

Land rights for disenfranchised and dispossessed peoples in Australia and South Africa: a legislative comparison

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I. Introduction

New land reform legislation was implemented in Australia and South Africa in the mid-1990s. In Australia, the legislation was a response to *Mabo v Queensland (No 2)* which held that the common law recognised Indigenous Australians had an interest in land based on traditional laws and customs.¹ The Federal government responded to this finding with two legislative acts: the *Native Title Act 1993 (Cth)*² which established a process for claiming native title and for defining its relationship with existing and future statutory interests in land; and the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995 (Cth)*³ which established a fund administered by the Aboriginal and Torres Strait Islander Commission and the Indigenous Land Council for the acquisition of land for Indigenous people. Around the same time in South Africa, the first post-apartheid, democratically elected government developed land reform legislation to address the dispossession of 'non-white' or 'black'⁴ South Africans from land under apartheid legislation between 1913 to 1994. The centrepiece of the South African legislative scheme is the *Restitution of Land Rights Act 1994*. This Act is one of a number of enactments in a comprehensive land reform policy aimed at restoring land to those dispossessed under racist laws,⁵ redistributing land in rural areas,⁶ providing security of tenure to labour tenants⁷ and protecting the interests of individuals or communities with informal rights to land while claims can be investigated on their behalf.⁸ In both countries, land reform legislation aims to provide wealth and opportunity previously denied Indigenous Australians and black South Africans as part of an exercise of restorative social justice. This paper discusses the political and constitutional foundations of land reform in each country. It draws a comparison between the *Native Title Act (NTA)* and *Restitution of Land Rights Act (RLRA)* in particular. The comparison is used to critically evaluate the major elements of the legislative schemes and to reflect on the relative successes and failures of native title law in Australia.

Native title jurisprudence has drawn heavily on comparison. The Federal and High Courts of Australia have relied upon US, Canadian and New Zealand authorities in the

1 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (Hereinafter '*Mabo*').

2 Act No 110 of 1993.

3 Act No 20 of 1995.

4 Under the apartheid system of racial classification, 'non-whites' included Indigenous African, Indian, Malay, Chinese and Coloured (mixed race) peoples. The term non-white imports racist connotations by defining these groups in terms of what they are not. In this paper, the groups will be referred to generically as 'blacks'. The term 'blacks' stands in direct opposition to and on equal terms with the description 'whites', and it undermines the eugenic rationale of racially based laws central to the apartheid.

5 *Restitution of Land Rights Act*, 22 of 1994.

6 *The Provisions of Certain Land for Settlement Act*, 126 of 1993.

7 *Land Reform (Labour Tenants) Act*, 3 of 1996.

8 *Interim Protection of Informal Land Rights Act*, 31 of 1996. See generally, Department of Land Affairs, *White Paper on South African Land Policy* (1997) at 10 for a summary of legislative initiatives.

development of legal principles.⁹ South Africa is a new source of comparison, and one with distinct characteristics. In North America, New Zealand and Australia, the constitutional framework of claims and the dynamics of Indigenous and non-Indigenous relations in which they occur are similar. The land reform legislation in these countries yields interesting points of comparison in relation to the way former colonial governments in each country have responded to the demands for land reform, the political mobilisation of Indigenous communities, the extent to which the courts have been prepared to articulate common law rights to land in the face of legislative resistance, the relationship of land rights to other socio-political rights, and the importance of land to calls for recognition of sovereignty.

In South Africa, the colonial power initially responsible for dispossession of land from Indigenous peoples is no longer in power, and its legal system is no longer the accepted rule of law. An initial challenge in a comparison between Australian and South African land reform legislation is to identify what indicators can be sensibly compared. This requires an examination of the historical and political pre-conditions to the establishment of the legislative schemes and an analysis of their founding principles. It will be seen that it is as much for the differences in the circumstances facing governments in Australia and South Africa, as it is for the similarities in their responses, that the comparison is of interest. The paper compares the following points: aspects of the colonial histories of each country, the political and constitutional frameworks in which land reform was implemented, and key aspects of the legislative schemes. The paper concludes with a discussion of the merits of native title law in Australia in light of the comparison.

II. Colonisation and Property Rights

According to the cultural understandings of colonisers there are recognisable differences between how indigenous groups relate to land. In South Africa, Indigenous groups were understood variously to be 'pastoral nomads' (such as the Khoikhoi), or 'hunter-gatherers' (such as the San) or 'cultivators of the soil' (such as the Xhosa, Thembu, and Zulu).¹⁰ In Australia, the several hundred Indigenous groups were uniformly understood to be transhumant, or semi-nomadic hunter-gatherers. This superficial understanding of Indigenous relations to land led to varying degrees of recognition of their common law property rights.

Commissions to Governor Phillip from King George III dated 12 October 1786 and 2 April 1787 detailed the area that was to be known as the Colony of New South Wales. Upon arrival with the first fleet in Sydney Harbour in 1788, Phillip claimed this area in the name of the British Crown. There was an assumption that upon claiming sovereignty, the radical and beneficial interest to land vested in the Crown.¹¹ In Western Australia, sovereignty under the Crown was asserted in similar terms upon settlement in Fremantle in 1829. Despite these assertions of sovereignty, the colonisers met resistance to their claims to the land. Violent conflicts occurred with Indigenous people across the continent with no recognition of Indigenous land rights.¹² Policies of assimilation in the late 19th

9 See for example, *Mabo* (1992) 175 CLR 1; *Yanner v Eaton* (1999) 166 ALR 258 (hereinafter *Yanner*); *Ward & Ors (on behalf of the Miriuwung and Gajerrong peoples) v Western Australia & Ors* (1998) 159 ALR 483 (hereinafter *Ward*).

10 See generally, Fryer-Smith S, 'Addressing Past Wrongs: Dispossession and Restitution of Land in South Africa' (1999) 7 *Australian Property Law Journal* 34; Bennett T, 'Redistribution of land and the doctrine of Aboriginal Title in South Africa' (1993) 9 *South African Journal of Human Rights* 443.

11 The Northern Territory area was included in the colony of New South Wales in 1825 when, by letters patent, the meridian of 129 east longitude was substituted for the meridian of 135 east longitude as the western boundary of that Colony.

12 See for example, Reynolds R, *Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*, Penguin Books, Ringwood 1982.

and early 20th centuries were possibly the clearest indication that Indigenous people were not considered to possess legal rights to the land.¹³ However, in the second half of the 20th century, persistent demands for land rights grew louder until *Mabo* reconsidered the terms of settlement.

The Dutch asserted sovereignty over the Cape area of South Africa in 1652 and introduced the Roman-Dutch legal system. The Cape Colony was captured by the British in 1795 and cession from the Netherlands occurred in 1806. In the Cape Colony, the British refused to recognise any aspect of customary law. This contrasts with Natal, the Transkei and later the Transvaal, where the local systems of African customary law were accorded general recognition.¹⁴ There have been other colonising groups in South Africa who did not claim sovereignty. As well Great Britain and the Netherlands, there were substantial colonising groups from Sri Lanka, Quebec, Mauritius and Malaysia.

A dramatic change to the complexion of land ownership in South Africa occurred in 1913 with the passing of the *Native Land Act 1913*. Under the *Native Land Act*, South Africa was divided into land for 'natives' and 'persons other than natives'.¹⁵ Each group was prevented from having an interest in land outside scheduled areas.¹⁶ Most of the land was scheduled for whites.¹⁷ In 1948, with the election of the Malan and Verwoerd National Party government, a more comprehensive system of apartheid became official government policy. The concept of apartheid was based on a policy of segregation of all racial groups. Under the *Population Registration Act*, people were to be classified as either white, Indian, Coloured or Black (Bantu).¹⁸ The *Group Areas Act* designated areas of land according to these racial classifications.¹⁹

The colonial histories in Australia and South Africa created different social evils. In Australia, Indigenous people were never afforded recognition as a distinct social group with separate, identifiable rights. Instead they were invisible in the community for most of the century. It was only in 1962 that Indigenous people could vote in Commonwealth elections and in 1967 that they were recognised in the *Commonwealth Constitution*.²⁰ The recognition of their unique land rights was a product of common law jurisprudence. It highlighted a legislative failure to adequately recognise Indigenous land rights from the time of first settlement. In South Africa, blacks received recognition as unique and separate, and even as rights holders. The recognition of racial difference was used as the basis for defining differential rights. Recognition was categorisation.

The underlying principles of land legislation in each country react to these different colonial histories.

III. Political and Constitutional Frameworks for Land Reform

1. *Extent of the Land Question*

As of 30 June 1996, Aboriginal and Torres Strait Islanders in Australia numbered 386,000, about 2.1% of the population.²¹ Under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), 42% of the Northern Territory has been granted to Aboriginal Land Trusts

13 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Human Rights and Equal Opportunities Commission, Sydney 1997.

14 Bennett T, n 10 at 443.

15 *Native Land Act*, No 27 of 1913, s 1(1)(a) & (b).

16 *Native Land Act*, No 27 of 1913, s 1(1)(a) & (b).

17 *Native Land Act*, No 27 of 1913, s 1(1)(a) & (b).

18 *Population Registration Act*, No 30 of 1950.

19 *Group Areas Act*, No 41 of 1950.

20 *Electoral Act Amendment Act 1962*; *Commonwealth Constitution Amendment Act 1967*.

21 Australian Bureau of Statistics, 'Special Article — Aboriginal and Torres Strait Islander Australians: A statistical profile from the 1996 Census', Year Book Australia, 1999.

for the benefit of Indigenous people, and there are outstanding claims over another 10%.²² In South Australia, Indigenous communities have property rights over 20% of the land area as a result of purchases made under the *Aboriginal Lands Trust Act 1966* (SA), *Pitjantjatjara Land Rights Act 1981* (SA), and the *Maralinga Tjarutja Land Rights Act 1984* (SA).²³ The extent of Indigenous land ownership in the other states and territory is considerably less. These figures need to be given some context to understand the extent of the Indigenous land question in Australia. First, two-thirds of Australia is arid or semi-arid,²⁴ and is unable to sustain agriculture.²⁵ Much of the land owned or leased by Indigenous people under land rights legislation lies in these regions.²⁶

In South Africa in 1994, the black population comprised 86% or 35.3 million of the total population of 41 million. They were permitted to live on 13% of the land. Conversely, the 6 million (14%) white South Africans owned 87% of the land.²⁷ The disparity between population and land ownership in South Africa is a direct result of legislative acts during the apartheid era.²⁸ South Africa has a considerably smaller land mass, over twice the Australian population, and a much higher percentage of land capable of supporting agriculture and other uses.

2. Constitutional Protection of Property

In negotiations leading to the interim Constitution in 1993²⁹ and the Final Constitution in 1996, the inclusion of a clause for the protection of property rights was one of the most contentious issues dividing the ANC and the National Party.³⁰ Negotiations on the existence and wording of a property clause occurred in the knowledge that a majority ANC government would want to implement significant land reform.³¹ The National Party and other representatives of white interest groups were concerned to protect their interest in land after the transition to democratic rule. In the end a compromise was reached. In the interim Constitution, the following clause was agreed upon:

28 Property

- (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
- (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

22 Reeves J, *Building on Land Rights for the Next Generation: Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (1998) at 61.

23 O'Connor, A, Department of State Aboriginal Affairs, South Australia Year Book 1997, Australian Bureau of Statistics Catalogue no 1301.4.

24 Australian Bureau of Statistics, Australia Now — A Statistical Profile, Geography and Climate, 'Landforms and their history', <http://www.abs.gov.au>.

25 Australian Bureau of Statistics, Australia Now — A Statistical Profile, Geography and Climate, 'Climate of Australia', <http://www.abs.gov.au>.

26 Australian Bureau of Statistics, Australia Now — A Statistical Profile, Geography and Climate, 'Water Resources', <http://www.abs.gov.au>.

27 Overseas Development Institute Economic Policies in the New South Africa Briefing Paper 2, London, April 1994, in Fryer-Smith S, n 10 at 34–35.

28 In particular, the *Native Land Act 1913*, *Black Administration Act 1927*, *Development Trust and Land Act 1936*, *Asiatic Land Tenure Act 1946*, *Group Areas Act 1950* and *1966*, *Rural Coloured Areas Act 1963* and the *Community Development Act 1966*. See: 'Special Focus', *Human Rights Report*, June 1996 at 17.

29 Act 200 of 1993, assented to 25 January 1994, date of Commencement 27 April 1994.

30 For a discussion of the Constitutional negotiations see Ibrahim H, *The Soul of a Nation: Constitution Making in South Africa*, Cape Town: Oxford University Press, 1998; S Friedman ed, *The Long Journey: South Africa's Quest for a Negotiated Settlement*, Ravan Press, Johannesburg 1993; Waldmeir P, *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa*, New York, W Norton and Co, 1997; Van der Walt AJ, 'The Constitutional Property Clause' in J McLean, *Property and the Constitution*, Hart Publishing, Oxford, 1999 at 111–112.

31 For debate on the constitutionalisation of property in South Africa, see Nedelsky, 'Should Property be Constitutionalised? A Relational and Comparative Approach' in GE van Maanen and AJ van der Walt (eds), *Property Law on the Threshold of the 21st Century*, Antwerp, Maklu, 1996.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

The section provides express protection for existing property rights. Under subsection 3, the only ground upon which the government can expropriate property is 'for public purposes'. There is no obligation on the State to engage in land reform.

The final Constitution was constructed by parliament after the elections in 1994. The ANC led Government of National Unity enjoyed a large majority. The National Assembly was able to draft a new property clause as long as it was consistent with the 34 constitutional principles that were entrenched in the interim Constitution as a result of negotiations leading to the elections in 1994.³² Not surprisingly, the protection of property rights in section 25 of the final Constitution was more circumscribed. Section 25(1) & (2) reiterate the protection of property in similar terms to the interim Constitution. Section 25(4) states that public purpose includes 'the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'. Section 25(5) places a positive obligation on the State to 'take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.' Section 25(7) creates an entitlement to property rights or equitable redress for 'a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices'.

The constitutional right created in s 25(7) is supported by the right to equality in section 9 of the Constitution. Section 9(2) states that 'equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination must be taken.'

In the *White Paper on South African Land Policy*, the Department of Land Affairs interpreted this combination of constitutional provisions in the final Constitution as 'placing the state under a constitutional duty to take reasonable steps to enable citizens to gain equitable access to land, to promote security of tenure, and to provide redress to those who were dispossessed of property after 19 June 1913 as a result of past discriminatory practices.'³³ The Assembly purported to fulfil these constitutional obligations through enacting comprehensive legislation.

In South Africa, the desire for land reform compelled the creation of the constitutional environment in which it was to take place. This environment then set the parameters in which the government was obliged to implement reform. It is not surprising that the resulting legal framework for land reform places positive obligations on the government to implement comprehensive reform.

In Australia, s 51(xxxi) of the Constitution declares that the Commonwealth has power to make laws with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which Parliament has power to make laws.' This provision applies only to an acquisition of property by the Commonwealth and not the States, so does not affect previous State grants of title which have extinguished native title.³⁴ There is nothing in Commonwealth or State Constitutions to compel governments

³² The Constitutional Principles are contained in Schedule 4 of the interim Constitution.

³³ Department of Land Affairs, *White Paper on South African Land Policy* (1997) at 15.

³⁴ For an extended discussion of s 51(xxxi) see Bartlett R, *Native Title in Australia*, Butterworths, Sydney, 1999 at 419-421.

to respond to the finding in *Mabo* that Indigenous peoples in Australia have common law rights to land. The altered state of the common law was pronounced in *Mabo* against the background of an established constitutional and legislative framework. The main impact of the judgment was on future dealings with land. As soon as the High Court articulated that there was native title, this title could not be extinguished by the Commonwealth except on just terms under s 51(xxxi) of the *Constitution*³⁵ and it could not be extinguished in the States or the Commonwealth in a discriminatory way contrary to the *Racial Discrimination Act 1975*.³⁶

When the ANC led Government of National Unity was elected in 1994, the law recognised existing statutory grants no matter how they had been obtained, but created a legal entitlement to restitution or equitable redress in those dispossessed under racially discriminatory laws. The RLRA creates a means of implementing that right. In Australia after *Mabo* in 1992, the law recognised two types of title — existing statutory grants and native title in common law. The claims process in the NTA created a mechanism for identifying where native title exists and for determining its relationship with statutory grants. Where black Africans had no title to land, but simply a constitutional right to reclaim titles removed under apartheid laws between 1913 and 1994, Indigenous Australians possessed an existing right to land which needed to be asserted. However, the legal frameworks also made it clear that whereas titles procured under unjust apartheid laws were vulnerable to extinguishment by claims of prior possession, titles claimed unjustly under statutory grants were not vulnerable to extinguishment upon proof of native title. Instead, the High Court confirmed the legitimacy of all statutory grants under Commonwealth and State legislation.

3. National and Provincial Constitutional Obligations

In Australia, the majority of land is owned and controlled by the State Crown. Native title had its most significant impact on State Crown land and on State statutory grants. Regulating the use of land is a State legislative competency,³⁷ subject to the Commonwealth parliament's legislative power under s 51 of the *Constitution*. Despite this, the Commonwealth implemented comprehensive native title legislation in response to *Mabo* under the Races power, s 51(xxvi) of the *Constitution*. The government of Western Australia, the State most affected by the advent of native title, attempted to pre-empt the NTA with its own legislation in response to *Mabo*, the *Land (Titles and Traditional Usage) Act 1993* (WA). The legislation extinguished native title and replaced it with a statutory grant. The High Court held that it was invalid for inconsistency with the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth) under s 109 of the *Constitution*.³⁸ This case demonstrates the tension between Commonwealth and State governments over control of legislation affecting land ownership. In amendments to the NTA in 1998, the Commonwealth has made it possible for the States to establish their own legislative schemes to process native title claims as long as they satisfy certain national benchmarks.³⁹

In South Africa, land is unequivocally a national competency. The national Parliament has plenary legislative power except for matters in Schedule V of the *Constitution* that lists matters exclusively within provincial legislative competence. Land is not one of these

35 See *Mabo* (1992) 175 CLR 1 per Deane and Gaudron JJ at 111: 'Our conclusion that rights under common law native title are true legal rights which are recognised and protected by the law would, we think, have the consequence that any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s 51(xxxi)'.

36 *Mabo* (1988) 166 CLR 186 per Brennan, Toohey and Gaudron JJ at 217–219; per Deane J at 229–230.

37 In the Constitutions of all the Australian States, Parliaments have plenary legislative power.

38 *Western Australia v Commonwealth* (1995) 183 CLR 373.

39 *Native Title Amendment Act 1998* sections 207A and 207B.

areas. Furthermore, the extent of government responsibility to implement land reform is clearly expressed in s 25 of the *National Constitution*.

4. Role of Governments in the Administration of the Land Claims Processes

In both South Africa and Australia, land reform is governed by national legislation. The RLRA establishes a Commission on the Restitution of Land Rights which receives claims,⁴⁰ ensures they are prepared and submitted correctly,⁴¹ reports to the Court on the terms of settlement of successfully mediated claims,⁴² and 'defines issues which may still be in dispute between claimants and other interested parties with a view to expediting the hearing of claims by the Court'.⁴³ Under the NTA, the equivalent body to the Commission is the National Native Title Tribunal, which is established by s 107-109 of the NTA with similar objects to the Commission. The Tribunal is directed to carry out its functions in a 'fair, just, economical, informal and prompt way'.⁴⁴

One clear difference between the Commission and the Tribunal is that the Commission is not completely neutral. Part of its legislative brief is to give direct assistance to claimants. The Tribunal, on the other hand, is very concerned to remain non-partisan.⁴⁵ Section 78 of the *Native Title Act 1993* allowed the Registrar to aid claimants in the preparation of applications. This was amended in 1998 such that the Registrar is directed to assist applicants and 'other people' in matters 'related to the proceedings'.⁴⁶ In *Connors v Native Title Registrar*, it was argued that the Registrar owed a particular duty to the applicants when providing assistance. This was rejected.⁴⁷ The non-partisan role in providing assistance has added to the perception that the Tribunal is an impartial body, a perception it has been at pains to foster.⁴⁸

The slow rate of progress under each of the legislative schemes has led to different responses by the legislature. In South Africa, amendments to the RLRA have given more power to the Commission in the hope that more claims will be settled administratively.⁴⁹ This approach to streamlining the claims process is not constitutionally possible in Australia because of the relatively strict separation of judicial and executive power in the *Commonwealth Constitution*.⁵⁰ The separation of powers means that the Tribunal cannot make binding determinations. The Court is locked into a central role in the claims process. Its role has been extended under the *Native Title Amendment Act 1998*, such that all claims must be registered through the Courts.⁵¹

In Australia, no government body at the National or State level takes direct responsibility for ensuring the *Native Title Act* process works effectively. State governments are invariably the first respondents to claims, and thus put arguments on

40 RLRA, Section 6(1)(a).

41 RLRA, Section 6(1)(b).

42 RLRA, Section 6(1)(d).

43 RLRA, Section 6(1)(e).

44 NTA s 109(1).

45 NTA s 109(2) 'The Tribunal, in carrying out its functions, may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any party to any proceedings that may be involved.'

46 See National Native Title Tribunal, Annual Report for 1998-99 for a discussion of this change.

47 *Connors v Native Title Registrar*, unreported decision of the Federal Court, Finn J, 9 April 1999.

48 The mission statement of the Tribunal included at the beginning of each annual report includes a requirement of 'fairness to all'. See for example, the Annual Report for 1997-98 at 5.

49 New Bill Aims to Speed up Land Claims Process', *Sunday Independent*, 11 February 1998.

50 In *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 it was held that administrative bodies cannot make binding determinations because this is an exercise of judicial power which can only be exercised by Federal Courts under Chapter 3 of the Commonwealth Constitution. Furthermore, it is not sufficient for a Court to simply sign off on a determination of a Tribunal and thereby make it final. To exercise judicial power constitutionally, federal courts must conduct genuine inquiries into the facts at issue.

51 *Native Title Amendment Act 1998*, sections 61, 184 and 190A.

behalf of other interested parties on questions of proof and extinguishment. The Commonwealth Attorney-General's department will sometimes intervene in claims to proffer submissions on points of law. Generally, the Commonwealth has intervened in favour of respondents, advocating for a narrow interpretation of native title rights.⁵² There is no constitutional impediment to State governments or the Federal government undermining the claims process, and there are allegations against both for doing so.⁵³

In South Africa, the Department of Land Affairs is responsible for the implementation of the RLRA. It sees its role as the facilitator of claims. Although the government is usually the main respondent to claims, it does not see this as necessarily being an oppositional role.

[Land Restitution] can only work if there is a close cooperation between different role players within the process. The fact that the state is a respondent should not be seen as implying, unequivocally, that it is also an adversary. . . . The successful resolution of a claim depends on co-operative and integrated management processes that span organisational divisions.⁵⁴

The government is committed to positive results from the land restitution process and may, arguably, have a constitutional obligation to deliver effective reform.

It is the responsibility of the national government to ensure a more equitable distribution of land ownership, to support the work of the Commission on Restitution of Land Rights and to ensure that a programme of land tenure and land administration reform is implemented.⁵⁵

The response to the slow rate of progress in the first few years of the operation of the land reform process in South Africa was to look to ways to amend the legislation to ensure better results. A major change was to place more emphasis on negotiated rather than legislated settlements. The *Land Restitution and Reform Laws Amendment Act 1999* gives more power to the Land Claims Commission for the resolution of claims. The Act does away with the need for claims to be referred to the Court where the interested parties agree on how a claim should be finalised. The Minister is empowered to make an award of a right to land, pay compensation or order financial assistance.⁵⁶ The slow pace of land reform has led to the replacement of senior personnel. The Chief Land Claims Commissioner Joe Seremane resigned in 1998, and the Minister of Land Affairs Derek Hanekom was replaced in Cabinet after the 1999 election. This active response to perceived problems in the delivery of land reform is consistent with the obligation on the State in s 25 of the *Constitution* to take 'reasonable legislative and other measures to foster conditions which enable citizens to gain access to land on an equitable basis'. There is an outstanding question of whether the failure to take reasonable measures to effect land reform could give rise to an enforceable constitutional right in persons dispossessed during apartheid to land restitution or equitable redress. The SA Constitutional Court has been prepared to place positive obligations on the State to ensure citizen rights arising under other sections of the *Constitution*.⁵⁷ However, establishing a standard of 'reasonableness'

52 See for example, *Western Australia v Ward* (2000) 170 ALR 159.

53 See for example, Dodson P, 'Reconciliation in Crisis' in G Yunupingu ed, *Our Land is Our Life*, University of Queensland Press, 1997.

54 Department of Land Affairs, *White Paper on South African Land Policy* (1997).

55 Department of Land Affairs, *White Paper on South African Land Policy* (1997) at 100.

56 *Land Restitution and Reform Laws Amendment Act 1999*, No 18 of 1999, amending section 14 of the principle Act.

57 See for example, *New National Party v Government of the Republic of South Africa and others CCT 9/99* (13 April 1999), 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC). The question for the Court was whether legislation enabling only citizens who possessed bar-coded identification or had applied for such identification were eligible to vote. This legislation had been passed only 6 months before the election. The Court had to determine whether this infringed the constitutional right to vote. The Court found that Parliament is obliged to provide for a scheme that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so. An appellant before the court has to establish that the scheme provided for is not reasonably capable of achieving that purpose.

in the delivery of land reform when it is so extensive and complex would be difficult to do.

Another significant difference in the claims process is the representation of claimants. In Australia, claimants are represented by Land Councils funded through ATSIC, which is itself a government-funded organisation.⁵⁸ Although ATSIC is semi-autonomous having an elected board of Indigenous representatives, it is totally reliant on government funding. There are several potential problems with this. Firstly, the government has the ability to limit resources for the funding of claims, which might compromise the ability of Indigenous representative bodies to run claims effectively. Secondly, funding of Indigenous representative bodies is a highly controversial political issue. Some Indigenous people perceive the existence of ATSIC as essential to their claim for self-determination as a group within Australian society. Others feel that ATSIC is just another level of government which is detached from the needs of Indigenous communities on the ground.⁵⁹ Thirdly, having provided funding for representative bodies to pursue the land interests of Indigenous communities, the government may consider that it has fulfilled its obligation to Indigenous people in relation to land reform.

In South Africa, claimants are funded predominantly by non-government organisations.⁶⁰ The existence of independent representative bodies for claimants makes it more difficult for the government to politicise the legal process. Although clearly preferable from a constitutional and political perspective, the availability of NGOs to take on this role is not in the control of National governments. Among NGOs, there has been more interest in social transformation in South Africa than in Australia. There is the perception (rightly) that Australia has sufficient resources to resolve questions of land reform itself.

IV. Legislation Compared

In 1993 and 1994 respectively, Australian and South African governments were faced with a section of their communities claiming illegitimate dispossession from their rights to land. Both countries chose to respond to their respective land questions with legislation within the constitutional frameworks discussed above.

1. *Origins and Rationale*

In December 1993, during the passage of the *Native Title Bill* through Parliament, the Australian Prime Minister stated:

As a nation, we take a major step towards a new and better relationship between Indigenous and non-Indigenous Australians. We give the indigenous people of Australia, at last, the standing they are owed as the original occupants of this continent, the standing they are owed as seminal contributors to our national life and culture: as workers, soldiers, explorers, artists, sportsmen and women — as a defining element in the character of this nation — and the standing they are owed as victims of grave injustices, as people who have survived the loss of their land and the shattering of their culture.⁶¹

The speech reveals a mix of motivations for the NTA. It suggests the Act is intended to recognise current rights and also contribute to remedying past injustices. The recognition is of the rights of Indigenous people as the original inhabitants of Australia with a unique connection to land, and of the rights of Indigenous people as Australian citizens

⁵⁸ *Aboriginal and Torres Strait Island Commission Act*, No 150 of 1989.

⁵⁹ See for example, McGlade H, 'Not invited to the Negotiating Table': The Native Title Amendment Act 1998 (Cth) and Indigenous Peoples' Right to Political Participation and Self-Determination Under International Law' (2000) 1(1) *Balay: Culture, Law and Colonialism* 97.

⁶⁰ Department of Land Affairs, *White Paper on South African Land Policy* (1997) at 104.

⁶¹ Native Title Section of the Department of Prime Minister and Cabinet, 'The *Mabo* Case and the Native Title Act' reproduced from Year Book Australia, 1995 ABS Catalogue No 1301.0.

contributing to 'national life'. The stated objects of the Act are, in fact, much narrower than this rhetoric would suggest.⁶²

- * It recognises and protects native title.
- * It provides for the validation of any past grants of land that may otherwise have been invalid because of the existence of native title.
- * It provides a regime to enable future dealings in native title lands and imposes conditions on those dealings.
- * It establishes a regime to ascertain where native title exists, who holds it and what it is, and to determine compensation for acts affecting it.

The objects of the Act reveal that it is limited to establishing a process through which the Courts can determine the extent to which the common law rights to land of Indigenous peoples has survived since the assertion of European sovereignty in Australia. The NTA is a response to land reform of a government which has had the need for reform thrust upon it by an unexpected decision of the High Court on the state of the common law. The legislative response is not to *increase* Indigenous land rights beyond what the law has already recognised, but to make the minimum possible recognition of existing rights. Furthermore, native title only benefits Indigenous communities able to establish the kind of continuous association with particular areas of land that would allow them to claim native title. The *Land Fund Act*, foreshadowed in the *Native Title Act 1993*, and passed two years later, was an important initiative for recognising the broader questions of injustice raised in the Prime Minister's speech quoted above.⁶³

In South Africa the legacy of apartheid left enormous inequalities between blacks and whites — in wealth, opportunity, government positions, housing, and land ownership. The new constitutional order is based on a principle of formal equality that is affirmatively pursued to restore justice in South Africa. As the Department of Land Affairs stated:

The importance of land reform in South Africa arises from the scale and scope of land dispossession of black people which has taken place at the hands of white colonisers. For most of this century . . . rights to own, rent or even share-crop land in South Africa depended upon a person's racial classification.⁶⁴

One of the most important challenges of the newly elected Government of National Unity in 1994 was to redress inequalities perpetuated through racial segregation. In relation to land, the *Land Restitution Act 1994* provides a process by which victims of discriminatory laws in South Africa could make claims to land from which they had been dispossessed. The policy behind land reform is 'to redress past injustices', 'to contribute to national reconciliation and stability', to underpin economic growth and 'to economically empower those disadvantaged under the apartheid regime'.⁶⁵ Regardless of the success or failure of the legislative scheme, these policy goals are at its heart.

2. *Nature of the title that can be claimed*

Perhaps surprisingly, there is still some debate about what exactly native title is, what is required for its proof, and how it is extinguished. According to *Mabo* and confirmed by the *Native Title Act*, native title is a *sui generis* title based on the traditional laws and customs of Indigenous peoples. This means that the content of the title may vary from

⁶² *Native Title Act 1993*, s 3.

⁶³ The *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (Cth) No 20 of 1995. The Land Fund was established for the purchase of land for Indigenous communities on the basis of need. It focused on communities who were ineligible to register native title claims or who had been unsuccessful in such claims. Unlike the *Native Title Act*, the *Land Fund Act* was based on a principle of restorative justice, and not simply a recognition of existing rights to land.

⁶⁴ Department of Land Affairs, *White Paper on South African Land Policy* (1997) at 9.

⁶⁵ Department of Land Affairs, *White Paper on South African Land Policy* (1997) at v.

community to community depending on its laws and customs. It might vary from a title approximating exclusive possession, to something closer to a right of access.⁶⁶ Native title is inalienable.⁶⁷ It cannot be sold, and if the relationship of the people to the land is no longer according to their traditional laws and customs, then the land reverts to the Crown.⁶⁸ However, it is not finally resolved whether native title is a right to the land, upon which other rights such as a right to fish, to hunt, or to hold traditional law ceremonies are incidents, or whether it is constituted of nothing more than the sum of these individual rights. In the recent case of *WA v Ward*, the Full Court of the Federal Court divided on this question, with a majority favouring the 'bundle of rights' approach to defining native title.⁶⁹

This result has serious implications for native title claimants. If native title is a bundle of rights and not an interest in land, traditional laws and customs are more vulnerable to extinguishment, having no land to buffer and protect them. Native title may be harder to claim, requiring proof of each of the bundle of native title rights. Currently particular traditional practices such as hunting, fishing and the holding of ceremonies are used only as evidence of native title to land. On any given claim area, claimants do not necessarily disclose all of their traditional laws and customs. They need only disclose what is considered necessary to make clear their continuing connection to the land according to traditional laws and customs. If, in the alternative, native title is a bundle of rights, it is only ever as extensive as the rights that constitute it, and each right must be individually proved — clearly an onerous task.

The RLRA avoids most of these difficult questions by focussing land reform on occupation of land regardless of the nature of that occupation. A claimant group or individual does not need to ascertain that they possessed a particular title to land between 1913 and 1994, but only that they occupied land under a claim of right. There was some consideration to establishing legislation for Aboriginal title style claims in South Africa.⁷⁰ The Department of Land Affairs explained why it had not taken this path as follows:

The government believes it is not possible to address pre-1913 claims through a judicial process such as that laid out in the *Restitution of Land Rights Act* or Aboriginal Title arguments that have been used in countries such as Canada and Australia. In South Africa, ancestral land claims could create a number of problems and legal-political complexities that would be impossible to unravel:

- * Most deep historical claims are justified on the basis of membership of a tribal kingdom or chiefdom. The entertainment of such claims would serve to awaken and/or prolong destructive ethnic and racial politics.
- * The members of ethnically defined communities and chiefdoms and their present descendants have increased more than eight times in this century alone and are scattered.
- * Large parts of South Africa could be subject to overlapping and competing claims where pieces of land have been occupied in succession by, for example, the San, Khoi, Xhosa, Mfengu, Trekkers and British.⁷¹

3. *Establishing a claim*

To make out a native title claim, Indigenous peoples must establish that they are the traditional owners of the land subject to claim. This requires them to establish that they belong to the community that occupied the land at the time of the assertion of British sovereignty, and that identifiable members of that community continue to occupy the land

66 *Mabo* (1992) 175 CLR 1 per Deane and Gaudron JJ at 88.

67 *Mabo* (1992) 175 CLR 1 per Brennan J at 59–62, per Deane and Gaudron JJ at 88.

68 *Mabo* (1992) 175 CLR 1 per Brennan J at 60.

69 *WA v Ward* (2000) 170 ALR 159 per Beaumont and von Doussa at [97].

70 Judge A Gildenhuys, Land Claims Court, 'Rights of Indigenous Peoples' Energy and Natural Resources Law 1998, International Bar Association at 15.

71 Department of Land Affairs, *White Paper on South African Land Policy* (1997) at 55.

according to their traditional laws and customs. The burden lies on the claimants to establish this.⁷² Proving a continuing connection since the time of sovereignty is an onerous task for communities who pass on knowledge of laws and customs orally. Claimants rely on a combination of archaeological, anthropological, genealogical, and historical evidence to establish the connection, as well as their own oral testimony on their connection to land.

To establish native title, a claimant group must be able to establish that 'a connection has been substantially maintained through the acknowledgement and observance, so far as practicable, of traditional laws and customs'.⁷³ This connection must be determined in the circumstances of great change inflicted on Indigenous peoples since the time of first sovereignty, in particular their diminished numbers.⁷⁴ There need not be proof of a continuing *physical* connection to the land. A continuing spiritual connection is sufficient, as long as there is sufficient evidence of its existence.⁷⁵

In proving a continuing connection to the land, there has been a difficult question of who is a member of the claimant group, and to whom native title rights can be transmitted. The law as it currently stands in Australia is that community membership is a question for native title claimants to determine.

The incident of a particular native title relating to inheritance, the transmission or acquisition of rights and interests on death or marriage, the transfer of rights and interests to land and the grouping of persons to possess rights and interests in land are matters to be determined by the laws and customs of the indigenous inhabitants . . . But so long as the people remain as an identifiable community living under its laws and customs, the communal native title survives to be enjoyed by the members.⁷⁶

There needs to be some biological continuity. However, 'a broad spectrum of links [with ancestors] is . . . sufficient proof of 'biological' connection between the present community and the community in occupation at the time of sovereignty'.⁷⁷ So, for example, a person could be adopted into the community.⁷⁸

In South Africa, because land restitution focuses on restoring individuals or communities to land from which have been dispossessed, it is necessary to be able to assert a prior right to the land. As with Native Title law, this can prove difficult. Although the rights to land of blacks in South Africa (unlike in Australia) was recognised prior to dispossession, this rarely translated into a recognisable title. The most common recognition of Indigenous title was through the creation of 'native reserves'. For example, in 1936 the *Native Trust and Land Act* was created to acquire ownership of land, setting it aside for occupation by 'native persons'.⁷⁹ The alternative to pointing to a formal land title as the basis of restitution, is to prove continuous occupation for at least 10 years.⁸⁰ Furthermore, claims can be made by individuals who were prevented from obtaining land through racially discriminatory legislation, as well as those dispossessed of land they already occupied. Also, as in Australia, there is a question on who is considered a 'descendant' of the original occupier of land for the purposes of the legislation. In *re Mayibuye I-remin Committee Land Claim*, the Land Claims Court interpreted 'direct descendant' under section 2(1)(a) of the Act to include only children and grandchildren, and not collateral

72 Note, however, that in the face of a community claiming to be the traditional owners of land under particular laws and customs, an evidentiary burden shifts to the respondents to establish facts to the contrary. *Ward* (1998) 159 ALR 483 per Lee J at 514.

73 *WA v Ward*, (2000) 170 ALR 159 per Beaumont, von Doussa JJ [241].

74 *WA v Ward*, (2000) 170 ALR 159 per Beaumont, von Doussa JJ [241].

75 *WA v Ward*, (2000) 170 ALR 159 per Lee J at 634-5.

76 *Mabo* (1992) 175 CLR 1 per Brennan J at 61.

77 *WA v Ward* (2000) 170 ALR 159 per Beaumont and von Doussa at [235].

78 *WA v Ward* (2000) 170 ALR 159 per Beaumont and von Doussa at [233].

79 *Native Trust and Land Act* No 18 of 1936.

80 *Restitution of Land Rights Act*, s 3(b).

relatives such as brothers, sisters, nephews and nieces, or the spouse of a direct descendant. The range of potential claimants to an area of land is thus much narrower than under the NTA.

It is likely that the amount of land that has survived the impact of the assertion of sovereignty and is potentially claimable as Aboriginal title is less in South Africa than in Australia. The potential for native title claims in Australia is due largely to the erroneous belief at the time of the assertion of sovereignty that Australia was legally unoccupied.⁸¹ Under this assumption, land in Australia was settled without any express legislative extinguishment of Aboriginal title. In South Africa, the attitude to Indigenous land rights was more complicated. Responses ranged from no recognition (in the Cape Colony), to limited recognition (in the Transkei), to full recognition (in Natal and the Transvaal).⁸² Ironically, the greater recognition of Indigenous land rights in South Africa at the time of settlement is likely to mean there are more occasions when colonial governments expressed an intention to extinguish Aboriginal title.

For claims to land that date before 1913 there is no legislative scheme for the processing of claims. However there is the possibility of claimants lodging an action in the Courts based on common law property rights to Aboriginal title as in Australia. There is at least one such claim on foot.⁸³ With respect to such claims, academic lawyers and advocates for potential claimants have looked with interest at the development of the common law of Aboriginal title in North America, Australia and New Zealand.⁸⁴ A distinct advantage for the establishment of claims in South Africa is that there are comprehensive written records of statutory grants to land and of removals from land under the apartheid regime. Little research is therefore required from expert witnesses.⁸⁵

4. Extinguishment

At common law, Aboriginal title is vulnerable to extinguishment by a colonial power. *Mabo* spent considerable time explaining how this was able to occur as a matter of law.⁸⁶ Being only a beneficial interest under the Crown,⁸⁷ native title can be extinguished through the granting of land interests that are inconsistent with its continued existence.⁸⁸ The test of inconsistency appears in the Preamble to the NTA:

Native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.

The inconsistency can be in the impact of the statutory grant itself or in the use of the land according to the grant. In relation to the impact of a statutory grant, the question is whether the statutory grant confers rights that are so inconsistent with native title that the two cannot co-exist.⁸⁹ The High Court has confirmed that this is the impact of native title

81 *Mabo* (1992) 175 CLR 1.

82 Bennett, T, n 10 at 443. See also, Moleah, AT, *South Africa: Colonialism, Apartheid and African Dispossession* (1993); Platzky, L and Walker, C, *The Surplus People: Forced Removals in South Africa*, Raven Press, Johannesburg, 1985; Meredith, M, *In the Name of Apartheid: South Africa in the Post-War Period* (1988); Judge Gildenhuys, n 70; Fryer-Smith, S, n 10.

83 *Richtersveld Community & Ors v Alexkor Ltd and the Government of the Republic of South Africa*, Land Claims Court, LCC 151/98, 13 September, 17 December 1998.

84 Bennett and Powell, 'Aboriginal Title in South Africa Revisited', *South African Journal of Human Rights* (forthcoming).

85 Bertus DeVilliers 'South Africa 2000 — the Progress of Land Claims and Reflections on the Australian Process' delivered at Conference titled 'Native Title in the new millennium' organised by the Mirimbiak Nations Aboriginal Corporation, Melbourne 16 April — 20 April 2000 (unpublished) at 17.

86 Bartlett R, n 34 at 216ff.

87 *Mabo* (1992) 175 CLR 1 per Brennan J 51–52.

88 *Wik Peoples v Queensland* (1996) 187 CLR 1 per Toohey J at 126; per Gummow J at 186; per Kirby J at 249; *Ward* (1998) 159 ALR 483 per Lee J at 552.

89 *Wik Peoples v Queensland* (1996) 187 CLR 1 per Toohey J at 126.

on freehold and traditional leasehold titles.⁹⁰ Extinguishment is effected whether or not the grant was ever taken up and whether or not an Indigenous community had continued to occupy the land uninterrupted under traditional laws and customs since the assertion of British sovereignty. It is the legal impact of the grant that extinguishes native title, regardless of its practical effect. The *Native Title Amendment Act 1998* contains a schedule of legislative acts that extinguish native title through the impact of the grant itself. Some of the statutory interests in this schedule, such as freehold, simply confirm what the common law has indicated extinguishes native title. Others for which the common law position is not so certain have been controversial.⁹¹ If coexistence is possible in law, and the grant itself does not extinguish native title, then it can still be extinguished by the performance of some act under the statutory grant that is inconsistent with native title.⁹²

The question of extinguishment is not a phenomenon unique to Aboriginal title. The power to affect private rights flows from the assertion of sovereignty.

[S]overeignty carries the power to create and to extinguish private rights and interests in land. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power.⁹³

In Australia, the question of when the sovereign exercised the power to affect Indigenous land rights has been complicated by the fact that Indigenous people were only understood to possess rights to land in 1992. By contrast, in South Africa apartheid laws evinced a clear intention to affect the rights of black Africans to their lands. The question is not whether rights to land have survived the operation of apartheid laws, but the terms upon which restitution can take place. In South Africa, there has been a *change* of sovereignty represented by the creation of a new Constitution and the holding of the first democratic elections of universal adult suffrage. Property relations are established by s 25 of the *Constitution*. Under this new property regime, it is statutory grants under the apartheid regime that are vulnerable to extinguishment.

5. Remedies

Under the NTA, if claimants successfully establish their native title rights, but those rights have been extinguished through inconsistent State or Commonwealth grants, there is no alternative remedy open to them in the legislation. It is not yet clear what, if any, compensation is payable for past acts of governments or others which have extinguished native title. The majority view in *Mabo* seems to be that State or Commonwealth governments are not liable to pay compensation in such cases.⁹⁴ The only tangential benefit for the claimant group is that they might have a stronger claim to a grant of land through the Land Fund legislation.⁹⁵

If a claim is successfully made under the RLRA, restitution can take many forms. If restoration to the land from which the claimants were dispossessed is not possible, other remedies include the provision of alternative land, payment of compensation, sharing land with others, special budgetary assistance on land where claimants currently live, or priority access to state resources in the allocation and development of housing and land in the appropriate development programme.⁹⁶ Furthermore, under the terms of the *Constitution*,

90 *Fejo & Anor on behalf of the Larrakia people v Northern Territory of Australia & Anor* (1998) 156 ALR 721 at 736.

91 In particular pastoral leases. See *Wik Peoples v Queensland* (1996) 187 CLR 1, *WA v Ward* (2000) 170 ALR 159.

92 *WA v Ward* (2000) 170 ALR 159 at [73]; *Yanner v Eaton* (1999) 166 ALR 258 per Gummow J at 289.

93 *Mabo* (1992) 175 CLR 1 per Brennan J at 63.

94 *Mabo* (1992) 175 CLR 1 per Brennan J at 15. See also, Bartlett R, n 34 ch 21, 'Compensation'.

95 *The Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (Cth) No 20 of 1995.

96 RLRA s15; Department of Land Affairs, *White Paper on South African Land Policy* (1997) at 56.

people with titles under the apartheid regime will receive fair compensation if they are removed under the terms of the RLRA. Compensation will be based on the consideration paid for the property upon acquisition.⁹⁷

6. *Extent of Rights*

The main purpose of the NTA was to protect Aboriginal land so that traditional laws and customs could continue to be practised freely and without interference. Native title is inalienable. Once it is successfully claimed, it cannot be sold off. It can only be surrendered to the Crown. It is not certain to what extent modern economic uses of land such as mining for minerals or petroleum, pastoralism and agriculture are consistent with traditional laws and customs.⁹⁸ Holders of native title can benefit from the economic use of native title land by others. The NTA allows holders of native title, by agreement with governments, to authorise future acts that affect their title. Through this mechanism, claimants can negotiate economic benefits for future acts on land on which governments and other parties wish to engage in activities.

Thus, the primary economic value of native title is in the bargaining power that it provides holders in relation to the use of the land by others. With the erosion of native title rights over time, this bargaining power has decreased. In *Mabo* the order of the Court included the statement that 'the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands'.⁹⁹ *Mabo*, therefore, left open the possibility that holders of native title might be able to use the courts to prevent development that impacted on native title rights. In the NTA, the bargaining power is contained in a statutory right to negotiate which has been eroded in amendments to the Act in 1998.¹⁰⁰

In South Africa, restitution to land under the RLRA provides full rights to property in land successfully claimed. The title exists under the uniform system of land law. Under the RLRA, communities are free to develop new relationships to the land without fear incompatibility with their title and they can divest their title to others. Furthermore, communities can still freely practice and observe traditional laws and customs on the land.

7. *Outcomes*

The eight years of Aboriginal title claims in Australia have seen the potential content of native title diminish, the types of interests that extinguish native title increase, and no claims finally determined through the court process. By the middle of 1998, the National Native Title Tribunal reported that there had been 804 applications for native title determinations registered with the Tribunal. By the end of June 1999, two native title claims had been determined through mediation in the Tribunal, one in the 1996-97 reporting period and one in the 1997-98 reporting period, and four claims have been

⁹⁷ Constitution of the Republic of South Africa, s25.

⁹⁸ See *WA v Ward* (2000) 170 ALR 159 which held that native title rights to minerals and petroleum was dependent on their being a traditional law, custom or use associated with the trade or use of these resources. The majority further held that State legislation which vested ownership of minerals in the Crown extinguished any native title rights to minerals [520], and that the grant of mining leases extinguished native title [525] — [526]. These findings have weakened considerably the potential for Indigenous people to negotiate favourable terms with mining companies in relation to the use of land upon which the companies wish to mine. See also, Kauffman, P, *Wik, Mining and Aborigines*, Allen & Unwin, St Leonards, 1998.

⁹⁹ *Mabo* (1988) 166 CLR 186 at 217.

¹⁰⁰ The *Native Title Act Amendment Act 1998* (Cth) removes the right to negotiate from compulsory acquisition of native title rights for private infrastructure projects which are not associated with mining [s 26(1)(c)(iii)]; compulsory acquisition of native title rights in a town or city [s 26(2)(f)]. Under s 26B, approved alluvial gold or tin mining can be excluded from the right to negotiate, and under s 26C, opal and gem mining can be excluded from the right to negotiate on certain conditions.

determined after trials in the Federal Court, *Yarmirr v NT*¹⁰¹, *Ward v WA*¹⁰², *Yorta Yorta v Victoria*¹⁰³ and *Hayes v NT*¹⁰⁴. The claim by the Yorta Yorta people was completely rejected by the Court. The other three claims met with some degree of success. *Ward and Yarmirr* have now been heard on appeal by the Full Court of the Federal Court and are likely to go on appeal to the High Court over the next few years.¹⁰⁵ When the court process has finally run its course, the relationship between native title and other interests on land will still have to be worked out practically through agreements between the interested parties.¹⁰⁶

The annual reports of the NNTT make it clear that these results are disappointing. They highlight strategies that the tribunal is attempting to adopt to resolve claims more rapidly. One such initiative is to have all native title determinations commence in the Federal Court and then to have them referred to the Tribunal for mediation. The NNTT is keen to promote Indigenous Land Use Agreements in place of native title determinations.¹⁰⁷ These are binding contractual agreements about the use and management of land and waters made between Indigenous communities claiming to hold native title and other persons or organisations. Lastly, the President of the NNTT has expressed the hope that as the courts settle on a clear common law definition of the nature of native title, its proof and its extinguishment, there will be a better framework for successful mediation and negotiation through the tribunal.¹⁰⁸ The spectacular failure of outcomes under the native title process is due to a combination of factors, such as the way the legislative process has been implemented, the complicated nature of Aboriginal title at common law and its slow development through the courts, the difficulty of reconciling native title with other interests in land, the confusion over amendments to the Act, and the unwillingness of some State governments to acknowledge and work co-operatively within the legislative scheme.¹⁰⁹ No one factor can be isolated, and there is limited political will to promote successful outcomes.

In 1996, the National Land Committee estimated that there were 3.4 million potential claims under the RLRA.¹¹⁰ The Act therefore promises an enormous redistribution of land with all the social, economic and demographic consequences that will flow from this. There was widespread dissatisfaction at the slow rate of progress of land claims in the first few years of the legislative scheme. By the end of 1997, only three of 17,803 claims had been processed.¹¹¹ In response to this slow progress, the legislation was amended to give more power to the Land Claims Commission to resolve claims through negotiation and mediation, and to remove as many claims from the court process as possible. When the period for the registration of claims ended at the end of 1998, there were 63,455 registered claims. By February 2000, 1500 of these claims had been settled. Most were urban claims and resolution was mainly through consent determination.¹¹²

101 *Yarmirr v NT* (1998) 156 ALR 370.

102 *Ward v WA* (1998) 159 ALR 483.

103 *Yorta Yorta v Victoria* [1998] FCA 1606.

104 *Hayes v NT* [1999] FCA 1248, and [2000] FCA 671.

105 *WA v Ward* (2000) 170 ALR 159; *Commonwealth v Yarmirr* (1999) 168 ALR 426.

106 National Native Title Tribunal, Annual Report 1996/97.

107 National Native Title Tribunal, Annual Report 1998/99 at 137–8.

108 President's Report in Annual Report of the NNTT, 1997/98.

109 The WA State government, in particular, has been openly opposed to the native title legislation, even passing its own conflicting legislation to replace native title with a statutory grant.

110 Special Focus', *Human Rights Report*, June 1996, 19. Note also, that between 1960 and 1980, 3.5 million people were removed from rural and urban areas between 1960 and 1980. See also Department of Land Affairs, *White Paper on South African Land Policy* (1997) at 11.

111 Department of Land Affairs, *White Paper on South African Land Policy* (1997) at 54.

112 DeVilliers B, note 85 at 11–12.

V. Merits of Native Title Law in Australia in Light of the Comparison

Many of the reasons that the South African Government decided not to base land restitution on the doctrine of Aboriginal title have proved well founded in the Australian context. Native title is difficult to define and remains unsettled after eight years of jurisprudence. It is difficult for claimants to establish a continuing connection to land from the time of the assertion of European sovereignty to the present and when and how native title is extinguished by other land grants requires a complicated process of statutory interpretation. Finally, as it has developed since *Mabo*, native title is a vulnerable interest in land which provides less rights to holders than is provided by statutory grants under the *Restitution of Land Rights Act*.

However, native title has benefits for Indigenous communities which cannot be measured in terms of the 'strength' of title. The advent of native title has led to a renewed interest in Indigenous laws and customs. It is these laws and customs that form the basis of a claim.¹¹³ A successful native title claim enables traditional laws and customs to be practiced freely either in co-existence with other interests, or while protected from them. In fact, not only are communities *free* to practice their traditional laws on native title land, but they are *empowered* to do so in the sense that the practice of traditional laws and customs is a confirmation of the legitimacy of their title.¹¹⁴

Precisely because native title is not primarily about economics, the focus has been on Aboriginal cultural heritage. There has been a dramatic increase in archaeological, anthropological, historical, and genealogical research into Aboriginal culture to support native title claims. This new focus of research energy is occurring at a crucial time. The elder men and women in Indigenous communities who possess the greatest wealth of cultural knowledge do not have much longer to live.¹¹⁵ Much effort is devoted to recording their knowledge on documentary film and in sound recordings of interviews. Most importantly, communities themselves are turning to their elders to pass on their knowledge. This movement in cultural regeneration owes much to the impetus that has been created by native title claims.

There is a cultural rejuvenation occurring in South Africa post-apartheid. But it is happening at a national rather than a local level. The focus for disenfranchised blacks has been the assertion of constitutional rights. The focus has been on restoring socio-economic justice, and not justice of an equal recognition of culturally unique laws and customs. Land restitution in South Africa is thus a vehicle to homogenise the laws of land title. Native title has the opposite aim.

Native title challenges British sovereignty in Australia. Being a *sui generis* right that is not directly comparable to common law land rights. Native title leaves open the possibility of a limited Aboriginal sovereignty in Australia.¹¹⁶ Once established, native title may be

113 See for example, F McKeown (ed) *Native Title: An Opportunity for Understanding* (1994).

114 There may, in fact, be greater restraints on the practice of traditional laws and customs in South Africa than in Australia due to the extensive bill of rights in the Constitution of the Republic of South Africa which provides for formal equality to all. Australia has no equivalent document.

115 A recurring tragedy in native title claims is the death of key witnesses during the court process. This has occurred during the hearing of traditional evidence in many native title trials including that of *Ward*. Most famously, Eddie Mabo died shortly before the High Court handed down its historic judgment accepting his Aboriginal title claim on behalf of the Meriam people.

116 On the relationship between native title and Aboriginal sovereignty, see: Reynolds, H, *Aboriginal Sovereignty: Reflections on Race, State and Nation*, Allen & Unwin, St Leonards 1996; Gilbert, K, *Aboriginal Sovereignty, Justice, the Law and Land*, Burrambinga Books, Canberra, 1993; Webber, J, 'Native Title as Self-Government' (1999) 5(2) *University of New South Wales Law Journal Forum* 5; Pearson, N, 'Reconciliation: to be or not to be — Separate Aboriginal Nationhood or Aboriginal Self-Determination and Self-Government Within the Australian Nation' (1993) 3(61) *Aboriginal Law Bulletin* 14; Brennan, F, *Sharing the Country*, Penguin, Ringwood, 1991; Thompson, J, 'Land Rights and Aboriginal Sovereignty' (1990) 68(3) *Australian Journal of Philosophy* 313.

more difficult for the State to extinguish in the future than other titles because of its unique relationship to other titles in the common law. There has been little support for the possibility of a fiduciary duty owed to native title holders in Australia (a possibility that has received judicial support in Canada¹¹⁷) but it remains to be seen how easy it will be for State and Commonwealth legislatures to extinguish native title rights that have been successfully claimed under the *Native Title Act*.

Native title challenges the pre-existing understanding of land tenure and property rights in Australia.¹¹⁸ Because of the *sui generis* nature of native title, and the evolving jurisprudence of co-existence since *Wik*, there is the possibility of a subtle and constantly evolving relationship of indigenous and non-indigenous rights to land. This may challenge more rigid common law classifications of co-existent rights such as easements, rights to access, non-exclusive leases and so on. In *Yanner v Eaton*, the High Court even questioned the concept of 'property' in its attempt to reconcile native title rights with the statutory regulation of fauna.¹¹⁹

As well as challenging the law's understanding of property, the native title claims process has required the law to develop new practices to deal with issues of great cultural sensitivity. Strict rules of evidence have had to be modified in the trial process to cater for oral traditions. Court practices for gathering evidence, attributing weight to different types of evidence, and techniques of examination and cross-examination have all been challenged. Recent decisions in the High Court and the Federal Court have demonstrated a sophisticated understanding of the problems faced by Indigenous communities in proving native title claims. The courts have accommodated new forms of evidence,¹²⁰ have recognised a range of familial relationships not known to the common law, and have recognised that the traditional laws and customs of Indigenous people can evolve significantly and still remain traditional.¹²¹ In South Africa, the Land Claims Court has not been required to engage with another understanding of fundamental legal concepts. The RLRA within the new constitutional framework, has set the parameters of the applicable legal principles. On occasions, the Court has been prepared to read the Act narrowly, as in *re Mayibuye I-Cremien Committee Land Claim* in which 'direct descendants' was narrowly defined.

Although the native title process has had these positive effects, it has also demonstrated that the law is a blunt instrument, not alive to important issues of cultural sensitivity. Communities claiming native title make enormous sacrifices and compromises to mount a claim, exposing laws and customs that are traditionally secret to scrutiny by the courts. They risk being judged not to be who they claim to be or that their laws and customs are not sufficiently traditional, and in this way failing in their claims for title.¹²² In such cases, claimant communities do not just lose what they consider to be their land, but their identities as well. By keeping the claims process separate from issues of traditional customary rights, the South African government has isolated these questions from the legal

117 For a discussion of these authorities, see for example Bartlett R, 'The Fiduciary Obligation of the Crown to the Indians' (1989) 53(2) *Saskatchewan Law Review* 301.

118 Grattam S and McNamara L, 'The Common Law Construct of Native Title: a 're-feudalisation' of Australian Land Law' (1999) 8 *Griffith Law Review* 50; Butt P and Eagleson R, *Mabo, Wik and Native Title*, Federation Press, Leichhardt 1998.

119 *Yanner v Eaton* (1999) 166 ALR 258 at 264. 'The concept of "property" may be elusive. Usually it is treated as a "bundle of rights". But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray puts it, that "the ultimate fact about property is that it does not really exist: it is mere illusion".' quoting Gray K and Gray SF, 'The Idea of Property in Land' in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, Oxford University Press, New York, 1998 at 15.

120 In particular, oral evidence of material which would traditionally be considered to be hearsay.

121 See *Ward v WA* (1998) 159 ALR 483, *WA v Ward*, (2000) 170 ALR 159, *Yanner* (1999) 166 ALR 258.

122 See for example, *Yorta Yorta v State of Victoria & Ors*, Federal Court of Australia, Olney J, 18 December 1998, unreported.

process. This has meant that there has not been the strong legal affirmation of traditional rights to land, or the damaging pronouncements of its extinction. It remains to be seen whether questions of traditional rights to land can be satisfactorily addressed once the issue of formal legal title is resolved.

VI. Conclusion

The governments of Australia and South Africa have both chosen to respond to land reform questions with comprehensive legislative policies. The policies have very different emphases. In South Africa, the policy focuses on formal legal rights under the new constitutional framework. In Australia, it focuses on the recognition of a co-existent legal system. It is somewhat surprising to find a similarity in the procedures chosen in response to the land questions in each country given these different policies. It is less surprising to find a greater ambition for significant reform in South Africa, and a greater will to achieve it given the political and legal contexts in which land reform has been implemented there. After a few years of operation, both claims processes received severe criticism for a lack of results. In South Africa the response was to amend the legislation to favour administrative over legal procedures for resolution. In Australia, amendments gave more responsibility to the Courts. Since these amendments, results in South Africa have been more positive, while in Australia the number of successful outcomes has not increased discernibly. Finally, and most importantly, the comparison with South Africa helps explain why it was important for Indigenous people that the Australian government preserved native title and did not replace it with a statutory grant. The answer lies primarily in the historical and political preconditions to land reform. Given a history where the rights of Indigenous people were afforded no recognition at all, given their lack of political power, given their institutional disadvantage and the vulnerability of their cultural heritage, it was of great importance to Indigenous Australians that their unique right to native title be protected.