and, Canada (1993), p.9. It is this aspect of Canada’s comprehensive claims policy that has attracted the most vehement criticism from Indigenous Peoples, who balk at the idea that judicially defensible aboriginal rights and native title legislated out of existence in order to satisfy the self-serving interests of Canadian governments and/or non-aboriginal people.

### *b) The Australian Case*

In the Australian case, by contrast, native title's resistance to lawful extinguishment is relatively weak and as a result the following areas can not be included in a native title determination application:

- privately owned land (including family homes, and privately owned freehold farms);
- land covered by residential, commercial and certain other leases;
- some Crown reserves vested in bodies such as local governments or statutory authorities; and,
- areas where governments have built roads, schools and undertaken other public works.<sup>93</sup>

This leaves the only following areas open to claims of continuing native title:

- vacant (unallocated) Crown land;
- some state forests, national parks and public reserves depending on the effect of state or territory legislation establishing and possibly vesting those parks and reserves;
- oceans, seas, reefs, lakes and inland waters; and
- some leases, such as non-exclusive pastoral and agricultural leases, depending on the state or territory legislation they were issued under.<sup>94</sup>

Furthermore, because the *Native Title Act* only serves to recognize and protect native title where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognized by the common law<sup>95</sup>

the abandoning of traditional laws and customs and/or a loss of connection to traditional territories will result in either an unsuccessful native title determination application or (in the event that this abandoning or loss occurs at a later date) a revised native title determination that revokes native title recognition and protection. Furthermore, given that native title has been characterized by the High Court as a 'bundle of rights',<sup>96</sup> it is

---

<sup>93</sup> National Native Title Tribunal (2003a), "What kinds of areas can be claimed in a native title application?", Fact Sheet No. 1b (June), [http://www.nntt.gov.au/publications/1036375662\\_1544.html](http://www.nntt.gov.au/publications/1036375662_1544.html) (retrieved: 2004/03/29).

<sup>94</sup> Ibid.

<sup>95</sup> NTA, s. 223(1).

<sup>96</sup> See: *Western Australia v Ward* [2002] HCA 28, Gleeson CJ, Gaudron, Gummow and Hayne JJ at paras 76 and 95.



inherently fragile and susceptible to degradation over time. As Phillipa Heatherton explains:

[t]he characterisation of native title as a separable ‘bundle’ of individual and unrelated rights allows for the removal of individual rights from the ‘bundle’ by Crown acts that are inconsistent with that particular exercise of native title. This ‘bundle’ may then be progressively reduced by the cumulative effect of a succession of different grants.<sup>97</sup> Over time, this process may lead to such extensive extinguishment that ‘a bundle of rights that was so extensive as to be in the nature of a proprietary interest, by partial extinguishment may be so reduced that the rights which remain no longer have that character’<sup>98</sup>. The result of this approach is that native title is extremely susceptible to every small incursion and may only ever decrease in strength.<sup>99</sup>

In contrast to the ‘bundle of rights’ approach, which facilitates the parcel-by-parcel extinguishment of native title through the issuing of multiple inconsistent grants over the same land over time, the ‘title to land’ approach (such as has been adopted in Canada) protects native title from parcel-by-parcel extinguishment by drawing a clear distinction between ‘native title’ and the rights parasitic upon it. As Heatherton again explains:

The legal effect of an inconsistent act depends on the degree of inconsistency. Inconsistency results in extinguishment of native title only where the inconsistency reflects an ‘... intention of the Crown to remove all connection of the aboriginal people from the land in question’.<sup>100</sup> This intention will only be held to exist where the inconsistent act is:

- *totally* inconsistent with the exercise of all native title rights and interests; and
- *permanently* inconsistent.

Where inconsistency is less than ‘fundamental’ the impairment of the exercise of native title rights will result in suspension or regulation of those rights for the duration of the inconsistency but the underlying title will remain.<sup>101</sup>

It goes without saying that the judicial characterization of native title as a ‘bundle of rights’ is bound to have significant implications for the extent of recognition and protection afforded native title by the *Native Title Act*. As Hal Wootten explains:

---

<sup>97</sup> See: *Western Australia and Ors v Ward and Ors (2000)*, per Beaumont and von Doussa JJ at 189.

<sup>98</sup> Ibid.

<sup>99</sup> Hetherington (2000), p. 16-17.

<sup>100</sup> *Western Australia and Ors v Ward and Ors (2000)*, per North J at 328.

<sup>101</sup> Hetherington (2000), p. 17.

On this view ... Aboriginal people were never ‘owners’ of their lands, but just users of land, and only the right to continue their traditional uses, for example rights to traverse the land, hunt on it, to perform ceremonies on it, presumably to defecate and urinate on it, but not to mine it or run cattle on it [are recognized and protected]. On this view, the land belonged to no one – we are back to *terra nullius* with grafted on to it a few superficial usufructuary rights which may become of decreasing importance or be abandoned as Aboriginal people are drawn more into the western economy and western lifestyle.<sup>102</sup>

## CONCLUSION

Statistics on the socio-economic disadvantages suffered by many Indigenous Peoples and communities are often quoted as an indication of the devastating impact of European newcomers’ ‘discovery’, invasion and colonial settlement of Indigenous territories. It must be remembered, however, that Indigenous Peoples were not and are not simply passive subjects of colonial attitudes and policies. Active resistance against European newcomers’ political, economic and social encroachments has been as much a part of colonial history as has Indigenous subjugation, although this history of active resistance is little known to most non-indigenous people.

In Canada and Australia, part of this resistance has involved the use of colonial legal and political institutions to assert and gain recognition for indigenous rights to land, resources and self-determination/government. The recognition and generous interpretation of such rights, it is argued, will positively enhance the (‘post’)colonial relationship between Indigenous Peoples and non-indigenous peoples/(‘post’)colonial governments, as well as facilitate the spiritual, physical, economic and political rebuilding of Indigenous communities devastated by over 200 years of colonial subjugation. Although not insignificant portions of Canada and Australia’s Indigenous populations have decried working within the Western-European legal and political institutions of their colonial societies to assert indigenous rights - questioning the capacity and inclination of these institutions to meaningfully redress historic wrongs and advance Indigenous agendas - important legal and political advances have arguably been made through these institutions and the relatively recent recognition of native title at common law in these two countries is often celebrated as a fundamental case in point.

---

<sup>102</sup> Hall Wootten (1995), “The end of dispossession? Anthropologists and lawyers in the native title process”, in J. Finlayson and D.E. Smith (eds), *Native Title: Emerging Issues for Research, Policy and Practice*, CARPR Research Monograph No. 10 (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University), p. 109. According to Wootten (1995), the concept of native title as a ‘bundle of rights’ defined by previous use is based on a misreading of *Mabo (No. 2)* as well as by a misunderstanding of indigenous relationships with land. “The *Mabo* judgement says that Aboriginal rights are defined not by use, but by a system of law and custom – just as the rights of freeholders and leaseholders depend not on the use they make or have made of the land, but on what the relevant system of law says are their rights.” [p. 110].

As this paper has demonstrated, however, neither the comprehensive claims policy nor the *Native Title Act* has significantly improved Indigenous Peoples' practical ability to exercise continuing native title (and its accompanying rights and interests) in the wake of native title's recognition at common law. In the Canadian case, this is owing to the fact that the comprehensive claims policy requires Indigenous claimant groups to either (i) 'cede, surrender and release' all of their claims to continuing native title and aboriginal rights in the terms of their Final Settlement Agreements; or (ii) agree that the exercise and defense of continuing native title and aboriginal rights will only be practicable insofar as the nature, content and extent of these rights is not inconsistent with the terms of their Final Settlement Agreements. In the Australian case, this is owing to the fact that the *Native Title Act* validates all actions taken prior to 23 December 1996 that did not pay respect to the common law concept of *sui generis* native title, thus extinguishing native title over large areas of the Australian landmass. These problematic aspects of the comprehensive claims policy and *Native Title Act* are compounded by the fact that Indigenous Peoples are required to satisfy a judicially based 'test' of continuing native title even as they consent to the extra-judicially negotiated final settlement or statutorily regulated determination of their continuing native title claims.

As a result, it is difficult to see how either the comprehensive claims policy or the *Native Title Act* can be meaningfully characterized as either important, monumental or significant. Furthermore, although Indigenous Peoples arguably have a greater practical ability to assert continuing native title claims under the auspices of Canada's comprehensive claims policy than they do under the terms of Australia's *Native Title Act*, both central government policies do little more than re-articulate the Indigenous land acquisition practices adopted by colonial government's during these countries' pre-common law recognition eras.

As was explained in a 1978 publication of the Government of Canada: "[f]rom the earliest day of European settlement in North America, the relationship between Indians and non-Indians was characterized by an assumption on the part of colonial governments that native people had an interest in the land which had to be dealt with before non-native settlement or development could take place."<sup>103</sup> This resulted in a colonial land acquisition policy (governed by the terms of the *Royal Proclamation of 1763*) that was designed to secure Indigenous Peoples' 'surrender' of their traditional territories in exchange for a defined range of rights, benefits and interests set out in a negotiated 'treaty' agreement. In Australia, by contrast "[a] critical assumption made about the Aborigines, both before and after settlement, was that they were nomadic, had no permanent homelands and therefore were not in effective possession of the land over which they wandered."<sup>104</sup> As a result, the Australian colonies, States and Territories were settled with an absolute disregard for the pre-existing rights of Indigenous Peoples in

<sup>103</sup> Canada, Indian and Northern Affairs – Office of Native Claims (1978), *Native Claims: Policy, Process and Perspectives*, opinion paper prepared for the Second National Workshop of the Canadian Arctic Resources Committee – Edmonton, AB, 20-22 February 1978 (Ottawa: Minister of Supply and Services Canada), p. 2.

<sup>104</sup> Henry Reynolds (1996), *Aboriginal Sovereignty: Three Nations, One Australia?* (St. Leonards: Allen & Unwin), p. 23.

respect of their traditional territories. This situation continued until 1966 when State and Commonwealth governments responded to the Indigenous land rights movement by introducing a novel series legislative measures designed to grant ‘statutory’ communal title to Indigenous Peoples living on reserves and/or permit Indigenous Peoples to lodge ‘traditional’ land claims in respect of unalienated Crown land.<sup>105</sup> As this paper has demonstrated, however, neither Canada’s comprehensive claims policy nor Australia’s *Native Title Act* represent a significant departure from these countries’ previous Indigenous land acquisition practices. As a result, one is left to wonder how and/or under what conditions Indigenous Peoples might secure a more meaningful political accommodation of continuing native title.

---

<sup>105</sup> In chronological order these are: Aboriginal Land Trust Act, 1966-1975 (South Australia); Aboriginal Land Act, 1970 (Victoria); Aboriginal Land Rights (Northern Territory) Act, 1976 (Commonwealth, with respect to the Northern Territory); Pitjantjatjara Land Rights Act, 1981 (South Australia); Aboriginal Land Rights Act, 1983 (New South Wales); Maralinga Tjarutja Land Rights Act, 1984 (South Australia); Aboriginal Land Grant (Jervis Bay) Act, 1986 (Commonwealth, with respect to the Australian Capital Territory); Aboriginal Land (Lake Condah and Framlingham Forest) Act, 1987 (Commonwealth, with respect to Victoria); and, Aboriginal Land Act, 1991 (Queensland); and, Torres Strait Land Act, 1991 (Queensland). [J.C. Altman (1994), “Economic implications of native title: dead end or way forward?” in Will Sanders (ed) *Mabo and Native Title: Origins and Implications*, CAEPR Research Monograph No. 7 (Canberra: Centre for Aboriginal and Economic Policy Research, Australian National University), p. 63.] For a detailed overview of and critical commentary on Australian lands rights legislation see: H. McRae, G. Nettheim and L. Beacroft (1991), *Aboriginal Legal Issues* (Sydney: The Law Book Company), Ch. 5. It is important to note, however, that not all Indigenous people lived on reserves or unallocated Crown land. “Some communities live on pastoral properties where they had been cattle workers, some in camps on the fringes of rural towns, others in country towns and cities, often without security of tenure and in appalling conditions. Many retained links with their traditional lands, others lost this affiliation. When the movement towards land rights began the question arose whether it could benefit these Aborigines as well.” [H. McRae, G. Nettheim and L. Beacroft (1991), p. 148].