BOOK REVIEW

Kathy Bowrey, *Law and Internet Cultures* (Cambridge University Press, 2005)

Kathy Bowrey has written a refreshing and optimistic response to the extensive literature which has been produced by US, European and Australian academics concerned with the increasing capture of the online environment by powerful, US based corporations.[1] Although she believes that the situation need not be as dire as some have been predicting, she argues that we do need to take positive action to ensure that spaces for a diversity of views and needs are reserved within the online environment. In particular, we need to acknowledge and resist moves by US-based corporations to dictate that what is good for them is good for the rest of the world. Bowrey's message is that the future of the Internet is still uncertain and that we all have an opportunity to participate in its formulation.

The book makes a very valuable contribution to our understanding of various components of Internet cultures, at a time when questions regarding the future of Internet governance are being considered.[2] Bowrey states that 'the intersections of technology, law, community and culture are dimensions of Internet governance attracting little study to date.'[3] Whilst this is true, this situation is about to change. Governments, citizens and businesses worldwide are realising that it will no longer be sufficient to put the issue of governance into the 'too hard' basket. Rather, some of the hard questions regarding the influence of the US over future Internet development, the control of the domain name system, the 'digital divide', and the question of jurisdiction will need to be resolved. However, in order to solve these problems, we need to answer some preliminary questions regarding what the Internet is as a legal entity and what we want it to be in future. In order to do this, Bowrey sets herself the task of identifying the various influences and groups that shape our thinking about what the Internet is and what it should be. Bowrey states:

> What this means is, that in relation to the internet, the idea of the law changes, depending upon the context and the nature and concerns of the relevant decision-making community. In this regard it is the definition of the relevant internet community and their culture that helps to focus and refine the relevant meaning for the law.[4]

1 See, eg, Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999); Lawrence Lessig, *The Future of Ideas: the Fate of the Commons in a Connected World* (2001); Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004); Jessica Litman, *Digital Copyright* (2001); Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (2001); Siva Vaidhyanathan, *The Anarchist in the Library: How the Clash Between Freedom and Control is Hacking the Real World and Crashing the System* (2004); Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy* (2002).

2 See, eg, the current work of the United Nations, Working Group on Internet Governance, a working group of the World Summit on the Information Society, <http://www.wsis-online.net/igov-forum/root/> at 21 April 2005.

3 Kathy Bowrey, *Law & Internet Cultures* (2005) 14.

4 Ibid 20.

In this book, Bowrey strives to restore a missing value to the study of the history and culture of the Internet: the aspirations of its various user groups. In achieving this, and signposting the way ahead, she tells some quirky and interesting stories along the way. Bowrey is a good story teller, with a strong sense of cultural history, although it is not always immediately clear where these stories are leading. Each chapter has a message but it may also raise more questions than it answers. Bowrey is not attempting to solve all of the issues she raises. Her task is more one of flagging issues for further debate.

Bowrey asserts that there are several online cultures and it is misleading to rely solely on the romanticised accounts of the pioneer founding fathers (and they are all men) of the Internet in seeking an explanation for its underlying rationale. Instead, we need to think proactively and ask the question, what do we want the Internet to be, for us all as a community, or, perhaps more accurately as a collection of communities?

Chapter one is titled 'Defining Internet Law'. It does not, however, give us a dry run through of the key areas of what may comprise a course of study in this area. Rather, it seeks to explore a number of key issues: the issue of Internet governance, a topic on which there is little or no consensus at present, the influence of cultures and community upon the relevant law, and 'the significant influence of US technology, jurisprudence, practice and culture upon the development of information technology law more generally'.[5] Adopting a critical legal studies approach, she asserts that studying the legislation and major cases presents only some of the picture: 'the levels of law most removed from everyday experience.'[6] Her aim is to identify the role that individuals, corporations and industry practices play in shaping the supposedly technologically defined environment. To this end, she is particularly interested in the stories that different participants tell about themselves and others that shape the way we view technical and cultural practices, for example, music 'piracy' and file 'sharing'.

Chapter two is titled 'Defining Internet Cultures'. This chapter explores the way in which different participants define the nature and role of the Internet. Bowrey identifies the role of those who mediate the understanding and experience of the Internet for others. One of the main stories told in this chapter is that of the dot com bubble: Bowrey's point being that analysis of the crash has tended to adopt a narrow focus on the ICT sector, allocating blame to the individuals who talked up the new 'Information Economy' and assuming that the Internet constituted a single soulless sector of society. Rather, we should acknowledge that the Internet has a much more pervasive influence over many sectors of society. We therefore need to identify and acknowledge the diversity of ideologies, practices and laws that operate within various online communities.

Bowrey constantly reminds us not to blindly accept US-centric assertions regarding the relationship between commerce and free speech. In chapter three

5 Ibid.
6 Ibid 17.

she explores the importance of technical rules and technical rule makers in shaping the history of the Internet. Bowrey discusses the working of ICANN (the Internet Corporation for Assigned Names and Numbers) and the IETF (the Internet Engineering Task Force). In particular she raises some important questions regarding the neutral stance of the IETF with respect to the increased use of patents to protect new web applications and the effect this may have on the development of open standards.

Chapter four raises similar questions regarding the 'openness' of Open Source software and the 'freedom' of the Cultural Commons movement. Bowrey questions the appropriateness of founding these alternative forms of distribution on a copyright as property model. She argues that equitable principles would serve as a far more appropriate foundation for these concepts. For example, trust law with its recognition of legal obligations owed to a group of beneficiaries, may provide a useful model.

Chapter five is a fascinating exploration of the Microsoft empire, considering Bill Gates' own writings, the corporate culture of Microsoft and, in particular, the antitrust action brought against Microsoft in the US and in Europe. In line with her critical legal studies approach, she spends as much time discussing the portrayal of the case in the media and developments outside the courtroom, as she does discussing the judgments. This makes for very interesting reading. This chapter and chapter seven highlight the capture of intellectual property law making by the US.[7] In particular it highlights the attitude of corporate copyright owners towards intellectual property rights in general: they are a property right of owners to be exploited as the owners see fit, for leveraging market power and obtaining (and retaining) market advantage. They are not concerned with a balancing of rights between owners and users. This is the message being pushed by copyright owners worldwide. Further, the role of government is simply to grant and enforce such rights. It should not involve itself any further in questioning how those rights are exercised.

Bowrey is a copyright expert and this shows in her enthusiasm when it comes to discussing the issues arising from online distribution of copyright material in chapter six. Bowrey again displays her optimism in this chapter in the discussion of the file sharing cases[8] and the Open Source and Creative Commons movements. Rather than seeing such movements as a necessary response to the ever encroaching power of content owners, Bowrey argues that online participants still retain a choice about whether to work within the legal frameworks created for the distribution of online content or not.

Bowrey argues that we 'should be suspicious of these pessimistic tales' of the likely domination of culture by a handful of 'global media empires'.[9] She

7 See, eg, the US-Australia Free Trade Agreement, concluded in 2004 and discussed in Bowrey, above n 3, 186-188.

8 *A & M Records Inc v Napster Inc*, 114 F Supp 2d 896 (ND Cal, 2000) and *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*, 259 F Supp 2d 1029 (CD Cal, 2003) affirmed 380 F 3d 1154 (9th Cir, 2004).

9 Bowrey, above n 3, 137.

considers the arguments raised by the two camps in the peer-to-peer 'piracy' debate, noting the arguments raised by the copyright owners that file sharers who 'steal' and 'pirate' music will destroy all incentive for continued cultural output, plunging us into a 'cultural Dark Ages',[10] and the arguments raised by the critics of the expansion of copyright laws, that these laws will deliver the control over all cultural output into corporate hands. Bowrey argues that this debate has overlooked a crucial practical point: that consumers can choose to ignore these laws altogether. Bowrey considers that 'the success of the mechanisms that drive the information economy at this point in time creates cause enough to doubt that digital copyright reform is really worth the overwhelming attention it has been receiving from IP critics.'[11] It is not a matter, Bowrey asserts, of getting the law right and consumer behaviour will simply fall into place. Consumer needs will shape behaviour as much as the law will. People are free to choose not to obey such laws.

The difficulty for this book will be finding its target audience. The book is well-written and explains all key concepts clearly. It is particularly refreshing to read a book written on this topic from the Australian perspective. However, it is pitched at a level above the needs of the average undergraduate student. It canvasses a broad range of issues, making it most useful for a general postgraduate subject dealing with various aspects of cyberlaw or Internet law. It would also be very useful for a cross disciplinary, media or cultural studies based subject.

I would like to share her optimism on these issues, however, I remain firmly fixed in the point of view that the very important issue of control over cultural material, as embodied in the debate between copyright owners and users, and in particular in the context of the legal entrenchment of technological protection measures, needs to be taken up at an institutional level. Australia's recent involvement in the process of concluding the US-Australia Free Trade Agreement demonstrated how the needs of copyright users can very easily be ignored. To leave important issues to the hope that users will be able to circumvent the controls vests too much hope in the inventiveness and independence of the few.

To be fair to Bowrey, she does not believe that this freedom is inevitable, it requires a conscious choice and her book is a call to the community to think through these issues, rather than to blindly accept that the US cultural and legal identity is readily applicable to the Australian context.

Bowrey ends the book with a call to do more than accept and lament the development of 'unaccountable and invasive forms of network power'. She reminds us that it is 'primarily within the legal arenas that the power to change things is most accessibly and visibly located.'[12] Bowrey intends her book to be part of an ongoing conversation, wresting control of the Internet governance

10 Time Warner CEO, Richard Parsons, quoted in Bowrey, above n 3, 138.
11 Ibid 164.
12 Ibid 199.

debate from the hands of corporations and law makers and giving it back to the Internet communities who began the conversation. I think this is a worthy aim, and hope that her invitation is taken up by others.

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BOOK REVIEW

Mohammed Taghi Karoubi, *Just or Unjust War? International Law and Unilateral Use of Armed Force by States at the Turn of the 20th Century* (Ashgate, 2004)

> When the United Nations Charter was written [sic], the idea of attack [sic] was defined by the history that had gone before [sic] and that is the idea [sic] of an army rolling across the border of a neighbouring country, or in the case of the Japanese in [sic; 'at'?] Pearl Harbour, bombing a base. Now that is different now [sic], you don't get that now. What you are getting ['now'?] is this non-state terrorism which is just as devastating and possibly more so and all I'm saying, I think many people are saying, is that maybe the body of international law has to catch up with that new reality.[1]
>
> – Australian Prime Minister John Winston Howard

This is an extremely frustrating book to review, in that an extraordinarily important and complex topic of international law has been treated in a wholly unsatisfactory manner. Even the title is wrong: 'Turn of the Century' denotes the transition to the 21st century, not the 20th, as is evidenced by the text's overriding concern with military actions in Kosovo and Iraq.

The structure and presentation is basic. There are six chapters, each usefully footnoted; the bibliography is one of the few strengths of the work. There is an introduction; a largely irrelevant chapter on the history of pacifism; an incomplete and highly selective discussion of the historical development of the doctrine of 'just war', or *bellum iustum*; two chapters on an ultimately misleading analysis of contemporary issues in collective security enforcement in terms of just war theory; and a limp conclusion. It is in absolutely every regard vastly inferior to a thematically similar work, Kenneth L Vaux's *Ethics and the Gulf War: Religion, Rhetoric, and Righteousness*, and also James Turner Johnson's and George Weigel's *Just War and the Gulf War*.

The origins of *bellum iustum* are complex and manifold, but received their most useful expression in the works of St Thomas Aquinas (1215-1274). The core concept is that a war may be legally sanctioned solely on the basis of it being morally right, or 'just'. In order to establish the moral justness – and, therefore, the legitimacy – of the armed conflict, three criteria must be unconditionally made out: (i) just cause, the lawful and moral response to an unacceptable injury (*iniuria*); (ii) the presence of an unassailable legal authority (*auctoritas*) that initiates the conflict, and; (iii) right intention (*recta ratio*), based upon objective considerations of proportionality, moderation, and, most importantly, the absence of a desire for personal or selfish gain (ie, *animo furandi* or territorial expansion).

1 ABC, *Howard warns of possible pre-emptive anti-terror strikes* (2002) ABC Radio Australia <http://www.abc.net.au/ra/asiapac/programs/s739003.htm> at 24 June 2005.

The bulk of Karoubi's text is taken up with a tortuous and largely repetitive demonstration that certain recent unilateral military actions, most importantly NATO action in Kosovo/Serbia and US involvement in Operation Iraqi Freedom, fail to comply with the formal requirements of *bellum iustum* and cannot, therefore, be sanctioned in terms of just war theory. He refrains from any discussion of the negative corollary, that these operations are inherently illegitimate *because* of their failure to comply with just war theory; his main rhetorical protagonists appear to be those unidentified others who try to positively rely upon a resuscitated just war theory to defend recent US unilateralism. Other problems with the text will take up the remainder of this review.

First, there are an unacceptably large number of factual and historical errors. On page 29, Karoubi refers to both the 'conversion' of the Emperor Constantine and the issuance of the Edict of Milan in CE 312 'as the establishment of Christianity as the official religion of the Roman Empire'. He is wrong on both counts. The Edict of Milan merely suspended the proscribed status of Christianity, recognising it as a *religio licta*. Historians have long dismissed the authenticity of Constantine's 'conversion' on the eve of the Battle of the Milvian Bridge; Constantine appears to have understood Christ as an exceptionally powerful solar deity.[2]

Other errors are major and inexcusable. For example, when discussing Slobodan Milosevic's 'appropriation' of Kosovo, Karoubi declares:

> It is submitted that, today, this argument is hardly worth discussing for two reasons, even if we should accept the Serbian distortions of history. First; *what happened 600 hundred years ago cannot be a basis for rights claimed today. With a similar though historically sounder reasoning, India could demand control of the US.*[3]

As for the first part of this submission, *contra* Karoubi, the entire basis for contemporary indigenous law is precisely the assumption that 'what happened 600 [sic] years ago' *can* serve as the basis for rights and compensation claimed today. As for the second, the most charitable interpretation that may be given is that Karoubi has actually intended to refer to the misnamed North American 'Indians' rather than the current South Asian inhabitants of the State of India. The *less* charitable interpretation, however, goes directly to the issue of Karoubi's authority as a scholar. Karoubi appears to be operating under the anthropological misunderstanding that the pre-Colombian peoples – misidentified by Columbus as the inhabitants of 'the East Indies' – *actually emigrated from India*, which, if true, would invest New Delhi with a possible claim of territorial possession over California on the basis of continuity of historical occupancy.

These errors are aggravated by a large number of misprints and typographical

2 A H M Jones, *Constantine and the Conversion of Europe* (1978) 73-90.
3 Mohammed Taghi Karoubi, *Just or Unjust War? International Law and Unilateral Use of Armed Force by States at the Turn of the 20th Century* (2004) 179 (emphasis added).

errors. The most embarrassing of these – or, alternatively, the most unintentionally hilarious - occurs in footnote 67 when Karoubi is discussing the Christian pacifism of Swiss Reformer Ulrich Zwingli:

> Christ commands that we should not go to law [sic. Does Karoubi mean 'war' here?] nor engage in carnal strife but if one take[s] away our coat, *let him have our clock also*, and He has taught this by His own example as well.[4]

If true, then Zwingli has clearly established the status of the Christian ethic as a timeless doctrine. Christ's prevarication in the Garden of Gethsemane was history's outstanding example of someone who was late for his own execution; almost. The mind's imaginative faculty palpitates at the image of the secularised proselytisers of the International Red Cross forcibly handing out Rolex watches to the starving refugees of the Sudan.

Such significant errors recur throughout the book. In blatant contradiction to the actual evidence, Karoubi excludes vengeance as a lawful basis for just war: 'right intention would not be met if the attacks were designed as punishment.'[5] In fact, *ius gladii*, or 'the law of the sword', was frequently relied upon as grounds for lawful *iustum bellum*. Later in the text, Karoubi himself unwittingly cites Vattel as an authority for this very proposition:

> The sovereign of the injured citizen *must avenge the deed* [the *iniuria*] and if possible, force the aggressor to give full satisfaction *or punish him* since otherwise the citizen will not obtain the chief end of civil society, which is protection.[6]

Finally, the treatment of the 18th and 19th centuries – pivotal eras for the evolution of international law – is altogether too cursory. As Martii Koskenniemi has recently proven beyond all doubt in his magisterial *The Gentle Civiliser of Nation*, the post-Congress of Vienna period was hardly the unmitigated triumph of positivism over naturalism that it is frequently made out to be.

The really big problem that the reviewer must address is figuring out exactly for whom, or to what, this text is addressed. Concerning the primary 'case studies' of the text - Kosovo and Iraq - none of the participants ever formally relied upon just war doctrine to legitimise their actions. It is revealing that Karoubi invests with great significance Tony Blair's speech of April 1999 regarding the legality of the NATO aerial campaign against Serbia.

> Blair ... claimed that 'this is a just war' because it was based not on any territorial ambitions but on values. Later he repeated the claims that NATO's action was based on the just war criterion of just cause. Blair also attempted to explain that the aim of the military strikes was 'crystal clear'. He said that it was 'to curb Milosevic's ability to wage war on an innocent civilian

4 Ibid 22-3 (emphasis added).
5 Ibid 163.
6 Ibid 216 (emphasis added).

> population' and then concluded that, 'We are doing what is right for Britain, for Europe, for a world [in that order!] that must know that barbarity cannot be allowed to defeat justice'.[7]

It is not at all clear, however, that Blair – quasi-secularised, itinerant lay Methodist preacher that he unquestionably is – was employing just war in the formal Thomistic sense, but in a broader, extra-judicial sense of moral, or, more ominously, 'civilisational' struggle.[8] This intellectual simplification highlights the central weakness of Karoubi's work. He tiresomely repeats the formal criteria of just war in order to de-legitimise recent unilateral military actions but, with the singular exception of his treatment of humanitarian intervention, utterly fails to critically engage with the actual reasons for a discernible revival of interest in *bellum iustum*: namely, the recent re-introduction of *moral absolutism* into international legal and political relations.

The vital historical nexus that Karoubi wholly overlooks is the almost imperceptible 'slide' from *bellum iustum* towards *bellum legale* that took place over the course of the 19th century; the legitimacy of armed conflict is established by legal not moral criteria (eg self-defence; military alliances). Significantly, Von Elbe's classic essay on precisely this topic is absent from Karoubi's otherwise competent bibliography. The current interest in just war, therefore, signifies a systemic, and perhaps unconscious, post-positivist shift backwards towards a 'civilisational' standard underpinning international dispute settlement, discursively signified by a strict constructivist interpretation of art 38(1)(c) of the ICJ Statute that formally restricts the substantive scope of international law to the law of 'civilised nations'. A comprehensive treatment of just war from the perspective of a *sub rosa* conflation of traditional Thomistic moral criteria with the current socio-political standards of civilisation/Statehood would have been fascinating and timely; unfortunately, this is not the book that Karoubi has written.

An outstanding of this recurrent deficiency is provided in footnote 455:

> Some politicians in the light of the human tragedy in the Balkans in the final decade of the 20th century have chosen a different approach to the question of 'territorial integrity and political independence of States'. They refer to the NATO airstrikes against Serbia in 1999 and argue that, even though NATO acted with no authority from the UN Security Council,[9] this violation of the UN Charter did not constitute an act of aggression or disrespect for international law, but took place under another law (human rights), one that ranks higher than the law which protects the sovereignty of States. In their

7 Ibid 188-9.

8 For an effective 'dishing' of the unnerving correlation between Blair's 'Christian Socialism' and his recently articulated 'warlike humanitarianism', cf David Coates and Joel Krieger, *Blair's War* (2004) 97-112.

9 Note, this is yet another factual error. It is widely accepted by the international law community that the Security Council's failure to adopt a Russian resolution condemning the NATO operation in the Balkans was tantamount to a passive post facto adoption of the act; a development whose logic is not dissimilar from the current post-Iraqi Freedom situation.

> view, to breach and ignore the territorial integrity and political independence of State [sic] in order to protect human life is permissible and applicable in many cases. If this view is accepted, however, there is no respect left for Article 2(4). The phrase 'territorial integrity and political independence' has been the object of controversy as to its meaning in relation to the prohibition of the use of armed force in Article 2(4) of the Charter.[10]

Once again, Karoubi's strict literalism leads him into logical difficulties. By insisting that the Thomist requirement of *auctoritas* is indispensable to any valid concept of just war and then, somewhat surreptitiously, restricting the agency of lawful collective security to the Security Council,[11] he arrives at the highly debatable conclusion that the 'correct' interpretation of art 2(4) renders inherently invalid any attempt to categorise the NATO action in terms of *bellum iustum*. The difficulty here, as Karoubi implicitly acknowledges, is the issue of how to interpret art 2(4). Does the Article prohibit all forms of armed force, or merely wars of territorial aggression?

Whatever the intent of the original drafters as revealed by the *trauvaux préparatoires* of the Dumbarton Oaks and San Francisco Conferences, the uniform and constant practice of States since 1945 regarding the interpretation of art 2(4) has rendered it wholly consistent with a plethora of violent actions: border disputes; unilateral self-defence; anticipatory self-defence; retorsion; forcible rescue of nationals (eg, the Entebbe raid); civil wars; wars of secession; wars of national liberation; and diverse forms of political and economic coercion (eg trade embargoes and naval blockades).

All of this strongly indicates the evolution in time later to the entry into force of the Charter of customary norms of construction that have effectively modified the 'meaning and purpose' of the original instrument. Given the overwhelming evidence of State practice, accompanied by the requisite expressions of subjective State belief *opinio iuris*, it is implausible in the extreme to maintain that today art 2(4) stands for anything that even remotely approximates a 'blanket' prohibition of all forms of unilateral inter-State violence. It is even possible – although highly contentious – to argue that art 2(4), in light of the questionable circumstances surrounding the last-minute insertion of the critically qualifying dependent clause 'or in any other manner inconsistent with the Purposes of the United Nations', reflects an original intent of the authors to subordinate the literal meaning of art 2(4) to a flexible and highly constructivist process of interpretation.

As shocking as it sounds, therefore, there is a distinct possibility of an objective truth inhabiting Howard's maladroit ramblings that headlined this review;[12] art 2(4) was *always intended* to be 'read' in light of extra-judicial shifts in

10 Karoubi, above n 3, 225.

11 Belied by the legal authority of the General Assembly, guaranteed by the Uniting For Peace Resolution, and for regional agencies pursuant to UNC C VIII, art 51, to enforce collective security.

12 ABC, above n 1.

contemporary understandings of collective security. Hence, the powerful – and quite intentional – 'word magic' of President Bush's denunciations of 'the axis of evil'. By undertaking a mimetic identification of Iraq/North Korea/Iran with Germany/Japan/Italy - the primary 'enemy nations' of the original United Nations *who were 'the Allies'* – the US State Department achieves a second-order identification of fascist 'crimes against world peace' with the unregulated proliferation of weapons of mass destruction. Conveniently, both are now deemed equally noxious breaches of the 'territorial integrity and political independence of States'.

This leads directly to the wider methodological problem concerning the 'correct' relationship between objective meanings and subjective interpretations within international law. Security Council and General Assembly resolutions, although not in themselves formally constitutive of customary international law, are, nonetheless, commonly accepted as expressions of the *opinio iuris* of States. Predictably, Karoubi systemically under-appreciates the subtle and nuanced *interplay* between subjective State belief and formal treaty text within the broader crystallisation process of international customary law. Expressed another way, Karoubi postulates the relationship between natural law and positive law as polar rather than dialectical. The method that he should have adopted is that provided by Philip Allott:

> In international law, there is really only one problem, what to do about natural law. In this sense, natural law should be understood, not in its religious sense which would explain its existence in terms of the divine origin of nature, but in a secular sense. The question raised by natural law is whether it can be said that a legal system, such as international law, should conform to some general underlying pattern or principle, or whether it must be said that the rules of international law must justify themselves in their own terms, and in terms of their end-purposes as being useful to, and accepted by, States.[13]

For Allott, the former model of naturalism is *essentialist*. International law, legitimated in the final instance by meta-normative principles which themselves receive positive expression within international law – such as *pacta sunt servanda* and *obligatio erga omnes* – while simultaneously governing the meaning and purpose of the entire regime, is necessarily immune from the vicissitudes of evolutionary pressures exerted through the temporally generated clash of alternative and conflicting meanings. This model explains Karoubi's strict literalism in his understanding and application of Just War doctrine. The latter model, however, is thoroughly *anti-essentialist*, investing international law with a defining elasticity of purpose and flexibility of understanding(s).[14] Herein, the naturalism underpinning international law is more pragmatically as adequately, but *passively*, reflecting the majoritarian consensus of the particular evolutionary

13 Philip Allott, 'Language, Method and the Nature of International Law' (1971) 45 *The British Yearbook of International Law* 78, 100.

14 In historical terms of reference, the first model corresponds to Vitoria's and Grotius' conception of international law, while the second model approximates the more positivist formulations of Pufendorf, Wolff, and Vattel.

phase of international society in question.

It should by now be clear why Karoubi finds it impossible to categorise Operation Iraqi Freedom as just war; on the grounds of a strictly essentialist understanding, the USA is simply unable to meet any of the criteria necessary to render licit such a unilateral exercise of armed force. Karoubi's strict constructivism. However, as with so many other critics of Gulf War II, this prevents him from understanding the controversy surrounding UNSC Resolution 1411 in terms of a self-grounding interpretative conflict. The *opinio iuris* of both the US and the UK, evidenced through the minutes of the Security Council debate, indicates that their subjective belief in the obligatorily strict enforcement of 1411 was, in fact, in full compliance with the political will of the Security Council, the resolution understood as the latest stage in an unbroken continuum of actions dating back to 1990. As US Ambassador Negroponte expressed it:

> If the Security Council fails to act decisively in the event of a further Iraqi violation, this resolution [1441] does not constrain any member state from acting to defend itself against the threat posed by Iraq, or to enforce relevant UN resolutions and protect world peace and security.[15]

If we do Karoubi's intellectual work for him, we would discern a fascinating rhetorical shift from *bellum legale* to a rejuvenated, albeit somewhat camouflaged, contemporary re-working of *bellum iustum*; obviating the formal requirement of moral considerations of *iniuria*, contemporary just war, to be lawful, hinges upon a positive determination of the respective socio-political identities of the contending parties. Iraq, as an 'unjust' – or, to use current parlance, a 'rogue' – State, itself constitutes the injury that must be 'compensated'. And, as was the case with that ghastly 'slippery slope' that was Kosovo, the formal silence of the UN is deafening. The humiliating debacle of the UN Food-For-Oil program, coupled with the sudden enthusiasm in Western Europe for a resolution of the 'problems' of Syria and Iran, all serve to make a nice counter-point. Following Allott's anti-essentialist paradigm, I would suggest that international law is best understood as the juridical expression of a uniquely uni-polar international landscape.

All of this notwithstanding, *Just or Unjust War?* does serve one useful function: it thoroughly deflates the noxious doctrine of humanitarian interventionism. Karoubi's writings here[16] reveal, by means of an inverted contrast, everything wrong with his unduly restrictive interpretation of *bellum iustum*; here, all of the evidence marshalled by the text points overwhelmingly to the operation of interpretative flexibility in the construction of international legal doctrine. Karoubi effectively demonstrates that humanitarian intervention is nothing more than a contemporary re-statement, in oblique form, of traditional just war theory – and that it should, therefore, be unconditionally rejected on those precise grounds. Special mention should be made of Karoubi's authoritative discussion

15 Karoubi, above n 3, 198.
16 Ibid 213-33, 240-5.

of the non-mandatory status of the alleged 'human rights provisions' contained within the *Charter of the United Nations*,[17] a point frequently overlooked in contemporary human rights discourse.

A final word. It is puzzling that there is a total absence of any consideration of the historical role played by Islam in the development of *bellum iustum* theory. Virtually alone of all of the major religions of the world, Islam is never mentioned, not even in connection with the development of the parallel but separate doctrine of holy war. This omission creates the possibility of leaving the reader with the mistaken impression that just war is a juridical phenomenon specific to Judaeo-Christian culture; it is not. My guess for this glaring *lacuna* is the wariness that Karoubi may have felt in producing a text that would have strengthened orientalist propaganda that presents Islam as a uniquely violent and, therefore, 'primitive' religion – as is well attested by the endless recycling of crude reductionist identifications between 'Islamicism' and terrorism. He need not have worried on that score: John Kelsay and James Turner Johnson have done an excellent job in providing a first-rate and highly sympathetic scholarly treatment in their *Just War and Jihad*. In short, another outstanding example of the type of book that Karoubi's should have been.

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17 Ibid 223-5.

BOOK REVIEW

Deborah Gao, *Chinese Law: A Language Perspective* (Ashgate, 2004)

In this book, Deborah Gao investigates the language aspects of Chinese law in ten interesting chapters. In chapter one (introduction), Gao emphasises the importance of the Chinese language in the development of Chinese culture that has nurtured the Chinese legal thoughts and system. It is, therefore, necessary and crucial to understand Chinese law in the context of Chinese culture and Chinese language. Gao then attributes the lack of legal philosophical debates in traditional China partly to the Confucian lack of interest in law and partly to the concreteness and the lack of abstractness of Chinese language, a speculation that I find unconvincing. It is true that there is a linkage between Chinese culture and the development of the Chinese legal system, however, it is hasty to assert that the Chinese language or the Chinese classical style of writing is more specific or less abstract compared with other languages, such as English.

In my opinion, it is a more acceptable view that the lack of legal philosophical debates in traditional China, to be precise, during the period between the Han Dynasty (206 BC) and the Qing Dynasty (1911 AD), was mainly the result of political deliberation and decision. Before the Han Dynasty, particularly at the time when China was in the transitional period from States/kingdoms into a centralised empire (770 BC-221 BC), debates on legal philosophy were fairly intense. At that time, the states competed for survival and expansion, and the rulers were consciously seeking guiding principles for governing their countries. Hundreds of schools of thoughts concerning establishing a rational society emerged as the times required. Different governance models and methodologies had different political, economic, military, legal and ethical emphases. In terms of legal philosophy, there were two important schools, Confucianism and legalism. The two schools held different views regarding the relative roles of law and morality in society. While legalists upheld that there should be a set of rules equally applicable to all citizens and backed by strict punishment in cases of non-compliance, Confucianists argued that the government should win the hearts of the people, not gain their outward submission by force. The core of Confucianism was that it emphasised the differences of human nature and upheld that only through the harmonious operation of these differences, can a society achieve a sound social order.

It was the legalist approach that was accepted by some of the States, including the Qin Kingdom, which later obliterated all the other kingdoms and unified China. These kingdoms all achieved the object of making their countries rich and militaries superior. However, the implementation of the rule of law in the first empire, the Qin Dynasty, largely relied on ruthless punishment, a phenomenon of legal development at its early stages. As a result, in the mind of common people,

law was always associated with cruelty and sanction. When the second empire, the Han Dynasty, replaced the Qin Dynasty, the rulers decided to adopt the policy of solely promoting Confucianism and dismissing the other schools of thought. It was believed that Confucianism would be a more acceptable ideology and the social stratum that Confucianism advocated would be conducive to strengthening the supreme authority of the Emperor.

Gao then briefly discusses the two revolutions of legal language in the late 1800s to the early 1900s and since the 1970s in China. From the late 1800s to the early 1900s, western law and legal thoughts, together with a number of new legal vocabularies were introduced into China. Gao points out that the establishment of modern Chinese law is based on the transplant of western laws. However, the new vocabularies have been understood and conceptualised within the Chinese culture and tradition: the same words or notions may be understood by the Chinese in both similar or dissimilar ways. I find this idea causes confusion. What could be the cause of the situation where a word is understood in a dissimilar way? Is the word given a dissimilar meaning upon transplantation with the result that it has since been used in such a way in official and professional publications? Or, is the word understood by some people in a dissimilar way before they truly apprehend its full meaning and application? Upon transplantation, a word or notion may need to be understood in a different social and legal context. However, it would be difficult to suggest that it is a general practice that a legal notion is given a different meaning or interpretation upon transplantation.

In chapter two, Gao presents to the reader comments made by some pre-imperial Chinese thinkers and suggests that these remarks have profound influence on Chinese culture and should still have an impact on contemporary Chinese law. Quotations selected include the comments of Confucius on law, morality, punishment, family and governance, and comments made by Han Fei, the founder of legalism, Lu Buwei and Shang Yang (legalists), on law, governance and equity. Confucius' view was that 'if people be led by laws ... they will try to avoid the punishment but have no sense of shame', whereas 'if they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good'. It is true that Confucian sense of shame played an important role in disciplining people in traditional China.

Chapter three examines the Chinese phrase 'the rule of law' (*fazi*). Gao tries to explain the rule of law semiotically. She argues that the concept of the rule of law is triadic – relational, relative and contextual – in nature. She then examines the origin and evolution of *fazi*. She summarises the generally accepted definition of *fazi* in today's China: that *fazi* refers to the theories and principles for governing a country in accordance with law as opposed to rule by men. *Fazi* means the supremacy of law and equity before the law. She then turns to reality. She believes that in contemporary China, *fazi* is still largely an ideal being debated and trying to find its foothold, drawing on western thinking along the way. Gao notes that today, *fazi* is incorporated in the Chinese Constitution and is widely

discussed, and argues that the Chinese Constitution is symbolic with a low degree of modality and is seldom interpreted or acted on: having little living and tangible significance, except to the extent that it is frequently amended. She thus observes a worse scenario where *fazi* is elevated onto too lofty a shelf to be of any pragmatic use. I find this argument less than convincing. Nevertheless, Gao argues persuasively that *fazi* is yet to have its full impact on people's lives or behaviour, in particular, on the government in relation to governing the country.

Chapter four discusses some Chinese legal performatives, including *bixu* (must), *yingdang* (should, ought to), *keyi* (may) and *bude* (must not, shall not) and the different legal consequences of non-compliance when the above performatives are used with main verbs in legal clauses to impose an obligation. In semantic terms, *bixu* is stronger and more forceful than *yingdang*. *Yingdang* carries a sense of being compelled to do something, a sense of moral judgment, and a sense of what is right or wrong. Hence, *yingdang* has a moral connotation connecting to traditional Chinese thinking on morality. Nowadays, from the legislative point of view, no distinction is made between the two terms. They perform the same function, that is, to impose a mandatory obligation. Gao says that although the two terms are intended to be identical in meaning in legislation, the original meaning is not entirely lost in a general sense. She reveals her interesting finding that in some major Chinese laws, *yingdang* is used more frequently than *bixu*, while in some foreign oriented laws, mainly the *Law of the People's Republic of China on Entry and Exit of Aliens (1985)* and the *Rules for the Implementation of the Law of the People's Republic of China on Entry and Exit of Aliens (1986)* laws, *bixu* is used more frequently than *yingdang*. She does not wish to draw a premature conclusion as to the reasons of the above linguistic phenomenon before further study is done.

Chapter five discusses the Chinese terms of 'rights' (*quanli*) and 'power' (*quanli*). The two terms are homophonic in Chinese: while the term 'power' existed in classical Chinese, the concept of 'rights' was introduced into China in 1864. Gao also examines the impact of both Confucianism and communism on promotion of individual rights in China. While Confucianism dominated traditional China for more than two thousand years, Communism was the exclusive dominant ideology in Mao's China (1949-1976). Confucianism emphasises duties and communism stresses collective interests. The two doctrines act as an intervening force in China's assimilation of the notion of rights. Gao is convincing on the discussions that language changes much faster than culture does. As she has observed, linguistic change is much more visible while culture evolves in a more subtle and complex fashion, and much more slowly.

In chapter six, Gao argues that Chinese language is imprecise in nature. As a result, Chinese law suffers from ambiguity. She provides two examples illustrating the impreciseness of the Chinese language. The first case involves the word *jie* and *huan*. The single word, *jie* could mean borrow or lend. The distinction can be made when an assisting word is used, or when it is used in phrase (such as *jiedai*), or in context. For example, *jiegei* or *jiechu* means lend,

jiede or *jieru* means borrow. *Huan* means repay, However, it can also be pronounced as *hai* which means yet or still. Again, the distinction can be made when an assisting word is used or when it is read in context. An IOU stating that A lends B x amount of money, with B to repay y amount caused much confusion because both *jie* and *huan* were used in the IOU. While *jie* does not clarify whether A lends to B or borrows from B, *huan* can be interpreted as either A has repaid or still owes y amount of money. The second example provided is a weak one. A will in the Chinese classical style of writing was interpreted differently by different people. However, this was because different people put punctuations in different positions of the sentences, when reading the will. Historically, punctuations were not reflected in the Chinese classical style of writing. This occasionally caused some confusion.

In chapter seven, Gao discusses the Chinese Constitution from the perspective of a 'Speech Act'. The Constitution is regarded as a legislative Speech Act that follows certain legal institutional conventions. Gao argues that for the success of the Chinese constitutional Speech Acts, the addresser and the addressee must communicate simultaneously at two levels: the level of intersubjectivity and the level of the propositional contents of the principles and rules contained in the Constitution. Currently the Chinese Constitutional Speech Acts need to acquire an elocutionary force to consist in a capacity to move the Chinese public to accept the various valid claims contained in the Constitution and to act under the premise that the commitment signaled by the lawmaker is seriously meant.

Chapter eight examines Chinese lawmaking practice as a communicative and interpretive act. Gao proposes a model of lawmaking for the People's Republic of China. She is of the opinion that China's legislative system falls short of the minimal standard of a thin rule of law. To tackle the problem, she suggests that it is necessary to establish a bi-directional relationship between the author, or legislature, and the reader of the legislation including judges, practitioners and ordinary citizens. Citizens can therefore play a part in law-making, instead of just being passive receivers. Gao stresses the importance of increasing popular input and feedback in the legislative process in China, a country where, in the legislative process, information flows largely from the legislature to reader. She notices that China has made some progress towards the constructive law-making model proposed in this chapter, however, it still has a very long way to go.

Chapter nine addresses some linguistic issues of cross-culture legal translation between Chinese and English. Gao introduces the history of legal translation in China. The methods of translation used by the Chinese include using existing Chinese words, neologism and direct borrowing. This demonstrates the correlation between legal transplantation and evolution of the Chinese law, and the fact that modern Chinese legal language is largely a translated language. By analysing the conceptual gaps between Chinese and English, Gao explains the fact that when texts are translated for different audiences in different languages, confusions and misunderstandings are inevitable. By examining the Chinese experience in translating law, she illustrates that translation is an active process of

understanding and creation.

Chapter ten concludes the book by quoting Confucius and Johann Wolfgang von Goethe's remarks in *Confucius Analects* and *Faust: A Tragedy in Two Parts*.

Overall this book provides some interesting discussions, despite the debatable propositions put forward, on Chinese legal language. It reveals the power of language in the development of the Chinese law.

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BOOK REVIEW

Richard H Bartlett, *Native Title in Australia* (Butterworths, 2004)

Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003)

Marcia Langton, Maureen Tehan, Lisa Palmer, Kathryn Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004)

I

Native title law, once described by Kirby J as an 'impenetrable jungle of legislation'[1] and as requiring 'navigational skills of a high order'[2] is, however, beginning to settle. Recent High Court authority[3] has resolved important issues, mostly rendering it more difficult for claimants to achieve native title to such areas that remain available for claim. *Yorta Yorta Aboriginal Community v Victoria*,[4] in particular, focuses upon the *Native Title Act 1993* (Cth) as amended ('*Native Title Act*') as the prime source of law guiding this jurisdiction. The common law, including *Mabo v Queensland (No 2)*,[5] is now relegated to the secondary role of explicating the meaning of the *Native Title Act* where ambiguity arises. Short of further substantial amendments to the *Native Title Act*, the native title ground rules are now unfortunately set in unyielding, opaque and generally unpalatable statutory mud.[6] Hence, *Native Title in Australia*,[7] *Australian Native Title*,[8] and the essays contained in *Honour Among Nations? Treaties and Agreements with Indigenous People*[9] are all timely and valuable navigation aides, since these books embrace these developments, and focus on the *Native Title Act*.

1 *Wilson v Anderson* (2002) 213 CLR 401, 453.
2 Ibid.
3 *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Western Australia v Ward* (2002) 213 CLR 1 ('Ward').
4 (2002) 214 CLR 422.
5 (1992) 175 CLR 1 ('*Mabo (No 2)*').
6 In 1994, the Chairman of the then BHP Ltd stated that reading the Native Title Act was like reading porridge, and I demurred. We were both wrong. It's like reading mud. See Bryan Andrew Keon-Cohen, 'Mabo, Native Title and Compensation - Or How to Enjoy Your Porridge' (1995) 21 *Monash University Law Review* 84.
7 Richard H Bartlett, *Native Title in Australia* (2nd ed, 2004).
8 Melissa Perry and Stephen Lloyd, *Australian Native Title* (2003).
9 Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004) ('*Honour Among Nations?*').

II

Twelve years after *Mabo (No 2)*, what is the state of play? Statistics tell us a little about the two main streams of activity in this jurisdiction - seeking a determination of native title before the Federal Court,[10] and negotiating access and use agreements concerning land under claim (or successfully claimed), especially Indigenous Land Use Agreements ('ILUAs').[11] Many, perhaps several hundred, non-ILUA agreements settling claims, or negotiated under the 'future act regime'[12] pursuant to claimant's 'right to negotiate' once land is claimed, have been executed.[13] These two key areas, and more, are dealt with in all three texts, particularly in Barlett and in Langton. However, let me offer some observations on the state of literature and the state of jurisdiction reflected in the books under review.

First is the state of the literature which these books augment. 'Native title' crosses many boundaries, not just geographic. Its advent and impact has excited voluminous commentary, scholarly and otherwise, from many perspectives. Hundreds of substantial books and scholarly articles have now appeared, particularly in Australia and North America, and this creativity is not confined to print. Documentaries have been repeatedly screened, especially Trevor Graham's *Land Bilong Islanders*,[14] and the avalanche continues. The title of one recent publication, *Australian Cinema After Mabo*,[15] says it all. According to its publicity blurb, this book deals with Australian films of the 1990s from a particular angle – 'the cultural, political and personal "aftershocks" created by the historic Mabo land rights decision'.[16] I can hardly wait to read it.

As to the scholarly arena, since the High Court's judgments in *Mabo v Queensland (No 1)*[17] and *Mabo (No 2)*,[18] an enormous amount of literature has erupted across many disciplines, from law to linguistics to land valuation, and well beyond. A comprehensive bibliography would be too voluminous to

10 As of 13 September 2004, there were 602 active claimant applications (ACT 1, NSW 44, NT 187, Queensland 189, SA 26, Tasmania 1, Victoria 20, WA 134). In addition, 20 compensation claims and 20 non-claimant applications have been filed. As at October 2004, the Federal Court had made twelve determinations of native title under Native Title Act s 225 after contested hearings; approximately 26 determination have been made by consent (with no hearing necessary); several more have been made under *Native Title Act* ss 86G, 87, to the effect that native title does not exist. Hearing days 'peaked' at 113 (*Yorta Yorta*) and averaged 46. See 'Introduction', 'Recent Decisions and 'Current Cases' in (2004) 6 *Native Title News* 195, 211, 215.

11 As at 13 September 2004, 134 ILUAs were registered with the National Native Title Tribunal (NSW 4, NT 36, Queensland 80, SA 2, Victoria 11, WA 2) and 14 have been lodged for registration with the National Native Title Tribunal (NT 1, Queensland 9, SA 1, Victoria 3). Twelve applications to register an ILUA have been withdrawn (NT 1, Queensland 7, Victoria 3, WA 1).

12 Extensively amended in 1998 following *Wik Peoples v Queensland* (1996) 187 CLR 1 ('*Wik*'). See in particular *Native Title Act* pt 2, div 3, ss 24AA-44G.

13 Bartlett, above n 7, 443-521. See in particular *Native Title Act* pt 2, div 3, sub-div P, ss 25-44.

14 Screened on the ABC, at various film festivals in Australia and abroad, and in many school and university classrooms.

15 Felicity Collins and Therese Davie, *Australian Cinema After Mabo* (2004).

16 *Australian Book Review*, November 2004, 5.

17 (1988) 166 CLR 186 ('*Mabo (No 1)*').

18 (1992) 175 CLR 1.

mention here, but the books under review, particularly Bartlett's extensively referenced text, provide valuable guides to the literature.

On the legal practice side, most native title claims brought for trial before the Federal Court include expert evidence from, at least, the 'disciplines' of anthropology and history. For example, in the *Wongatha* trial before Lindgren J,[19] about 20 expert reports drawn from 'expert' disciplines such as anthropology, history, linguistics, archaeology, and ethno-botany were filed.[20] Each of these disciplines has generated a large literature in response to involvement in the native title industry. Just how influential all this material is, at trial, is a nice question. Judges tend to dislike it, and the primary evidence of the indigenous claimants rightly remains the focus of attention. However, it seems somebody out there is interested to hear it and read it, for the conference papers and books continue to appear.

For legal practitioners, several publications stand out, amongst them are two books reviewed here: Bartlett and Perry. Others already in the marketplace, and often found on bar tables and solicitors' desks around the nation, are Butterworths' *Native Title Service*, various publications by the National Native Title Tribunal,[21] and two specialist periodicals produced by the Indigenous Law Centre at the University of New South Wales Law School: the *Indigenous Law Bulletin* and the peer-reviewed *Australian Indigenous Law Reporter*. Finally, Butterworths' *Native Title News* is a no-nonsense, information-focused quarterly journal listing current cases and negotiations, their state-of-play, plus short review articles. The jurisdiction being so large and complex, there is plenty to talk about.

On the academic side, a large volume of material has appeared canvassing the 'modern era' which reaches back 35 years to the 1971 decision of *Milirrpum v Nabalco Pty Ltd*,[22] and even further, to the 1960s, if we include, as we should, the pioneering legislation of the Dunston government in South Australia during the 1960s.[23] In the *Gove* case, Blackburn J in the Northern Territory Supreme Court triggered an academic storm when he rejected native title claims to areas of north-east Arnham land. This interest was heightened by the Whitlam Labor government's *Northern Territory Land Rights Bill*, which fell with its proposers on 11 November 1975. The Bill was re-introduced in amended form by the incoming Fraser government and enacted in 1976 as the *Aboriginal Land Rights*

19 The hearing of evidence began in March 2001 and was completed on 10 December 2003. Nine interlocutory decisions have been handed down, the latest being *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 8)* (2004) 207 ALR 483, concerning exceptions to the hearsay rule under *Evidence Act 1995* (Cth). The hearing finished in June 2004 upon delivery of written and oral submissions and at the time of writing (February 2005), the Court's determination is pending.

20 Questions arose in that trial as to whether a historian and an 'ethno-botanist' qualified as an 'expert' for the purposes of the *Evidence Act 1995* (Cth), see *Harrington-Smith v Western Australia (No 7)* (2003) 130 FCR 424.

21 Available at <http://www.nntt.gov.au>.

22 (1971) 17 FLR 141 ('*Gove*').

23 See, eg, *Aboriginal and Historic Relics Preservation Act 1965* (SA) and *Aboriginal Lands Trust Act 1966* (SA).

(Northern Territory) Act 1976 (Cth). That legislation led to numerous hearings before, and reports by, various Commissioners during the 1970s, 1980s and 1990s, the first of whom was John Toohey QC, later Toohey J of the High Court. Pens were working in earnest by then, and numerous works appeared during those decades. These focused on the Territory legislation, its administration, and the unacceptable (to most academics at least) state of the law in other Australian States and Territories. Further, international initiatives and comparisons were reviewed, especially with the work of the United Nations Working Group on Indigenous Populations,[24] and its *Draft Declaration of the Rights of Indigenous Peoples*. However, this negotiation and drafting exercise which began in 1985 and concluded in 1993 (the draft declaration remains unresolved in the UN bureaucracy)[25] is, strangely, barely mentioned in Langton's book.[26]

Secondly, to the state of the jurisdiction. In an area so diffuse, generalisations can be dangerous. However, I would have to characterise it as depressed, largely resulting from the federal government's determined and successful efforts to confine the availability and strength of native title to an absolute minimum through legislation, and then for good measure, the flogging of the unruly beast into a comatose state by starving it of funds at various critical points. In case this assessment is considered unbalanced from a 'partisan' advocate, I note, first, the 'statutory corruption' comment of Rio Tinto's Bruce Harvey, from the Langton's book.[27] Secondly, I note the comments of McHugh J, who in *Ward* declared the entire native title system to be 'costly and time-consuming'[28] with the 'deck ... stacked against the native-title holders whose fragile rights must give way to the superior rights of landholders'.[29] His Honour considered that the present scheme should be abandoned in favour of an 'arbitral system that declares what the rights of the parties *ought to be* according to the justice and circumstances of the individual case' (original emphasis). Sadly, I agree. But we all remain firmly stuck in the legal mud.

24 The Group comprised of five members of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. This was an expert group that allowed unrestricted access of indigenous people to its annual meetings in Geneva. In Geneva in 1994, a total of 162 indigenous organisations from around the world attended. The Group reports to the UN Commission on Human Rights; the Commission (a political body) reports to the Economic and Social Council, which in turn, reports to the General Assembly. The Draft Declaration thus still has a long way to go. See Catherine J Iorns Magallanes, 'International Human Rights and their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada and New Zealand' in Paul Havemann (ed), *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (1999) 235, 239-40.

25 For an overview of this lengthy process by the United Nations bureaucracy, see Marcia L Langton, 'The United Nations and Indigenous Minorities: A Report on the United Nations Working Group on Indigenous Populations' in Barbara Hocking (ed), *International Law and Aboriginal Human Rights* (1988) 83. For the text of the Declaration, see the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, '1994/45 Draft United Nations declaration on the rights of indigenous peoples' (1996) 1(1) *Australian Indigenous Law Reporter* 133.

26 A sole (passing) reference mentioned in the Index of *Honour Among Nations?* is all that could be found: at 299.

27 See below, text at footnote 97.

28 *Ward* (2002) 213 CLR 1, 241.

29 Ibid 240-1.

As to the jurisdiction's financial coma, let me give one recent practical example, the Wangatha native title claim.[30] Eight Aboriginal groups totalling about 2000 individuals are making overlapping claims to a remote area of country north-east of Kalgoorlie, Western Australia. About 500 respondents are involved, including State and federal governments, pastoralists, mining companies, Telstra and local shire councils. I act for four claimant groups. The trial has been running on and off for three years, with final written and oral submissions delivered to the trial Judge (Lindgren J) in June 2004. At the time of writing, February 2005, we all await his Honour's determination.

According to Lindgren J, 'the history in relation to funding [of the claimants] ... presents a sorry and unfortunate picture'.[31] The claim and the trial process was initially supported with a grant of funds, plus provision for consideration of further possible grants, by the Commonwealth via the then allegedly functioning, Native Title branch of the Aboriginal and Torres Strait Islander Commission ('ATSIC').[32] For reasons wholly unrelated to my clients' funding, the trial was adjourned from time to time, including between November 2002 and 4 August 2003.

During that adjournment, the Representative Body ('GLSC'),[33] acting for my clients[34] made repeated requests to the Native Title Branch of ATSIC, for a further grant of aid,[35] for its funds were exhausted. From November 2002 to July 2003, despite repeated requests, ATSIC either did not respond, or gave no clear answer, about the status of the GLSC's application for further funding. This being so, on 19 June 2003, six weeks prior to the commencement of the re-convened trial, the GLSC made application, by video link, to adjourn the forthcoming tranche of evidence on the basis that it was not possible for the claimants to arrange alternative funding and that my clients, in the current funding-hiatus, would not be legally represented in the forthcoming sittings and obviously could not adequately represent themselves. This situation, I argued, raised a serious threat of injustice.

Following this hearing on 19 June, ATSIC hurriedly provided limited funds to the GLSC to enable the claimants' anthropologists to participate in a previously arranged 'hot tub' conference. On 20 June, ATSIC wrote to the GLSC advising that a decision was 'anticipated' by the end of July.[36] As Lindgren J concluded in written reasons, delivered on 26 June 2003,[37] '[i]n other words, the GLSC

30 See the latest interlocutory ruling, *Harrington-Smith v Western Australia (No 8)* (2004) 207 ALR 483.

31 *Harrington-Smith v Western Australia (No 6)* [2003] FCA 663 (Unreported, Lindgren J, 26 June 2003) [11].

32 Ibid [12]. To June 2003, $454,000 had been provided.

33 The Goldfields Land and Sea Council, Kalgoorlie, a Native Title Representative Body carrying out facilitation and assistance functions pursuant to *Native Title Act* ss 203B, 203BB.

34 The GLSC acts for four claimant groups. Four additional aboriginal groups, making overlapping claims, are separately represented with their own funding problems which I do not discuss here.

35 See, for an account of these communications, *Harrington-Smith v Western Australia (No 6)* [2003] FCA 663 (Unreported, Lindgren J, 26 June 2003) [13]-[14].

36 Ibid [30].

37 Ibid [31].

applicants will have only one working day between finding out whether they are funded by ATSIC, and the resumption of the hearing'.

Lindgren J rejected the claimants' application. Whilst acknowledging the claimants' serious difficulties, the unsatisfactory conduct of ATSIC, and the undesirability of indigenous claimants being forced-on unrepresented, on balance, his Honour preferred to proceed with the trial in the period allocated. His Honour pointed out that this was an important case which would most likely set precedents for many like it, then (and now) pending, in the Goldfields region; the difficulty of obtaining alternative hearing dates; and the risk of losing witnesses.[38]

That such still-unexplained procrastination should arise within the Native Title Branch, or one presumes, amongst the senior leadership, of the little-lamented former ATSIC is scandalous. After all, it is ATSIC's own constituency that is damaged by such bureaucratic incompetence. That ATSIC itself and, in turn, my instructors, are severely under-funded by the Commonwealth government, to enable ATSIC and Representative Bodies to properly support the native title process, whilst opponents of claims are adequately funded by the same Commonwealth, is simply bizarre and grossly unjust. That neither any government of any political persuasion, nor the general community, seem to care is both obvious and a sign of the depression and despair that now permeates this jurisdiction.

III NATIVE TITLE IN AUSTRALIA

For those who still wish to read a scholarly text about native title, Bartlett's *Native Title in Australia* is unquestionably the text to buy. Sadly, but understandably, it exhibits the anger and disillusionment discernable in this review. This is because Bartlett and I both believe that citizens' rights should be protected and advanced, not minimised. Only those flushed with both a full panoply of jealously guarded and frequently asserted personal rights as well as an assumed God-given 'right to rule' could say otherwise. The first edition, published in 2000, as noted in the Preface 'was grounded on the principle of the recognition of native title declared ... in *Mabo No 2* (1992), and applied in *Wik* (1996), that of equality'.[39] This second edition, however, is responding to a radically different environment. As Bartlett states:

> The High Court ... has in the *Ward* (2002) and *Yorta Yorta* (2002) decisions seemingly rejected the rationale of equality in favour of that of the uniqueness and subordinate status of native title grounded in traditional laws and customs. The unique rationale of native title has been relied upon:

38 Ibid [32]-[49].
39 Bartlett, above n 7, xxvii.

- to impose unique and substantial barriers to proof of native title,
- to narrow, if not, freeze the content of native title, and
- to broaden and declare a wide scope for the operation of the extinguishment of native title.[40]

Bartlett continues:

> Lower courts, taking the lead from the current High Court, have gone so far as to suggest that shopping in a supermarket may deny proof of native title (*De Rose*, 2002) and that native title may include the right to live in humpies but not houses (*Daniel*, 2003). The resultant common law jurisprudence in Australia is significantly at variance with principles of equality declared and applied to native title elsewhere in the world.[41]

These developments, among others, particularly the High Court's focus on the *Native Title Act* as the starting point in 'determining the character of native title'[42] and relegating the common law to merely assisting in understanding the meaning of the statute, plus the need to update all of the material, has led to substantial changes and the inclusion of significant, and often critical, additional material in this second edition.

Are these criticisms sound? Is the prevailing sense of disappointment amongst supporters of native title anything more than the normal dejection of failed litigants? In my view, clearly not – Bartlett's points are good. The national opportunity represented by *Mabo (No 2)* has been squandered. This represents a failure of political will and, behind that, of national sensibility which the country is increasingly recognising but, it seems, is not regretting.

In such an environment, this comprehensive book records significant legal initiatives and achievements since 1992, wide-spread dissatisfaction and disappointment on all sides, and casts much-needed 'rays of light'[43] into the native title 'jungle'.[44] As Bartlett says:

> The book seeks in eight parts and 31 chapters to trace the historic, political and legal background to native title, to determine the nature of the concept, its proof, content and extinguishment, to explain its limited degree of protection in the context of future acts, and to apply the principles to resource development and traditional pursuits. The last chapters address the institutions of native title [part 7, chapters 28, 29, 30] and compare the Australian legislative approach to that of regional agreements in North America [chapter 31]. Three new chapters, including another part, have been

40 Ibid.
41 Ibid.
42 Ibid xxvii.
43 *Wilson v Anderson* (2002) 213 CLR 401, 453 (Kirby J).
44 Ibid 453, 454.

> added in [this] edition. They address the 'Retreat from *Mabo*' [chapter 6] declared in Ward, the 'Onerous Burden of Proof' [chapter 7] depicted in *Yorta Yorta*, and the relationship between fiduciary obligation and native title [chapter 24].[45]

The book does all these things competently and exhaustively. It reads well, examines the common law and statutory complexities thoroughly, is abundantly sourced, and takes strong stands on contentious issues. It also ventures into the theoretical and speculative. For example, chapter 24 discusses the issue of whether in Australia, the Crown should be held to be in a fiduciary relationship with indigenous peoples when dealing with native title land and the results of such a finding. Though such a relationship has been found to exist in North America,[46] though Deane, Gaudron and Toohey JJ supported such a finding in *Mabo (No 2)*,[47] and though the issue remains to be comprehensively ruled upon by the High Court,[48] the clear indications are that the current Court would forcefully reject such a development in Australian law. Undeterred, Bartlett considers 'the powers which the Crown exercises over native title lands, the degree if any of fiduciary accountability which the courts will attach, and the significance of fiduciary obligation in the context of the *Native Title Act*'.[49] After a review of decided cases, Bartlett concludes, somewhat equivocally, that 'Australian authority favours the finding of a fiduciary obligation with respect to the control and management of Aboriginal reserves'.[50] This, in my view, is wishful thinking. Likewise, chapter 30, which provides a comparative analysis of experience in USA, Canada and Australia in reaching agreements, ranges into analysis of both legal and political matters well removed from Australia experience.

These 'theoretical' and 'comparative' themes are worthy additions in an already large text but might, I feel, be better published as separate articles or monographs. On the other hand, part of the value of this publication is its wide and long view – clearly the 'fiduciary duty' question along with 'sovereignty' are the next battlegrounds in this area of law and policy, if there are to be further battles. These parts of this text will be particularly valuable to the rising generation of lawyers and aboriginal activists (hopefully, increasingly one and the same in the

45 Bartlett, above n 7, xxviii.

46 Ibid 590-1. For Canada, see *Guerin v R* [1984] 2 SCR 335 and *Wewaykun Indian Band v Canada* [2003] 1 CNLR 341. For USA see *United States v Mitchell II*, 103 S Ct 2961, 2970, 2971-2 (1983). The different constitutional arrangements in North America favouring a general fiduciary obligation should also be noted. See also, for Canada, *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, s 35; and for the domestic dependant status of Indian Tribes in the USA: see *Worcester v Georgia*, 31 US 515 (1832) (Marshall CJ).

47 *Mabo (No 2)* (1992) 175 CLR 1, 100, 112, 113, 119 (Deane and Gaudron JJ) and 200-5 (Toohey J). They concluded that the imposition of a fiduciary duty would render the Crown a constructive trustee.

48 See Bartlett, above n 7, 588-9. In *Wik* (1996) 187 CLR 1, 96, Brennan CJ, with whom McHugh and Dawson JJ concurred (all in dissent), strongly rejected any such duty. However, Kirby J has more recently noted that the question remains open: *Thorpe v Commonwealth (No 3)* (1997) 144 ALR 677, 688.

49 Bartlett, above n 7, 580.

50 Ibid 593.

years ahead). The comparative material reminds Australian readers how we stack up against equivalent jurisdictions. Suffice to say that all jurisdictions have continuing problems coping with native title and Australia continues to run a long second on many criteria to the most comparable jurisdiction, Canada.

More generally, Bartlett's book is divided into 8 parts. Part 1, 'The Background', chronologically deals with relevant legal developments. It describes the common law jurisprudence drawn from North America[51] and the Privy Council on appeal from the colonies, especially Africa, leading to the first significant Australian land rights case in the modern era, *Gove*.[52] Then follows a discussion of *Mabo (No 1)* and *Mabo (No 2)* (chapter 2) and the political and legislative responses to those so-called 'revolutions' (chapter 3) – a most inept description.[53] The *Wik* case[54] of 1996 and the issue of how native title might or might not fit with pastoral leases is discussed (chapter 4), followed by the Howard government's 'Ten Point Plan' (chapter 5) by way of response to *Wik*, leading to Bartlett's constant theme: 'A denial of equality before the law'.[55] The 'Retreat from Mabo' (chapter 6), represented especially by the *Ward* decision,[56] leading to 'frozen rights' and 'judicial denial of equality' is discussed;[57] and the 'Onerous Burden of Proof' represented by the sequence of decisions in the *Yorta Yorta* cases is discussed in chapter 7.[58] Finally, chapter 8 deals with the 'Constitutional Framework of Native Title'. The chapter considers, amongst others, State and federal jurisdictions, and the three powers of the Commonwealth Parliament of relevance: external affairs s 51(xxix), race s 51(xxvi) and acquisition of property s 51(xxxi).

Part 1 is thus both an introduction to the issues and an overview of the native title experience, since 1992. Much of the material is discussed in greater detail in subsequent chapters.

Part 2 (chapters 9-14) deals with 'The Nature of Native Title'. Collected under this somewhat amorphous heading are useful discussions of the concept (chapter 9), its proof (chapter 10), the claim process before the National Native Title Tribunal and the Federal Court (chapter 11), the content of native title (chapter 12, ie, meaning what activities or resources it extends to, including comparative material, again from Canada and the USA), its transferability and alienability (chapter 13) and its proprietary nature (chapter 14). This material includes, importantly, an analysis of what is required for governments and others to achieve the extinguishment of native title.

Part 3, headed 'Extinguishment and Validation' (chapters 15-19), deals with the

51 Commencing with the well-known *Johnson v McIntosh*, 21 US 543 (1823) (Marshall CJ).
52 (1971) 17 FLR 141.
53 A description employed from Margaret A Stephenson and Suri Ratnapala (eds), *Mabo, A Judicial Revolution: the Aboriginal land rights decision and its impact on Australian law* (1993).
54 *Wik* (1996) 187 CLR 1.
55 Bartlett, above n 7, 63, 581-2.
56 *Ward* (2002) 213 CLR 1.
57 Bartlett, above n 7, 65.
58 *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606; *Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244; *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

most complex aspects of the *Native Title Act* and some of its most convoluted statutory drafting. This material deals with jurisdiction and powers to extinguish native title under common law, State complementary laws, and the *Native Title Act* itself, with special regard to the protective umbrella of the *Racial Discrimination Act 1975* (Cth) highlighted in *Mabo (No 1)*. Thus 'Extinguishment and Impairment at Common Law' from 1788 to 1975 – the date of coming into law of the *Racial Discrimination Act 1975* (Cth) – is discussed (chapter 16) and with reference to other key dates set out in the Act such as 18 December 1996, being the date of the handing down of *Wik* by the High Court.

The complex political and legal over-kill in this area of the law, intended to achieve the 'bucket loads of extinguishment' gleefully promised in 1998 by the then Deputy Prime Minister, Tim Fisher, is a prime example of the national failure spoken of above. This complexity is also demonstrated by the fact that chapter 16 is the longest in the book. Given that native title rights are inferior to and, in situations of conflict, must yield to all other property rights granted by the Crown, the need for this vast panoply of extinguishment beggars belief.

A useful point of contrast, and an indication of national regression over the two decades between 1976 and 1993, especially indicated by the amendments to the *Native Title Act* in 1998, are the terms of the abovementioned Fraser Government's 1976 legislation establishing a land rights regime in the Northern Territory, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Under that legislation, areas successfully claimed are vested in trust in an estate in fee simple, without any overarching, crushing regime of extinguishment being involved.[59] Further, schedule 1 to that legislation vested in the relevant traditional land-holding group, without need for any claims process, aboriginal reserves then existing in the Territory – again, in an estate in fee simple held in trust. Why was this level of land restitution not done 17 years later under the *Native Title Act*? The answer no doubt lies in the Keating government's cabinet papers, public-opinion polls conducted at the time, and in the entrenched limits of our federal system. Thus, senior politicians like Brian Burke, former WA State Premier, supported by the WA mining industry, strenuously opposed Prime Minister Bob Hawke's brave announcement in June 1983 of national land rights legislation and his further promise in June 1988 that a treaty would be 'negotiated between the Aboriginal people and the Government on behalf of all the people of Australia'.[60] How times and politics have changed.

Part 4 (chapters 20-23), 'Future Dealings', discusses the 'future act' regime under the *Native Title Act*. The technical details are clearly and thoroughly presented,

59 For discussion on this legislation and its operation, see Graeme Neate, *Aboriginal Land Rights Law in the Northern Territory* (1989), Nicolas Peterson and Marcia Langton (eds) *Aborigines, Land and Land Rights* (1983). See also John Reeves, *Building on Land Rights for the Next Generation: the Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (1998).

60 See generally Robert Tickner, *Taking a Stand, Land Rights to Reconciliation* (2001) 21, 27-47; Hannah McGlade, 'Native Title, "Tides of History and our Continuing Claims for Justice, Sovereignty, Self Determination and Treaty"' in ATSIC (ed), *Treaty: Let's Get It Right* (2003), 118.

especially the question of which future acts (ie dealings) over land the subject of a native title claim will be held valid, or invalid, and why (chapter 20). The associated 'Right to Negotiate' and the 1998 reforms (part of the ubiquitous Ten Point Plan) strengthening the provisions of the *Native Title Act* which foster negotiated outcomes, rather than litigation, are also reviewed in chapter 21.

Bartlett justifiably deals extensively with this topic, for this arena is the one clear success story of the legislation. The trend – accelerated by the abovementioned restrictive aspects of the 1998 amendments, the equally restrictive decisions of the High Court and the need of the Federal Court to deal with the 602 claimant applications now filed – to seek to reach agreement with those wishing to enter and utilise land the subject of native title claims for various purposes (usually development of one sort or another) as a sensible alternative to litigation, continues apace.

This whole topic, now a sub-industry in itself, is dealt with from various perspectives, in the Langton book (see below) and is a central concern of perhaps the most significant *Native Title Act* institution – the National Native Title Tribunal. Its job, amongst others, is to receive new claims filed in the Federal Court (*Native Title Act* ss 63 and 64(4)), notify interested parties of the claim (*Native Title Act* s 66), and apply a 'registration test' to them.[61] Following controversial amendments in 1998, if a claim passes the statutory tests, it is entered into a statutory register of native title claims,[62] whereupon the 'registered applicants' achieve, without more, the 'right to negotiate'[63] with regard to the claimed land.[64] The National Native Title Tribunal then pursues further key tasks: facilitating, mediating and generally assisting parties to get together around an round table (often large) to seek to resolve terms and conditions of access and use of the land and its resources. In addition, where some or all of the claimed native title rights are conceded, the parties to a claim may reach agreement upon the terms of a consent determination of the claim itself.

The *Native Title Act* encourages parties to enter into various forms of ILUAs, which, once executed and approved by the National Native Title Tribunal are placed (subject to commercial in confidence aspects) upon yet another register.[65] Once so registered, an ILUA by force of the *Native Title Act*, over and above its contractual effect inter-parties, binds all persons enjoying, or claiming, native title rights in the subject land.

Since 1994, hundreds, of native title agreements have been entered into, and many more are in the pipeline. Given the state of the jurisprudence, and short of

61 See *Native Title Act*, pt 7, ss 184-191, especially ss 190A-C. Registration requires, amongst other things, that prima facie at least, some of the native title rights claimed in the application, and supporting materials, can be established: *Native Title Act* s 190B(6).

62 See *Native Title Act*, pt 7, ss 185, 186.

63 And other, lesser, consultative or objection rights usefully listed in Bartlett, above n 7, 187.

64 See *Native Title Act*, ss 29, 31, 38. This process involves receipt of notification of proposed future acts, negotiation in good faith of terms and conditions of entry with the proponent, an arbitral body (the National Native Title Tribunal) determination of whether an act might be done.

65 See *Native Title Act*, pt 8A, ss 199A-F.

deaths drastically reshaping the current High Court, and a change of government in Canberra, fewer and fewer claimants are likely to opt to proceed to trial, preferring to rely upon agreement-making as the most fruitful means of resolving their claims. One of the anomalies of this jurisdiction is that whilst governments of all political hues and at the two senior levels – State and Federal, (but not local) – are the most determined of all respondents at the bar table (far exceeding, for example, miners and pastoralists in their forensic efforts to defeat claims) those same governments are sitting around negotiation tables with other claimants, seeking to be 'good neighbours' and to achieve 'lasting outcomes and relationships' in an environment of 'respect for native title rights'. The duplicity, and wastage, of governments never ceases to amaze. If this 'respect' is genuine, why do these same governments, through their counsel, take every point, aggressively cross-examine claimants and their expert witnesses, refuse to even consider settling claims, and launch appeals at every opportunity? Could it be that Ministers do not know, or don't care, what counsel do, in court, in their name? Or should we look to the Courts, not negotiation tables, or spin-saturated media releases, to best understand a government's true position? This double-faced scenario is most evident in South Australia, where useful state-wide negotiations involving indigenous peak bodies and the South Australian government have run for several years whilst, at the same time, the state strenuously, and successfully, opposed the *De Rose Hill* claim.[66]

Part 6 (chapters 25-27), 'Resource Developments and Traditional Pursuits', is important and an area well known to the author.[67] Bartlett discusses 'Minerals and Petroleum' (chapter 25), 'Water' (chapter 26) and 'Hunting, Fishing and Gathering Rights' (chapter 27). The approach here is to examine whether native title includes, or may include, traditional rights to, for example minerals and water – and then to discuss the extinguishment regime under the *Native Title Act* which largely removes those rights or renders them subservient to a crown grantee's rights.

The material here is the most dense and difficult foliage of all and its navigation demands both much concentration and a copy of the *Native Title Act* close at hand (though generally not the fault of Bartlett). For example, in discussing the so-called 'freehold test' under the heading 'Mining and Petroleum Tenements' Bartlett informs the reader:

> The freehold test validates grants of mining and petroleum tenements which would be valid in relation to the land if the native title holders interests were freehold interests ('ordinary title') or would be valid in relation to the water if they instead held freehold to the land adjoining or surrounding the water.[68]

66 *De Rose Hill v South Australia* [2002] FCA 1342 (Unreported, O'Loughlin J, 1 November 2002); and on appeal *De Rose Hill v South Australia* (2003) 133 FCR 325.

67 Bartlett is also the Director of the Centre for Mining, Energy, and Natural Resources Law in the University of Western Australia.

68 Bartlett, above n 7, 613.

This is difficult enough to comprehend, yet on the following page under the heading 'Mining and Petroleum Legislation' the following appears:

> The freehold test validates future mining and petroleum legislation which applies in the same way to native title holders as it would if they instead held freehold, 'ordinary title' (for example, the making of legislation that permits mining on land in respect of which there is either native title or freehold), or which does not place them in a more disadvantageous position at law than if they instead held 'ordinary title' (for example, the amendment of legislation that permits mining on land that is subject to freehold so that it will also permit mining, on the same terms, as land in relation to which native title exists)...[69]

Dear reader, good luck in the jungle. Totalling 105 words and symbols, this sentence gives lawyers and native title a bad name. It is typical of the *Native Title Act*, but fortunately, not typical of Bartlett's writing. He can do much better and should have done so here. For those still interested in reading on, s 24MA of the *Native Title Act* arises from the 1998 'Ten Point Plan' and is a fair reflection of much of that torturous Bill and its underlying philosophy: 'bucket loads of extinguishment'.

As to 'Hunting Fishing and Gathering Rights' (chapter 27) and the conceptual shift entailed, Bartlett examines the degree to which these traditional rights are recognised and protected at common law, by the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act* itself. This chapter considers 'the scope of the right, the problems of proof, the likelihood of surviving extinguishment by legislation, and whether any different regime applies in the offshore [sic]. It raises questions as to the limited protection accorded the native title right to fish by the [*Native Title Act*].'[70]

This chapter demonstrates, however, one of the weaknesses of this book – an excessive propensity to refer to Canadian authority on a range of issues.[71] Such reliance is not useful and is unnecessary. First, it is not useful because the different legal context means that Canadian authority is rarely a reliable guide to the law in Australia, especially given the Australian focus on the *Native Title Act*, not the Australian (let alone Canadian) common law. Secondly, it is not useful because Australian judges, when interpreting this statute (or others) are rarely interested in such international explications, though they undoubtedly enrich the text and raise ideas for future directions of Australian law. The Canadian reliance is also unnecessary because in contrast to the time when the first edition of this book appeared (2000), significant authority now exists to deal with many issues under discussion. This is not a question of parochial legal analysis or a practical (necessary myopic) view of the task at hand, rather, it is a question of stating what the law is as compared to the author's view of what it should be.

69 Ibid 614.
70 Ibid 640.
71 For example, on pages 642-3, Bartlett extensively discusses and quotes from three Canadian cases.

Another example of this problem is seen at page 132, where criteria for establishing a native title holding 'group' are discussed. After reference to Australian authority, Bartlett lets go, saying: 'This approach is also found in North American jurisprudence',[72] and then pursues a page-and-a-half of discussion of Canadian and US cases. This leads to a listing of eight 'significant factors' said by Bartlett to be relevant to a court determining 'the group' with several of these factors supported, in part, by North American authority.[73] But reliance upon such material (particularly from the USA) can be extremely dangerous before an Australian judge, particularly if he (now all he's) happens to sit on the High Court. The local material is always preferred. And if there is no authority, this High Court directs judges to, first and foremost, go back to the words of the *Native Title Act*; and only thereafter, if doubt exists refer to allegedly helpful authority from other jurisdictions.

The book contains niggling failings of presentation, some trifling in a book as comprehensively sourced, and as large as this, others more serious. Amongst the trifling genre is the following astonishing information, at para 10.46: '(see paras [zzzz], [mmmmmm])'. This editorial glitch is found elsewhere: see, eg, para 10.43, footnote 52. Again, the Table of Statutes (p IXV) refers the reader to a USA Constitutional provision which, in truth, does not exist. This is unfortunate and should not happen. Again, throughout the text, is found a mysterious and distracting habit of inserting some references in the text, often running to two lines or more, (see p 617, to 9 lines) while other references are relegated to footnotes. No rational basis for this haphazard presentation is demonstrated. A variation on this niggle is the propensity, sometimes marked, to hide a footnote on the following page – or pages.[74] Small irritations perhaps, but books of this standard attract the search for perfection. By contrast, the physical presentation of the material is exemplary: clear text, bold and helpful headings and sub-headings, clear pagination and paragraph-numbering, all integrated with a detailed index that makes navigation through 735 pages a physical pleasure. Unfortunately, however, even Lexis Nexis Butterworths cannot transform political disgrace and legal complexity into intellectual delight.

Overall, *Native Title in Australia* is a valuable addition to the already existing copious scholarly works which discuss Australian native title.

IV AUSTRALIAN NATIVE TITLE LAW

The philosophies underlying Barlett's work could not be more diverse than those demonstrated in Perry and Lloyd's *Australian Native Title Law*. Bartlett's work is guided by a philosophy that befits a leading academic and occasional

72 Bartlett, above n 7, 132.
73 For similar examples, see Bartlett, above n 7, 143, 149, 154-5.
74 Again, this happens constantly, an extreme example appearing at pages 620-22. At pages 620-1, footnotes 55-9 appear, but only footnote 55 (being 25 lines of dense references) is visible at page 621. Footnotes 56-9 must be sought over the page, at pages 622-3.

practitioner who has advocated powerfully, in many fora, for indigenous people. In contrast, Perry and Lloyd merely state the law and its impact, and appear to have written their text for practitioners acting for respondents in various courts. Despite this, *Australian Native Title Law*, like Bartlett's *Native Title in Australia*, successfully bestrides the artificial divide that some would erect between academia and practice.

Australian Native Title Law comprises a volume plus an attached CD-ROM. It is a well-presented, detailed, and comprehensive package – essentially an annotated *Native Title Act* – that is a valuable first port-of-call for practitioners and students alike.

The volume contains three elements. First is a section entitled 'Native Title: Essential Principles and Concepts'. This discusses the recognition of native title in *Mabo (No 2)*, its definition as now set out in the *Native Title Act*, and its nature and incidents. The regime imposed by the *Native Title Act* is then discussed, again broadly. The provisions whereby native title is protected amongst a welter of executive acts and other property interests, called 'past acts' (ie activities of the executive, such as the granting out of a lease-hold interest prior to stipulated dates), 'future acts', and others are discussed. The protection accorded by ss 9 and 10 of the *Racial Discrimination Act 1975* (Cth) and lastly, extinguishment of native title, both under the common law and the *Native Title Act*, is referred to.

The second, and by far the longest, element is a comprehensive annotation to the provisions of the *Native Title Act*. Each section of the Act is clearly set out with the author's commentary immediately following. The discussion is practical with extensive reference to authority, especially the considerable number of rulings and determinations now delivered. There is also reference to the role and decisions of the National Native Title Tribunal, to parliamentary materials such as explanatory memoranda, and to the extensive complementary State and Territory legislation enacted as part of the nation-wide statutory response to *Mabo (No 2)*. Thus, for example, as facilitated by s 19 of the *Native Title Act*, each of the States and Territories has enacted laws to provide for the validation of 'past acts' attributable to that State or Territory, and these various laws are listed and briefly discussed.[75] Many sub-headings appear in the commentary, providing a useful guide to the reader, and where significant amendments were made by the *Native Title Amendment Act 1998* (Cth) these too are explained, along with their impact on the law.

Useful tables and summaries are also provided on various topics. For example, a discussion of the statutory definition of a 'commercial lease' (s 246 of the *Native Title Act*) is followed by a short list of decisions which have discussed the point.[76] The law is stated as at 10 September 2003 and the text contains extensive reference to unreported decisions. There is a 'stop press' page noting nine decisions handed down since 10 September 2003.[77]

75 Perry and Lloyd, above n 8, 124.
76 Ibid 822.
77 Ibid xxxix.

The third element of the volume contains the usual tables of cases, statutes and index, all of which are thoroughly compiled. In addition, the transitional provisions of the 1998 amendments, and O 78 of the *Federal Court Rules* (which deals with Native Title Proceedings) are reproduced in the volume's appendices. This text is clearly presented and is a quality product. However, a seemingly haphazard allocation of citations either scattered throughout the text, or relegated to footnotes, is a distracting irritation.

The CD-ROM contains a copy of the *Native Title Act*, Regulations made under the Act, various Notices made under Regulations and, very usefully, the full text of most of the native title cases referred to. However, some significant cases decided prior to 10 September 2003 such as the *Yorta Yorta* cases,[78] are not included, nor is the complementary State and Territory legislation. This is a pity if one wished to purchase a comprehensive package.

The attached CD also includes Adobe Acrobat Reader 5+, software that facilitates searches, with helpful instructions for searching cases and statutes. Indexes of legislation and cases included in the CD are arranged alphabetically and appear on the opening page. The system is user-friendly and seems easy enough to navigate.

The authors, both experienced native title practitioners who have appeared in numerous cases, advise in their 'Preface and User's Guide' that comments are welcomed, for they 'anticipate publishing further editions.'

V HONOUR AMONG NATIONS? TREATIES AND AGREEMENTS WITH INDIGENOUS PEOPLE

This collection of essays in *Honour Among Nations* is a different type of book concerning one aspect of the indigenous debate: the role and nature of treaties and agreement making. It fights for its place amongst many publications of similar character such as reviews focusing on Australia,[79] and those of a comparative nature.[80]

The book's main strengths are that the authors draw together, especially in the comparative chapters, experience to date following *Mabo (No 2)* and the emphasis on agreement-making emphasised in the 1998 amendments to the *Native Title Act*. These experiences are placed in the context of developments overseas, particularly, but not limited to, New Zealand and Canada.

78 *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606; *Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244; *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

79 See, eg, Mary Edmunds (ed), *Regional Agreements: Key Issues in Australia* (1999).

80 See, eg, Richard Howitt, John Connell and Phillip Hirsch (eds), *Resources, Nations and Indigenous Peoples: Case Studies from Australasia, Melanesia and Southeast Asia* (1996); Garth Nettheim, Gary Meyers and Donna Craig, *Indigenous Peoples and Governance Structures* (2002); and Havemann, above n 24.

Issues running through these essays focus upon sovereignty, treaty and agreement making, land rights, autonomy and self-determination. The treaty-making approach adopted (historically at least), in North America and New Zealand, is contrasted with the lack of such an approach in Australia. The development and relevance of international law to these issues is a further theme. As Sir Anthony Mason notes in his brief Preface:

> The essays ... deal with the evolution of international law as it expanded from a system of rules to govern the relations of European nation states *inter se* to a system of rules which sought also, however inadequately, to govern the acquisition of colonial territories in America, Africa, Asia and Australasia by the major European powers. International law is presently in the process of endeavouring to articulate the rights and interests of Indigenous peoples.[81]

The book is well set out in four parts, with an introduction to each, but unfortunately it lacks essential working tools such as tables of cases, statutes or treaties. This is a serious omission, further compounded by the barely adequate Index.

The 26 contributors are an interesting mix of indigenous and non-indigenous authors, all well qualified in their disparate fields. They are drawn from academia, the mining sector, native title practitioners and from a range of disciplines including law, anthropology, Koori health, human geography, globalisation, history, politics and literary studies. Four of these authors are associated with a Melbourne University research project on Agreements, Treaties and Negotiated Settlements, a major impetus for this publication.

In my view, one of the best contributions is the general introduction by the editors. This goes further than merely summarising the 19 essays and drawing out themes, although there is plenty of this. The editors isolate broad historical movements of the concept and practice of the sovereign State and its relations with those found in the new world, and isolate the growing modern focus on agreement making within that context. Thus they observe that:

> the idea of recognition and restitution through the making of agreements ... has become the principal form of engagement between Indigenous nations and the modern nation-state. Building on their histories of engagement through treaty making (and breaking), in the United States of America, Canada and New Zealand, negotiated agreements have replaced treaties as the modern arrangement for engagement with Indigenous peoples with respect to resource use.[82]

The editors trace, very briefly, the history of treaty making in the new world since the 16th century, referring to the *Papal Bull* of 1537 and Marshall CJ's foundation judgment in the US Supreme Court in 1823[83] where native title, in effect, was first

81 Langton et al, above n 9, vii.
82 Ibid 1-2.
83 *Johnson v McIntosh*, 21 US 543 (1823).

clearly recognised by the common law in the new world. The editors summarise developments in Canada, the USA and New Zealand, noting that treaties proceeded on a different basis in Canada to America, since Canadian Indians were not considered sovereign powers. 'Post Confederation treaties, the numbered treaties,' we are told, 'tended to follow a pattern of surrender of lands in return for particular rights'.[84] However, modern treaty making in Canada is underpinned by new elements such as the introduction of s 35 into the *Constitution Act* in 1982,[85] s 25 of the Canadian Charter of Rights and Freedoms[86] contained in Part I of the *Constitution Act* 1982, and notions of the Honour of the Crown and the Crown's fiduciary obligations to aboriginal peoples (all unfortunately, and conspicuously, absent in Australia).

New Zealand is different again, where the *Treaty of Waitangi*, whilst now revived and increasingly part of the fabric of governance, is operative law to the extent only that it is incorporated by reference into legislation. Rather like the New Zealand *Bill of Rights 1990*, the *Treaty of Waitangi* is considered in the nature of extrinsic material: to be consulted when interpreting statutory provisions of doubtful meaning. However, the editors, citing essays within, note that 'the *Treaty* now has a central place in legislation, bureaucracy and the scheme of New Zealand life. Regardless of the lack of specific enforceability, the *Treaty* is entrenched in the political and legal process, and will not "go away"'.[87]

As to Australia, this book does not discuss the 'treaty' proposal as such but refers to recent publications on this contentious topic.[88] Here, after brief reference to historical attempts in Victoria (John Batman in 1835)[89] and Tasmania (G A Robinson perhaps on behalf of Governor Arthur)[90] the editors summarise the various essays in the book which deal with agreement making in Australia, particularly with reference to the native title regime, but also beyond.

The editors point to three key developments over the decade since *Mabo (No 2)*. First, the passage of the *Native Title Act* and its amendments in 1998. Secondly, the High Court moving away from its engagement, evidenced in the *Mabo* judgments, with the jurisprudence of common law aboriginal title developed in other common law jurisdictions. They rightly observe that the Court has in recent decisions 'retreated from the common law, treating the rights associated with

84 Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title* (1998) 22.

85 Section 35(1) states: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed'. See schedule B to the *Canada Act 1982* (UK), c 11.

86 Section 25 states: 'The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including: (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreement or may be so acquired.' Further, see generally Kent McNeil, 'Aboriginal Governments and the Canadian Charter of Rights and Freedoms' (1996) 34 *Osgoode Hall Law Journal* 61.

87 Langton et al, above n 9, 12.

88 See generally ATSIC (ed), above n 58.

89 See Alex C Castles, *Australian Legal History* (1982) 28-9.

90 See Henry Reynolds, *Fate of a Free People* (1995).

native title as little more than statutory rights under the [Act]'.[91] The point is good, and is similar to that made by Bartlett in greater detail in *Native Title in Australia*. The third development referred to is 'a faltering, uneven but undoubted movement towards agreement making within the native title process which has now flowed beyond that increasingly complex and difficult jurisdiction.'[92]

From this setting, the book's 19 essays range across many topics. Authors provide general accounts,[93] specific case studies,[94] and comparative analysis.[95]

Topics dealt with include treaty making in Canada, Natal, and the Yolgnu experience leading to *Gove*;[96] Canada's Royal Commission on Aboriginal Peoples and its treaty recommendations of 1996; comprehensive agreement making in British Columbia; Treaty making in New Zealand; a range of agreement experiences underpinned by the native title regime in Australia; embracing Torrres Strait self-government; the drawn-out South Australian endeavours to reach a state-wide comprehensive settlement; Rio Tinto's involvement in both 'a program of internal cultural change' and 'agreement making with Indigenous communities', notably the Western Cape (York) Communities Co-Existence Agreement (WCCCA); intergovernmental framework agreements dealing with indigenous health; the continuing background of racial discrimination in Australia and its impact on treaty making; intellectual property issues focusing on legal and moral rights under the *Copyright Act 1968* (Cth) and the *Copyright Amendment (Moral Rights) Act 2000* (Cth), and an assessment of the Timor Sea Treaty between Australia and East Timor.

One notable treaty not discussed is the *Torres Strait Treaty*, entered into between Australia and Papua New Guinea in 1978.[97] It deals, amongst other things, with the customary laws of indigenous populations of each State-party and raised, at the time, for the Fraser Federal and Bjelke Petersen Queensland governments, the prospect of altering the boundaries of Australia and removal of some of the inhabited Torres Strait Islands from Australian jurisdiction. Faced with the prospect of enhanced recognition of traditional rights under the Papua New Guinea regime, but reduced standards of living generally, the Islanders affected wisely agitated to stay within the Commonwealth. But it was that debate which

91 *Ward* (2002) 213 CLR 1, *Wilson v Anderson* (2002) 213 CLR 401 and *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

92 Langton et al, above n 9, 19.

93 Such as Professor Brad Morse, 'Indigenous Settler Treaty Making in Canada': at 50; and Judge Joe Williams, 'Treaty Making in New Zealand/Te Hanga Tiriti ki Aotearoa': at 163.

94 Such as Dr Sue Jackson, 'Maritime Agreements and the Recognition of Customary Marine Tenure in the Northern Territory': at 220; and Professor Gillian Triggs, 'Creative Conflict Resolution: the Timor Sea Treaty between Australia and East Timor': at 329.

95 See Dr Julie Evans in the ostentatiously named 'The Formulation of Privilege and Exclusion in Settler States: Land, Law, Political Rights and Indigenous Peoples in Nineteenth Century Australia and Natal': at 69.

96 *Gove* (1971) 17 FLR 141.

97 *Treaty between Australia and the Independent State of Papua New Guinea, concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and related matters*, opened for signature 18 December 1978, ATS No 4 (entered into force 15 February 1985).

first clearly identified to Eddie Mabo and his colleagues that, contrary to their prior belief, the laws of Australia did not accept that they 'owned' their traditional lands and seas.

It is probably unwise to select any particular contributions, but I shall mention that of Rio Tinto's Bruce Harvey, who thoughtfully analyses the change of culture that took place in Rio Tinto during the 1990s, from flat out opposition to engagement and seeking to build sound foundations for long-term relations with traditional owners. Bruce Harvey also states that the 'High Court's recognition of Native Title in *Mabo (No 2)*, despite its subsequent corruption through statutory codification and amendments, has changed the social landscape for mining company-Indigenous agreement making in Australia'.[98]

This is an assessment with which I heartily agree. But that such a thing should be said today by a leading mining executive says a lot more. It indicates how far some significant players have come since, for example, Victorian Premier Jeff Kennett hit the media in 1993, in a frenzy of irresponsible scare-mongering, alleging that *Mabo (No 2)* placed every citizen's 'back-yard at risk'.[99] Whilst many major players in the mining sector have moved forward, many governments (at both ends of the political spectrum) have not.

Bruce Harvey also, interestingly, introduces an entirely new note: the impact of globalisation which, in his view, reduces national sovereignty to the advantage of cultural groups. Whether this is in fact so is debateable: but his thesis is interesting.

This collection of essays is a valuable contribution to the literature recording the state of play, ten years after *Mabo*.

BRYAN ANDREW KEON-COHEN QC
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98 Bruce Harvey, 'Rio Tinto's Agreement Working in Australia in a Context of Globalisation' in Langton et al above n 9, 237, 237.

99 See, eg, Gillian Cowlishaw, 'Mabo Breeds a Sinister New Form of Racism', *The Age* (Melbourne), 31 July 1993, 5; and comments by Hugh Morgan of Western Mining Corporation in G Hughes, 'High Court Failed Nation with Mabo, Says Mining Chief', *The Australian* (Sydney), 1 July 1993, 1.