LEGAL RECOGNITION OF INDIGENOUS GROUPS

by

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FAO LEGAL PAPERS ONLINE

DECEMBER, 1998

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Preface

Community-based natural resource management has received a great deal of attention over the last decade, with respect to both its potential and its difficulties. There is now a substantial body of evidence that local users of natural resources can, and in many cases do, manage those resources sustainably – if their rights to do so are recognized and protected, if appropriate institutions are in place or can be developed, and if the benefits are significant, obvious and secure.

Law is one of many variables – economic, social, political, environmental – that play a role in the success or failure of community-based approaches in a particular context. As several recent studies have demonstrated, prevailing laws in many countries have contributed over time to the weakening of local incentives and institutional capacities (Lynch and Talbott, 1995). And even where laws do not directly undercut community-based approaches, the absence of appropriate legal foundations can create uncertainties that threaten the long-term viability of successful management efforts.

In recent years, interest in developing stronger legal foundations for community-based management has grown substantially, within governments and civil society. *How* to develop such foundations, however, is not as obvious as the need for them in the first place.

In the following article – the first in the new series of FAO Legal Papers Online – Jim Fingleton analyses one facet of the complex relationship between law and community-based management: the problem of how national laws *recognize* community-based land-owning or resource managing groups.

As Fingleton explains, legal recognition is a matter of growing importance to groups trying to survive in an increasingly inter-dependent world in which there are escalating threats to local resources. On the one hand, legal recognition is important for strengthening a group's ability to negotiate and transact with non-group members. At the same time, it is an important way of protecting the group against undue interference from the government and other outsiders. The dilemma is how to provide the potential benefits of legal recognition without at the same time undermining a group's cultural integrity and disrupting its ability to operate according to community-based laws and institutions. In short, writes Fingleton, the central question is "how to recognize a group without converting it into something else."

In exploring this problem, Fingleton presents detailed case studies of two countries in which the jurisprudence on this issue is relatively extensive: Papua New Guinea and Australia. His traversal of the relevant national and provincial laws provides us with detailed comparative insights into the potential benefits and pitfalls of different legislative approaches, particularly in light of the diversity of techniques that lawmakers in both countries have tried over the years. The concluding section of the paper then draws upon the case study material to provide a thematic overview of the central issues in legal recognition, including the process of group recognition; group membership; group functions and powers; group decision-making; and dispute resolution.

No laws, of course, however well conceived, can ensure the success of community-based management in the face of unfavourable economic or social conditions, or if the political will to implement well-designed legislation is absent. Law remains, however, a critical piece of the larger

puzzle. In the years ahead, there will be a continuing need to search for workable legal arrangements that provide real and enforceable rights to community-based institutions while allowing a flexible response to vastly different local conditions and a balancing of multiple interests. We hope that the following article (as well as later contributions to this Series) will be of help to those engaged in this important ongoing task.

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Rome
December 1998

LEGAL RECOGNITION OF INDIGENOUS GROUPS

J. S. Fingleton[1]

Contents

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I. INTRODUCTION

On 25 November 1997, an agreement between Aboriginal representatives of traditional landowners and the American energy giant, Chevron Corporation, was signed on the far north coast of Queensland, Australia. The agreement was the culmination of lengthy negotiations, aimed at securing approval of Aboriginal traditional landowners to the construction of a gas pipeline from the Kutubu oilfields in the Southern Highlands of Papua New Guinea across the Torres Strait to Cape York Peninsula, and down through central Queensland to supply a proposed new power station and alumina refinery. This ground-breaking project, if it proceeds, will link two important innovations in the legal recognition of indigenous groups[2] which this paper will explore - the *Land Groups Incorporation Act* of Papua New Guinea and the *Native Title Act* of Australia.

An adviser who was present at the signing ceremony made the following observations, which go to the heart of the problem addressed in this paper -

> "There are a lot of people here. They come from every region through which the pipeline will pass. They belong to lots of different Aboriginal organisations, from Land Councils to Steering Committees to language groups to traditional owners. They've had a hard job. It's one thing to represent your own mob, it's another to try and work out what will be good for everybody along 2000 kilometres of pipeline. It's one thing to represent your own interests, it's another matter to represent the interests of future generations. It's one thing to be here, it's another to make sure you're not squeezing anybody out."[3]

Here again is the familiar challenge to indigenous people - a development is proposed for their land, and they have to organize a response. Who can speak for the traditional landowners? Can a "steering committee" or a "land council" speak for them? Do "representatives" just work for their own people, or do they have responsibilities to the other indigenous people affected by the project? And are representatives who sign an agreement entitled to bind members of their group who are absent, or not even born?

This paper will examine how the "problem" of indigenous group recognition has been handled in two particular countries - Papua New Guinea and Australia. These two countries were chosen as case studies primarily because of the author's familiarity with them,[4] but they possess striking differences, as well as having shared a fairly common legal tradition for much of their

[2] The term "indigenous groups" is used in this paper because of its appropriateness in the context of Australia and Papua New Guinea – the countries which are the subject of the case studies presented in Part III – as well as in many other countries of the world. However, in light of the range of connotations assigned to the word "indigenous" in different parts of the world, it should be emphasised that the term is intended here to encompass a broad spectrum of "traditional" communities world-wide who have historically exercised ownership and control over land and natural resources, whether or not such communities would be considered the "aboriginal" inhabitants of a particular country.

[3] John von Sturmer, adviser to Cape York Land Council, writing in *Cape York Unity News,* Edition No.8, December 1997, at p.10.

[4] During the 1970s I was a senior adviser on land policy and legislation to the Government of Papua New Guinea, and I have since carried out many consultancies there on land tenure and related matters. In Australia, in 1993 I was appointed Head of the new Native Titles Research Unit in the Australian Institute of Aboriginal and Torres Strait Islander Studies, and during 1995-96 I led a team of consultants which reviewed the *Aboriginal Councils and Associations Act.*

recent histories, which make them valuable for purposes of comparison. They are neighbours in the south-west Pacific, a part of the world which stands out for its rich variety of cultures, and for the measures taken to incorporate and conserve indigenous values, institutions and practices in the national legal systems. Papua New Guinea is an independent country, whose indigenous people elect their national leadership under a system of representative democratic government. The indigenous population of Australia, by contrast, is a very small minority group, which cannot look forward to majority representation at any level higher than a local government council, anywhere in the country. Papua New Guinea is a Melanesian country with a long agricultural tradition, whereas, apart from the Melanesian occupants of the islands in the Torres Strait between Australia and Papua New Guinea, the indigenous inhabitants of the vast continent of mainland Australia are descendants of hunter-gatherer societies which are among the oldest on Earth.

The next part of this paper raises the problem of recognizing indigenous groups, and outlines the approaches of a range of countries. As the above comments on the pipeline agreement suggest, the problem is frequently one imposed on indigenous peoples from "outside" to which they must make the internal adjustments. In legal terms, outsiders need to have some recognized authority that can be made legally accountable for the group, and it is the outsider's legal system which largely determines the terms of that recognition, whether the outsider be a colonial power or a government in an independent nation-state. The legal recognition of indigenous groups is, therefore, frequently driven by outside interests, with the danger that it becomes a heavily one-sided operation. But legal recognition is not simply a device demanded by outsiders intent on interacting with indigenous groups. In an increasingly interdependent world, indigenous groups themselves find legal recognition to be of growing importance -- as a necessary part of bolstering their own ability to negotiate and transact with non-group members, and, at the same time, of protecting themselves and their resources against the undue interference of outsiders, including the state. The dilemma for indigenous groups is how to obtain the potential benefits of legal recognition while ensuring that the nature of that recognition does not seriously disrupt their cultural integrity and their ability to continue operating according to community-based laws and institutions.

Part III of the paper contains the two main case studies - Papua New Guinea and Australia. In each case, the way legislation has developed to take account of indigenous land-owning groups will be examined, followed by outlines of the results achieved to date. In the final part of the paper the findings from the case studies will be drawn together, to identify the main legal issues, how they have been handled and what lessons can be learnt from the experience in both countries.

II. THE PROBLEM

A. Are indigenous groups important?

The main purpose of this paper is to examine legal measures taken to recognize indigenous groups and provide for their ongoing operation; the paper starts, therefore, from an underlying *assumption* that indigenous groups have continued relevance to the needs and wishes of the people who operate within them. Nevertheless, while it is beyond the scope and purpose of the paper to explore this complex issue in any depth, it may be useful to present – however briefly – some of the arguments made for and against the preservation of indigenous groups. In the course of this brief discussion, the focus of the present paper will be narrowed to a concentration on the role of indigenous groups in the ownership and control of land and other natural resources. It should, perhaps, be stressed at the beginning that it is the role of groups *as groups* which is under consideration - that is, the group as an entity over and above the individual members which make it up.

In many ways, this distinction characterises the main issue over whether there should be a continuing role for groups: the argument is not over whether their individual members are important; rather, the argument is over whether the whole membership as a group should be given a separate status in a country's legal system. Is a clan, for example, entitled to be treated as a separate legal entity from the individuals which comprise it? In legal terms, there is generally no objection to the notion that groups of people can have a separate legal identity - nation states are an obvious example, but there are many other corporate bodies which are given legal recognition for all kinds of purposes, commercial, social, cultural, etc. The objections seem to lie not so much to the recognition of groups as such but to the recognition of *indigenous* groups, and the arguments are usually expressed in terms of the backwardness of clans and other such traditional groupings, and their inappropriateness for modern needs and purposes.

In their crudest form, these objections amount to not much more than thinly-disguised cultural imperialism, but the argument is usually put more subtly. For example, there is a national debate raging at the moment in Australia over a recent decision by the highest court in the land to give belated legal recognition to indigenous titles to land.[5] The decision has been strongly criticised as divisive, as a threat to national unity, and as breaking the fundamental principle of equal treatment under the law. It is said by these critics to emphasise differences between the races, and to fly in the face of indigenous demands for the benefits of modern education, housing, medical and municipal services - benefits "created by Western civilisation". By making special provision for the special circumstances of Aboriginal peoples in Australia, Federal and State governments are accused of practising a form of apartheid.

Often these views reflect a form of social Darwinism, with indigenous races being expected either to evolve in the face of Western competition (ie, assimilate) or become extinct. Others take the opposite view - that the survival of indigenous peoples and their cultures contributes to a richer cultural diversity, from which we all benefit. The trend in international treaties and other instruments is towards a recognition of the rights of traditional communities to enjoy their own

[5] The decision of the High Court of Australia in the Mabo Case, discussed more fully in Part III.

cultures, participate in the management of their resources, and thereby contribute to the sustainable use of the world's biological diversity.[6]

More serious are the arguments based on pragmatism - that indigenous groups are obstacles in the path of development, and that indigenous peoples are themselves abandoning their traditional groups (tribes, clans, extended families, etc.) in favour of individuals and the nuclear family. This individualisation trend is thought to be most pronounced in customary land tenures, which are themselves commonly portrayed as obstacles to development. Much of the criticism is, in the author's view, misinformed, failing to understand the distinction between land tenure and land use. In many traditional societies, the tenure to their land is group-based, and individuals have rights to land as a result of their membership of a group, or some other relationship to it (eg, marriage to a member). Land use, on the other hand, is largely in the hands of individuals - members of the group, their spouses, siblings, children or other close kin. So, between land tenure and land use there exists a balance between group and individual rights and obligations. It is a traditional balance, but one which can be shifted in the direction of strengthening the role of individual group members - without necessarily involving the extinction of their groups - as people adapt to the demands of modern living.

And, of course, customary tenures in land and other natural resources (for example, forests and fisheries) *are* dynamic and *do* change - unless governments make the mistake of arresting their development, by attempting to codify them without providing for their adaptation. Among the various external agents of change are new technologies, new commercial plants and animals, central government, major changes in population levels, suppression of warfare and greatly increased personal mobility. In a 1995 study on Papua New Guinea, Australia's official aid agency distinguished "four different levels of difficulty for officials and others dealing with customary land tenure", being -

(i) difficulties about content - the complexity and variety of customary tenures;
(ii) difficulties about groups - membership, representation and decision-making issues;
(iii) difficulties about finality; and
(iv) difficulties about government. (Clarke et al. 1995:3-4)

The present paper is concerned with the second "level of difficulty" - problems related to group membership, representation and decision-making.

Indigenous groups face many difficulties in today's world. Modernising influences tend strongly towards individualism, and the resource base of indigenous groups is under constant threat. Group management obviously presents special difficulties which do not apply to individuals, especially where economic decision-making is concerned. Furthermore, groups are often undemocratic, and the rights of women can go largely unrecognized. A common response to these difficulties is to call for the dissolution of groups, and distribution of their property among the individual members. Such a choice should be available, but at the same time the members should be able to preserve their groups if that is their choice. The problem is that if the legal system in a country does not recognize that indigenous groups have an important role to play, not just in resource management but also in political development and the maintenance of social order, then the continued survival of such groups will be at risk. The state should provide the processes which

[6] In particular, the International Covenant on Civil and Political Rights, the International Labor Organization's Conventions Nos.107 and 169, and the Convention on Biological Diversity.

facilitate the adaptation of groups to their members' modern needs and circumstances, but this can only be done if the groups are given legal recognition first.

B. Legal approaches taken to indigenous groups

A brief overview reveals a wide variety of approaches taken to the recognition of indigenous groups, and group decision-making processes, by legal systems around the world. In many countries of Asia, legal provision for groups is relatively sparse, in part because communal resource management regimes may be regarded by governments as "politically suspect, or an obstacle to their programs of nationalist modernisation" (Larmour 1997:8-9).[7] This approach is in stark contrast to the treatment of indigenous groups in Pacific Islands states, where custom, traditional authority and customary tenures are frequently installed as hallmarks of national identity, in their independence constitutions and other laws. Many specialist bodies exist for the maintenance of customary authority and control over land, ranging from Councils of Chiefs with a constitutional say in government in Fiji and Vanuatu to the Land and Titles Court of Western Samoa, Fiji's Native Land Trust Board and the judicial powers of village chiefs over land disputes in Vanuatu and Solomon Islands.

Philippines has been the scene of long-standing efforts on the part of indigenous communities to secure recognition of community-based tenurial regimes. The most recent manifestation of these efforts was the adoption in 1997 of the *Indigenous Peoples Rights Act*, which, among other matters, provides mechanisms for the issuance of "certificates of ancestral domain title" to indigenous communities.

In New Zealand, recent developments have seen the reaffirmation of the group nature of traditional Maori land tenure. For more than a century after colonisation the legal system in New Zealand insisted on applying European concepts of individual ownership, trusts and "incorporations" to Maori land, with the result that a great deal of the land was alienated away from Maori ownership, and often what remained was hopelessly fragmented among individual shareholders. After passage of the *Treaty of Waitangi Act* in 1975, it became possible for Maori to make claims to their ancestral lands and other natural resources, and the opportunity was taken to rethink the meaning of Maori identity in the modern context, where more than 80% of Maori people no longer live in tribal communities. In 1983 the New Zealand Maori Council, having given lengthy consideration to Maori kinship and tribal cultural values, concluded –

> "Our objective is to keep Maori land in the undisturbed possession of its owners; and its occupation, use and administration by them or for their benefit. Laws and policies must emphasise and consolidate Maori land ownership and use by the whanau or kin group."[8]

Accordingly, in 1993 the New Zealand Parliament passed the *Ture Whenua Maori Act* with the aim of promoting "the retention, use, development, and control" of Maori land as the sacred heritage of Maori owners, their tribal groups and their descendants. One provision in the Act authorises the Maori Land Court to determine who are "the most appropriate representatives" of any Maori land-owning group for the purposes of any negotiations, consultations, allocation or other matter.

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[7] I am also indebted to Dr R.J. Fisher for his thoughts on the reasons for lack of legal status for ethnic groups in Asia.
[8] Quoted by Sir Hugh Kawharu (1997:92).

Many African countries have long recognized certain communal rights over certain areas; more frequently than not, however, the legal status of those rights and of the groups that purportedly hold them has been only weakly and ambiguously defined in national laws. One attempt to provide for the explicit recognition and registration of group rights was a 1968 Kenyan law - the *Land (Group Representatives) Act.* This law, in a manner similar to the New Zealand examples above, requires that a group appoint its representatives in advance as a prerequisite to registration of title to land used for such purposes as communal cattle ranching. Innovative contemporary efforts to define and register group ownership rights and to provide for the recognition of communal land-owning entities are taking place in post-apartheid South Africa (see, for example, the *Communal Property Associations Act, 1996*). In a wide range of countries, from Madagascar and Mozambique to Guinea-Bissau and Mali, recent or ongoing legislative reform has, to varying degrees, focused on the need for clearer and more secure mechanisms for the assertion of group rights over land or other natural resources.

In North America, there is some difference in approach between Canada and the United States, and in the latter case between the "lower 48" states and the states of Alaska and Hawaii. In Canada, again different approaches were adopted to the recognition of indigenous titles in eastern Canada and west of the Rockies, in British Columbia. In 1990 the federal government made a commitment to building a "new relationship" with the First Nations, with the resolution of native title claims as one of its fundamental goals. The term "First Nation" is defined, for example, in the document setting up the British Columbia Treaty Commission as meaning –

> "an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia."[9]

This approach of incorporating the all-important authority for group representation in the actual definition of the group has been extended further in the process proposed for the negotiation of treaties with First Nations. In order to provide communal authority for any treaties concluded between the parties, the First Nations will be required to consult their communities, establish an organization to support the negotiations, and adopt a ratification procedure before negotiations even begin.[10] This approach seeks to "lock in" group authority for the ultimate decision from the outset.

In the United States of America, a basic difference from the status of indigenous minorities elsewhere is that the inherent sovereignty of Indian tribes has been accepted from the beginning. Each tribe is sovereign over its members and its tribal lands, although the federal government has "plenary power" to regulate Indian affairs. In the last century, the *General Allotment Act* 1887 allowed the communal tribal lands of Indian reservations to be divided into individual titles, a process which led to the loss of almost two-thirds of the area from Indian ownership. As in New Zealand (see above), allotments which were not sold descended over time to an ever-increasing number of heirs, leading to uneconomical fragmentation of titles. Further allotment of Indian

[9] British Columbia Treaty Commission Agreement, signed 21 September 1992, clause 1.1.
[10] Report of the British Columbia Task Force, 28 June 1991, under the heading " Process: How the Negotiations Should Proceed".

reservations was abolished in 1934, and a policy of self-determination has evolved during the second half of this century, enabling a revitalisation of tribal government.

The dangers of applying European concepts of individual ownership and corporations to indigenous land tenure are, however, slowly learnt. In Alaska, in 1971 the *Alaska Native Claims Settlement Act* ("ANCSA") converted claims to indigenous communal lands into individual shares in Native corporations. The shares were subject to a 20-year restriction on transfer, but thereafter they can pass out of indigenous hands. The effect has been to divide communal land rights based on traditional title into individual shares in more than 200 business corporations. To treat rights in land as shares in a company, and membership of a customary group as if it were the same as company shareholding, risks undermining the whole purpose of recognizing the special status of indigenous peoples. If indigenous groups are important and likely to remain so, then the problem is how to recognize them by laws which allow space for their growth and development *on their own terms*, not just in terms of the legal system which is affording them that recognition.

C. Main aspects of the problem

As argued in the Introduction, the legal recognition of indigenous groups has inescapably meant the subordination of indigenous legal systems, in the process of "recognizing" clans and other customary groups through outsider's eyes. All recognition laws, therefore, are to some degree acts of assimilation - the conversion into what is similar, familiar and more convenient to deal with for the mainstream community. Where countries have tried to come to terms with their indigenous peoples, either in full recognition of their inherent sovereignty or in incorporating customary tenures into their land administration systems, they have commonly adopted concepts from the mainstream legal culture. Sometimes groups are treated as corporations, co-operatives, associations or councils; often a representative approach, using trustees or agents, is adopted; decision-making processes based on democratic principles of majority voting are commonly invoked; and in extreme cases the existence of a group is ignored altogether, and members are simply treated as individuals with no natural relationship or connection with each other.

From a legal viewpoint, the main aspects of the problem of indigenous group recognition revolve around this central question of how to recognize a group without converting it into something else. There are two main dimensions to this recognition:

> the *external* dimension - how do outsiders relate to the group, know what powers it has and what actions it has taken?
>
> the *internal* dimension - how do the members of the group, the "insiders", relate to it and control its powers and actions, and how do they relate to each other?

Once the group has been given formal legal recognition, its nature will inevitably be changed. The goal is to minimise the extent to which this legal recognition interferes with the dynamics of the group's internal operations. The following Part will now examine how land-owning groups have been legally recognized in two countries - Papua New Guinea and Australia.

III. THE CASE STUDIES

A. Papua New Guinea

Area

Total: 462,243 sq km
Under indigenous tenure: 97%

Population

Total: 4 million
Indigenous: 99%

Source: US State Department

1. The groups[11]

There are some 700 separate language groups in Papua New Guinea, more than one-sixth of the world's total. Many languages are spoken today by less than 100 people, while only a few have more than 100,000 members. These groups are often called tribes, although they lack political cohesion. In the Highlands provinces, however, a tribe is thought of as a politically and militarily united group, usually comprising several intermarrying clans and having a well-defined territory.

Kinship is the basis of customary land tenure, and individual rights to customary land derive from membership of kinship groups. Members are commonly recruited to these groups according to principles of patrilineal and/or matrilineal descent. The most common land-owning group is what is usually called a clan, being the males and females who have descended from its founding ancestor. Clans are usually exogamous, and tribal or language groups are frequently divided into two moieties - members of one moiety being obliged to marry members of the other. Women usually move to their husband's land upon marriage, but may continue to use their own clan's land if that is practicable.

Within clans, the social unit which uses land is commonly the household - a man and his wife, their non-adult children, and possibly a brother, unmarried sister, or other close relative of the male household head.

[11] What follows is only the broadest outline, intended to give a general impression of the character of indigenous groups in Papua New Guinea.

2. The laws

(a) Early communal measures

The first land laws introduced by the colonial authorities in the two territories which in 1975 became the independent state of Papua New Guinea[12] were concerned with the land needs of the colonisers - they provided for the acquisition of land from the indigenous population and the grant of titles in that land to European settlers and others. There was, therefore, legal recognition of the property rights of the indigenous peoples, and machinery provided for acquisition of those rights and registration of secure land titles. The indigenous parties to land acquisition agreements were individuals, taken to be the landowners or, at least, acting on their behalf. These laws provided the tenurial underpinnings for the plantation economy.

The earliest attempt to give the benefits of security afforded by western law to agricultural operations under customary tenure was the *Native Plantations Ordinances* 1918 and 1925 of Papua. Under these laws an area of customary land could be declared "a native plantation", enabling the enforcement of compulsory labour by villagers under official supervision, and a sharing of profits between villagers and government. The measure was based on the official belief that villagers were more naturally adapted to communal patterns of work - and it is an early example of the confusion often made between patterns of land tenure and land use (see Part IIA, above).

The first true customary land registration law in Papua New Guinea was the *Native Land Registration Ordinance* 1952. It provided for registration of title in customary land in the ownership of either a community or named individuals. After a period of five years a registration became conclusive evidence of the ownership as stated. The registered land remained subject to custom, and provision was made for dealings in the land. By 1963, when the law was repealed, although a great deal of work had been done in demarcating group boundaries and recording group genealogies, not a single title had been registered.

To this stage, while there had been official acceptance that, under custom, land could be owned and used by communities, the legal recognition afforded to groups was minimal. Nothing, for example, was spelt out about the functions and powers of groups, and how the group acted as a group.

(b) Land law reforms in the mid-1960s

From the mid-1950s official measures to promote indigenous cash cropping were concentrated on individual producers. The shift of emphasis to individualisation was spelt out by the Australian Minister responsible for PNG, who laid down as his first principle for reform of customary land tenure that the ultimate long-term objective was a single system of landholding, "providing for secure individual registered titles after the pattern of the Australian system." Despite

[12] The two territories were Papua, originally proclaimed a British protectorate in 1884, and New Guinea, originally annexed by Germany also in 1884. In 1905 the Australian Government assumed responsibility for Papua, and New Guinea became a mandate territory under the League of Nations in 1920, and later a United Nations trust territory. The two territories were jointly administered by Australia prior to independence.

this emphasis, the major land law reforms of 1963 and 1964 - parts of which remain in place today - still made provision for group titles. The most relevant new laws were the following -

- The *Land Titles Commission Ordinance*[13] 1962: A Land Titles Commission (LTC) was established, with exclusive jurisdiction to handle claims to the ownership of customary land. The law also provided machinery for systematic adjudication of rights in customary land, to be followed by the registration of titles.

- The *Lands Registration (Communally Owned Land) Ordinance* 1962: A Register of Communally Owned Land was set up, in which LTC findings of ownership under custom were to be recorded. Land so registered remained subject to custom, but a registration was conclusive evidence of the rights as stated, as at the date of the LTC finding.

- The *Land (Tenure Conversion) Ordinance* 1963: This law provided machinery for the registration of individual freehold titles in customary land. It was an elaborate process with many demanding statutory requirements, but the result was termination of all customary interests in and controls over the land in question, and their replacement by an individually-owned freehold title, registered under the Torrens system.

This scheme of legislation, therefore, provided the options of customary land being registered either -

(i) in the Register of Communally Owned Land, in the name of an individual or a group; or
(ii) in the Torrens system register, in the name of individuals.

In the latter case custom ceased to apply to the land, but land registered in the former case remained subject to custom. No special legal provision was made for recognition of the land-owning groups or their management of the registered land.

In 1970, after a visit to PNG by the British land registration authority, S. Rowton Simpson, the operation of the *Lands Registration (Communally Owned Land) Ordinance* 1962 was suspended, never to be revived. Not a single title had ever been registered. Simpson was highly critical of the legislation, and was particularly concerned that provision was made in the law for "registered individual customary titles" - which he called "a contradiction in terms" (1969:13). In the author's view, this takes an unnecessarily restrictive approach to customary land registration, and legislation has been drafted in the Papua New Guinea context which provides for registered individual titles in customary land, as discussed below. Another Simpson criticism related to what he saw as the potential for "unregulated private conveyancing." (Ibid.) Although the Ordinance did not, in fact, provide for dealings in land registered under its provisions, the criticism does point up the law's weakness in failing to address the practical questions involved in the management by groups of their registered land. As mentioned above, the legal effect of registration was confined to declaring the status quo at the date that ownership was recorded.

[13] Legislation was enacted as Ordinances until self-government in 1973. Thereafter new legislation, and Ordinances still in force, were called Acts.

(c) Reform proposals in the 1970s

Papua New Guinea achieved self-government in 1973 and full independence in 1975. With the suspension in 1970 of the law for registration of communally-owned land, only individual freeholds could be carved out of customary land and given the security of registration. In 1971 the Australian authorities made one last attempt to reform the land legislation, drawing heavily on Kenyan laws of the 1960s.[14] There was, however, strong opposition to such comprehensive changes proceeding on the eve of independence, and the bills were withdrawn. In 1973 a Commission of Inquiry into Land Matters, comprising ten Papua New Guineans, was established. The Commissioners, basing their report on the Government's national goals of more equal distribution of benefits and reliance on indigenous forms of organization, advocated building on a customary base, avoiding both the collective and individualistic extremes, and facilitating the spontaneous adaptation of customary tenures (Papua New Guinea 1973). The basic pattern recommended for land registration was that group titles should be registered in the first instance, with provision for groups to grant registrable subordinate occupation rights to individual members, subgroups or others wishing to use the land.

This renewed emphasis on groups called for more careful consideration of how indigenous land-owning groups could be given appropriate legal recognition, and provision made for their effective decision-making over land. The country was fortunate in that its senior legislative draftsman at the time, C.J. Lynch, had been studying this matter for some years. The product of the Commission of Inquiry's recommendations and his ideas was one of the most innovative laws on the general subject of group recognition, the *Land Groups Incorporation Act* 1974*.*

The preamble of the *Land Groups Incorporation Act* states that it is a law "to recognize the corporate nature of customary groups and to allow them to hold, manage and deal with land in their customary names". It is a relatively brief law, of 35 sections.

The Act provides a simple process for the incorporation of land groups, which begins with preparation of the group's constitution. That must set out –

(a) the name of the group;
(b) the qualifications for membership of the group;
(c) the title, composition and manner of appointment of the committee or other controlling body of the group;
(d) the way in which the group acts, and its acts are evidenced;
(e) any limitations or conditions on the exercise of powers conferred on the group under the Act (see below);

A group applies to the Registrar for incorporation, sending in its constitution. The application is given publicity in the area concerned, and checks are carried out on the group's suitability for incorporation. After considering comments and any objections, the Registrar can issue a certificate of recognition, whereupon the group becomes incorporated, gaining legal status as a corporation with perpetual succession and the capacity to sue and be sued and do other things a corporation may do.

[14] This was a further consequence of the Simpson visit. He was, when he visited PNG in 1969, with the British Ministry of Overseas Development, having previously spent many years in Africa working on land tenure and administration.

Upon incorporation, the rights and liabilities of the customary group become rights and liabilities of the incorporated land group. The powers of the land group relate only to land, its use and management, and they must be exercised in accordance with the group's constitution and the relevant custom as nominated in the constitution. Subject to these requirements, a land group may acquire, hold or dispose of customary land or rights in customary land, enter into agreements for use or management of the land, and distribute any product or profits from the land.

Evidentiary provisions protect persons who enter into transactions with land groups which are in formal compliance with the provisions of its constitution.

Each incorporated land group is required to have a dispute-settlement authority, for dealing with disputes between group members or between the land group and a member. Such disputes might be over membership of the group. Non-members are not affected, unless they agree to be. In general, the jurisdiction of courts is excluded over such internal disputes in the first instance, and the dispute-settlement authority (which may be a person or persons specified by name or position, or determined in a manner specified in the land group's constitution) is required to do substantial justice between all persons interested, in accordance with the Act, the group's constitution and any relevant custom. Provision is made for limited rights of review and appeal.

Fairly detailed provision is made for the winding-up of incorporated land groups, and the liability of members, payment of debts, distribution of assets and the vesting of customary land in the event of a winding-up. In general, customary land reverts to the persons who would be the customary owners if the group had never been recognized.

Key features of this law are -

(i) It is a process for recognition of existing groups - that is, bodies which already have a corporate identity under custom.
(ii) Groups have a great deal of freedom in setting out their constitutions - the rules which will govern their legal nature and operations. The Act prescribes certain matters upon which rules must be made - on membership, the way the group acts and its acts are evidenced, and so on - but it does not dictate the contents of those rules.
(iii) Land groups remain subject to custom. In their constitution they are required to identify the custom under which they operate, but this may be done by simply naming it, and there is no attempt to require the custom to be written down.
(iv) The powers of land groups are confined to their land - its ownership, use and management, and the distribution of its produce or profits. The group may, in its constitution, place limits or conditions on the exercise of those powers.
(v) Upon incorporation, the assets and liabilities of a customary group are transferred to the incorporated land group. Upon winding-up, the group's customary land is vested back in the customary land owners.
(vi) Protection is given to outsiders dealing with a land group. They are entitled to rely on a group's constitution, and if the group has entered into a dealing in accordance with the formal requirements set out in its constitution, that is generally conclusive as to its power to enter into that dealing. (This presumption is not extended to transactions disposing of land, in recognition of their major significance to the group.)
(vii) Special machinery is provided for dealing with internal disputes within the group.

The *Land Groups Incorporation Act* was part of a body of legislation brought in during 1974 as the legal basis of the Government's Plantation Redistribution Scheme. In order to provide for the orderly return of plantation lands to their traditional owners, laws were passed enabling the Government to acquire such land, by compulsory process if necessary, and redistribute it among the local land-owning groups.[15] The *Land Groups Incorporation Act* provided the mechanism for affording legal recognition to those customary groups, so that the title could be vested in them under the redistribution and they could manage the land and dispose of its profits.[16] But a wider role was intended for the *Land Groups Incorporation Act* than simply being the vehicle for vesting titles in former plantation land.

In 1978 the National Government in PNG undertook a comprehensive overhaul of the many land laws which had built up over the preceding decades, with a view to adapting them to the National Goals of the independence Constitution, and the new decentralised system of government. One of the five National Goals was for development to be achieved "primarily through the use of Papua New Guinean forms of social, political and economic organization", and in 1978 policy decisions were made under which the primary focus of new land registration measures would be customary land-owning groups. These groups would gain their legal status and decision-making machinery under the *Land Groups Incorporation Act*.

Policy approval was given for the drafting of a scheme of implementing legislation based on a detailed set of drafting instructions, but in 1980 the Somare government which had taken PNG to independence was replaced by one with a stronger orientation towards private enterprise, and new proposals were made to facilitate dealings in customary land to enable the rights of individuals to be secured (see Knetsch and Trebilcock 1981). Under this approach the problems of dealing with group decision-making over land were "transaction costs", an unacceptable impediment to development.

(d) Loss of the reform momentum

Since 1980, for a variety of reasons, the early momentum for a systematic reform of the set of land laws PNG inherited at independence has dissipated. At the national level, the main development during this period was government adoption of the Land Evaluation and Demarcation (LEAD) Project, which arose from a World Bank mission in 1986. The major objective of the LEAD Project (later renamed the Land Mobilization Project) was to facilitate the implementation of agricultural and forestry development projects, through improved land administration, resource evaluation and mapping. The approach taken to customary land registration under this project was ambivalent, with most of the aid being devoted to "institution strengthening". There was to be an "exploratory phase" with respect to "mobilizing" customary land, during which a few existing measures would be supported and assessed with a view to developing acceptable and cost-effective methods for adoption nationwide. Two of these measures were effectively for individualisation of customary tenure - the promotion of freeholds under the *Land (Tenure Conversion) Act* (see above), and of what were called "lease-leasebacks" under the *Land Act,*

[15] For a detailed account of the policies behind the Plantation Redistribution Scheme and its implementing legislation see Fingleton 1981:218-23.
[16] A very similar law, the *Business Groups Incorporation Act*, was also passed at this time, to enable customary groups to engage in business activities as a corporate group. See more on business groups in the next section.

whereby customary land was first leased by its owners to the government and then leased back to one or a small number of those owners under a State lease.[17]

Another measure recommended for trial under the project was what was called "the East Sepik initiative". East Sepik is one of PNG's nineteen provinces and in 1987, frustrated by the lack of progress in legislating for customary land registration at the national level, the Provincial Government exercised its powers under the constitutional laws to introduce a Provincial *Land Act* and a *Customary Land Registration Act.* The former law sets out the general principles of land tenure in the province, providing in particular that all land is either held under the State (being land alienated from customary ownership) or owned by customary groups under customary tenure.[18] This amounted to a rejection of the notion that customary land in the province could be owned absolutely by individuals. Based on this premise of group ownership of customary land, the second law -- the *East Sepik's Customary Land Registration Act* 1987 -- provided the machinery for customary land registration in the province.

The *East Sepik's Customary Land Registration Act* 1987 provides for registration of customary land at two levels -

registration of full ownership, and
registration of interests which are less than full ownership.

The other basic dichotomy drawn by the Act is between registration in declared Customary Land Registration Areas and registration outside such Areas.

Customary Land Registration Areas (CLR Areas) are those parts of the province officially identified as having a priority for registration - based on criteria of local need and demand, and the availability of administrative resources necessary to carry out and maintain the registration of land titles. In CLR Areas, the group ownership of all land will be systematically investigated and registered. In addition, subordinate rights (leases, etc) granted by land-owning groups to individual members or others can also be registered, upon application. Within CLR Areas, the effect of a registration is that it is conclusive evidence of title.[19]

Outside of CLR Areas, people can also apply for registration of their rights in customary land, either in full group ownership or as subordinate rightholders. Because they are not preceded by systematic investigations (as in CLR Areas), however, the effect of these registrations is only to confer *prima facie* evidence of title. In contrast to the approach in other registration laws, the East Sepik Act specifies that customary land registered under its provisions remains subject to custom - although a claim based on custom would not be able to defeat a registered title in a CLR Area.

Although it is the act of registration which gives statutory effect to registrations under the East Sepik law, the legislation requires that land-owning groups must first incorporate under the *Land Groups Incorporation Act* before they can be issued with a certificate of title. This protective

[17] The individualisation thrust of these two measures was mitigated somewhat by later steps to allow the issue of titles to incorporated land groups, but, generally speaking, individuals have been the beneficiaries of these measures (see, eg, Hulme 1983).
[18] The Provincial *Land Act* also provides for dealings with customary land - in particular, sales, leases and charges.
[19] The provincial laws contained protections against fraudulent acts, etc., and controls on land dealings. For a fuller description of the laws see Fingleton 1991.

device ensures that land groups are properly constituted and prepared to exercise decision-making powers, before they receive the documentary evidence of their titles.

The East Sepik legislation was the customary land registration model which, together with the tenure conversion and lease-leaseback measures, was intended for trial under the World Bank's Land Mobilization Project. It was an innovative law, which drew its inspiration from PNG's constitutional commitment to a Melanesian-style development, as elaborated on by the Commission of Inquiry into Land Matters in 1973. It embraced customary groups as the enduring basis of development, and set out processes for the orderly confirmation of group ownership of land and the allocation of rights to land users.

It is a matter of considerable regret, therefore, that the East Sepik legislation was not given the support envisaged by the World Bank, which would have allowed its strengths and weaknesses to be assessed. Provincial Governments in PNG, an intermediate tier of government introduced after independence, suffered a chronic lack of administrative and financial capacity, which meant that local initiatives could not proceed without National Government support. Politicians at the national level did not look favourably on their provincial counterparts, and the Provincial Government system has now been replaced by a weaker form of political decentralisation.

The East Sepik Province's customary land registration initiative was a casualty of this weakness in capacity below the national level, but it did have some effect in galvanising the National Government to a renewed interest in land registration. In 1988, as the person who had drafted the East Sepik legislation, the author was engaged by the World Bank to consult governments at national and provincial levels, and produce drafting instructions for a 2-tier approach - a "framework" Act at the national level, setting out the general standards for customary land registration which would apply throughout the country, and Acts passed by each Provincial Government, where the detailed arrangements for customary land registration would be set out (Fingleton 1988).

This novel approach reflected the constitutional sharing of powers over land between governments at the national and provincial levels which was then current in PNG, but it was probably as much an accommodation of the fact that one Provincial Government (East Sepik) had already passed its own legislation on customary land registration, while others were keen to follow its example. The National Government looked like losing all control over this vital policy area, and the "framework" approach allowed it to recover some initiative. Once this had been proposed, however, the urgency went out of the matter again, as had happened in the early 1980s. After a period of desultory committee work, in 1996 the National Government announced its intention to introduce its national "framework" law. In the absence of careful explanation to the public, the motives and effects of the legislation were easily misunderstood and misrepresented. In the face of hostile demonstrations, and with an election looming, the draft laws were withdrawn. It remains to be seen whether the two-tiered "framework" approach will survive the winding-back of provincial government and at what point a National Government will again risk burning its fingers on this perennial political hot potato.

As with the East Sepik legislation, the proposed national law would have used incorporated land groups as the basic units for customary land registration. Here again, the value of the *Land Groups Incorporation Act* passed so providentially in 1974 would have been apparent. Although a national law is still waiting in the wings, and East Sepik's *Customary Land Registration Act* has only

made a shadowy appearance so far, the ability to give legal recognition to the corporate nature of indigenous land-owning groups, and provide for their effective and reliable decision-making, has been used to advantage by other resource laws and a range of development projects. In the East Sepik Province, for example, incorporated land groups were the basic land-owning units for the nucleus rubber estate project proposed in 1989 by the Angoram Land Development Project, as they were for the low-costing housing in the provincial capital of Wewak, under the Urban Settlement Planning Project. Chevron Niugini used incorporated land groups for arranging payments to customary landowners for access to land at its oil and gas fields in the PNG Highlands, and along the length of its pipeline to the Gulf of Papua, as mentioned above in the Introduction. The *Forestry Act* 1991 requires that, in general, the customary owners of land must be incorporated under the *Land Groups Incorporation Act,* before they can enter into agreements for the sale of their timber.

3. The results

Although for almost half a century there have been laws in Papua New Guinea providing for the registration of group ownership of customary land, and in 1973 the Commission of Inquiry into Land Matters gave authoritative support to this approach, the results are disappointing. The *Native Land Registration Ordinance* of 1952 was repealed in 1963 without the registration of a single title under its provisions, and the law introduced in its place - the *Lands Registration (Communally Owned Land) Ordinance* 1962 - was suspended in 1970 with the same total lack of results. The measure which had most official support leading up to independence in 1975 was the *Land (Tenure Conversion) Ordinance* 1963, by which land could be removed altogether from customary tenure and registered in individual ownership. Although this law is still operational, only small areas have been registered under its provisions, amounting to well under 1% of Papua New Guinea's total land area.

Reforms approved by the colonial administration in 1971, and by the independent National Government in 1978, were frustrated, and the only significant recent initiative in customary land registration - the *Customary Land Registration Act* brought in by the East Sepik Provincial Government in 1987 - was denied the financial and administrative support necessary to get it under way. The National Government's recent attempt to legislate for a land title registration system for the 97% of the land in Papua New Guinea still under customary tenure was abandoned in the face of hostile public opposition. The country, in common with many of its Pacific Islands neighbours, is suffering from an apparent weakness of national will, when it comes to adapting customary land tenures to modern needs and conditions.

Meanwhile, there has been some progress in the legal recognition of indigenous groups. Although the original measure for this purpose, the *Land Groups Incorporation Act* of 1974,[20] was brought in as part of a package of legislation dealing with the urgent need to redistribute plantation land which had been alienated from customary tenure during colonial times, its scope was not confined to such lands. Incorporated land groups were specifically empowered to hold and dispose of customary land and rights in customary land in the manner and to the extent allowed by custom, to use and enter into agreements for the use of customary land, and to distribute any profits arising from the use of their land.

[20] Originally passed as the *Land Groups Act* 1974 in August 1974, the Act was in fact preceded by the *Business Groups Act* passed in June that year. The latter law was, however, very substantially based on the bill for the former, which was held up while other laws in the legislation package were being finalised.

For more than a decade incorporation activity under the land groups legislation was minimal. Part of the reason was a belief among officials that the Act only applied to former plantations, where for various reasons the vesting of titles had been held up (Fingleton 1981:222;1983). A further explanation is that no single body took responsibility for publicising the new Act's existence, or for assisting interested groups to prepare their constitutions and otherwise comply with the Act's requirements.

The *Business Groups Incorporation Act* had very similar requirements for incorporation, yet under the active sponsorship of the Department of Business Development (later, Department of Commerce) many hundreds of business groups were incorporated in the first few years of this Act's operation. The parallel land groups legislation was allowed to languish. When around 1990 the author was assisting land groups to incorporate for the purposes of a World Bank-funded urban settlement project, it was clear that their applications to the Registrar of Incorporated Land Groups would have been shelved in the absence of that personal intervention. The first applications sent in by groups owning land affected by the Kutubu Petroleum Development Project in the Southern Highlands Province in 1992 faced similar hurdles stemming from the ignorance or indifference of the officials responsible for administering the Act.

There is, however, increasing demand for the benefits provided by the Act - its affording of legal recognition to customary land-owning and resource-owning groups, and the machinery it provides for their responsible and reliable decision-making. As noted above, a number of land-based projects supported by foreign development assistance have embraced incorporated land groups as the customary base upon which the land tenure and land management arrangements have been erected, and the new forestry legislation installs incorporated land groups as the main bodies through which commercial access to indigenous-owned forest resources must be negotiated. Under the Kutubu project, Chevron Niugini has distributed many millions of dollars worth of compensation to landowners incorporated under the *Land Groups Incorporation Act*. The legislation of 1974 is starting to come into its own, but the law will be to no avail if it is not carefully administered, and if customary groups are not given adequate support in adopting this legal device by which their traditional values, institutions and practices can be applied to modern needs and conditions.

B. Australia

Area

Total: 7,682,300 sq km
Under indigenous tenure: 8.3%

Population

Total: 18 million
Indigenous: 1.6%

Source: US State Department

1. The groups[21]

Of the original 250 or so distinct languages, since European settlement began in 1788 two-thirds have become extinct. Only about 20 of the surviving languages are spoken fluently. The disruptive effects of European settlement have been most severe in the southern half of the country.

Although the concept of tribe is frequently used in discussing Aboriginal society, and many Aboriginal people have adopted the concept, it does not necessarily correspond to a unit of religious or political organization. Religious knowledge is highly valued, and when rituals are performed a number of clans - forming a chain integrated by shared "Dreaming" tracks - will work together, often including speakers of different languages.[22]

Indicative of the diversity of groups in mainland Australia is the following account-

> "The size and nature of the 'people' that holds exclusive possession is likely to vary considerably from place to place and region to region. It could be anything from a family (however defined), a kindred, a lineage, or a clan, to a tribe, a linguistic coalition, a ceremonial group, a marriage network, a riverine coalition, members of a culture bloc or a nation." (Peterson 1995:12).

[21] As with the outline above of groups in Papua New Guinea, what follows here is only intended to give a general impression of the character of indigenous groups.
[22] See *The Encyclopaedia of Aboriginal Australia,* 1994 ed., under "Tribal Organisation".

2. The laws

(a) The foundation of Australia's land law

Before the High Court of Australia's watershed decision in *Mabo v. The State of Queensland (No.2),* better known as "the Mabo Case", the foundation of land law in Australia was, in the words of a present High Court judge, "as simple as it was clear".[23] From the moment that the lands of Australia were successively annexed to the British Crown they became in law *the property* of the English Sovereign, and thereafter all land interests were enjoyed only as, or under, grants made by the Crown. The territory of Australia was neither ceded to the Crown by its indigenous inhabitants nor taken by conquest. Instead, it was regarded as "terra nullius" - land belonging to no-one - a convenient fiction which enabled European settlement to proceed without the need to recognize any pre-existing rightholders. The foundation of Australia's land law differed fundamentally in this respect from the principles applying elsewhere. The British Crown, in settling the American colonies, Canada and New Zealand, recognized pre-existing rights of the indigenous peoples, and that recognition was built into the common law of those countries.

In 1992, the High Court of Australia authoritatively rejected the "terra nullius" doctrine, and thereby revolutionised the foundations of Australia's land law. The court held in the Mabo Case that the long-standing refusal in Australia to accommodate concepts of native title within the common law rested upon assumptions of historical fact which were false. The Crown, in acquiring sovereignty over the territories which today comprise Australia, acquired a radical title to the land, but what the court called "native title" survived that acquisition of sovereignty and radical title. However, where the Crown had exercised its sovereign power in ways inconsistent with the continued existence of native title (eg, by freehold grant), the title was extinguished.

In response to the Mabo judgment and its far-reaching implications for land tenure, the Federal Parliament passed the *Native Title Act* 1993. The Act gave legislative sanction to the High Court's decision, and established a mechanism for determining claims to native title, and procedures for future dealings which might affect native title. Of immediate relevance to the present paper, provision is also made for corporate bodies to be identified for the purposes of holding and managing native titles. How the Act addresses this will be examined below but these are recent legal developments, and some of the details of the new native title regime have not yet been finalised. Before examining it, a body of land rights legislation which preceded the recognition of native title should be considered, to see how the matter of indigenous groups was handled.

(b) Land rights legislation

As remarked above, until the Mabo judgment the legal system in Australia refused to accord the status of property rights to indigenous land tenures. The prevailing policy until quite recently was to ignore Aboriginals, leaving them as far as possible untouched by Australian law in the expectation - and hope - that they would become "civilised", assimilated or otherwise disappear as a "problem" (Reynolds 1989). By the 1960s, however, the continuing survival of indigenous societies in Australia and a more enlightened approach by governments fostered a string of enactments providing land rights to indigenous communities.

[23] Mr Justice Kirby in *The Wik Peoples and Others v. the State of Queensland and Others* (1996).

Australia's federal system involves a distribution of powers between the national (Commonwealth) level, and the constituent States (six) and Territories (two). After a referendum in 1967 the Commonwealth Constitution was amended to allow the Commonwealth Parliament to make special laws for the benefit of peoples of the aboriginal race, and the Commonwealth also has responsibility for giving domestic effect to international treaties - for example, the International Convention on the Elimination of All Forms of Racial Discrimination. The States and Territories, on the other hand, have primary responsibility for land management. It is this distribution of powers, together with the election of more progressive governments at Commonwealth and State levels from time to time, which mainly accounts for the scattered and uneven nature of land rights legislation across Australia.

While this legislation in most cases focuses on vesting land in its traditional owners, it must be noted that land rights under these schemes arise strictly from the enactments, rather than from any legal recognition of existing rights under customary tenure. As seen above, until the Mabo Case it was thought that such rights had no legal status, and by granting rights in land the legislation being considered here can more accurately be characterised as statutory land grants - even though the beneficiaries were the traditional "owners" of the land in question in most cases. In a few cases, people with no traditional attachment to the land in question could benefit from these laws, but the special circumstances of dispossessed Aboriginal communities were generally not covered by the land rights legislation.

The State and Territory land rights legislation, dating over 30 years from South Australia's pioneering *Aboriginal Lands Trust Act* of 1966 through to the most recent enactment, Tasmania's *Aboriginal Lands Act* 1995, is a hotchpotch of uncoordinated laws, reflecting different approaches to the granting of land rights to indigenous communities. In most cases, the land being returned was "reserve" lands - that is, Crown land reserved from grant, for the use of the occupying indigenous communities. After the long process of expanding European settlement, it can be assumed that areas left over as Aboriginal reserves were those not wanted for settlement purposes. Some of the Acts vested these reserve lands directly in communities, or in trustees for their benefit, while others involved complicated claims processes. Usually the title vested was a freehold - the most complete form of land ownership available in Australia - and this title was often made "inalienable", to ensure that it remained in traditional ownership in perpetuity. The powers granted to the indigenous owners over their land also varied considerably around the country, in particular in the degree of indigenous control given over mining operations - often the main commercial interest in former reserve lands - and the ability to share in mining royalties.

For present purposes, the most important aspect of this land rights legislation is the body identified for vesting of the titles. The following treatment examines the laws in each jurisdiction, in order of the year they first introduced land rights legislation.

South Australia:

The original Act of 1966 provided for lands to be vested in a State-wide Aboriginal land trust created under the Act, to be held by the trust on behalf of the traditional owners of the land in each case. As we shall see, this was a model commonly adopted by other jurisdictions. Small former reserves were granted under this Act, but when it came to returning the extensive desert lands in the west of the State to the Pitjantjatjara and Maralinga communities in the 1980s, a different model was adopted..

The purpose of the *Pitjantjatjara Land Rights Act* 1981 is to provide for the vesting of title in lands scheduled in the Act in the Pitjantjatjara people - "Anangu Pitjantjatjara" (AP). The Act establishes AP as a body corporate, whose membership is all Pitjantjatjaras who are traditional owners of the lands in question. The term "traditional owners" is defined as meaning a person who, in accordance with Aboriginal tradition, has "social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them".

The Act then lists the functions and powers of AP. They include –

(a) to give effect, as far as possible, to the wishes and opinions of the traditional owners regarding the management, use and control of the lands;
(b) to administer the lands vested in it;
(c) to grant leases or licences in respect of any part of the lands, for limited terms of years in the case of grants to non-Pitjantjatjaras; and
(d) to enter into contracts, appoint and dismiss staff, and receive and pay out moneys.

There is a special requirement that AP must consult with the traditional owners who are affected by any land development proposal, to ensure that they understand the nature of the proposal, have had the opportunity to express their views on it, and - before it is proceeded with - have consented to it.

Provision is made for annual and special general meetings of AP, and for appointment of its Executive Board. Evidentiary provisions protect persons who rely on apparently genuine documents, which meet certain formal specifications as to how AP is required to act. To facilitate its proceedings and the administration of its affairs, AP must prepare a constitution, and must specify an address for the service of notices, etc., on it.

A part of the Act deals with the AP's traditional lands, providing for their formal grant in fee simple to AP, and specifying that no interest in the lands may be alienated by AP or compulsorily acquired from it. The Act allows AP to control access to its lands, and provision is made with respect to mining operations. Another part of the Act sets up machinery for settlement of internal disputes within AP.

All in all, the *Pitjantjatjara Land Rights Act* was a major innovation in Australia's approach to the recognition of indigenous groups, but one which bore some basic similarities with its predecessor in Papua New Guinea - the *Land Groups Incorporation Act* examined above. A few years later, the *Maralinga Tjarutja Land Rights Act* 1984 was passed, following the precedents set by the Pitjantjatjara Act very closely.

Victoria:

In this State the official attitude for a long time was that there were very few remaining Aboriginal communities who still retained a strong cultural, religious and historical association with their ancestral lands. The land rights legislation in Victoria, therefore, was piecemeal, often dealing with particular communities. The first such law was the *Aboriginal Lands Act* 1970, which vested previous reserve lands at two localities in two trusts established by the Act. In 1982, the *Aboriginal Lands (Aborigines Advancement League) (Wall Street, Northcote) Act* was passed, and its title manifests its specificity. The Act granted an inalienable title in a small block of suburban land in Melbourne to the trustees of the Aborigines Advancement League, on condition that it continue to be used as an Aboriginal Community Centre.

In 1987 the *Aboriginal Land (Lake Condah and Framlingham Forest) Act* was passed. Again, the specificity of the legislation is clear, but the law is also significant for having been passed by the Commonwealth, not the State, Parliament. The Labor government had attempted to pass it as State legislation, but was blocked by the conservative majority in the State's upper house. The State government therefore asked the Commonwealth Labor government to enact the law for it, so the land in question was acquired by the Commonwealth, and then vested in the two communities. The bodies in which the two titles were vested were two Aboriginal Corporations, already incorporated under the Commonwealth's *Aboriginal Councils and Associations Act* 1976, which will be studied more closely below. A Committee of Elders was given power in each case to rule on group membership, and carry out various management functions on the group's land.

In 1991 under the *Aboriginal Lands Act* provision was made for titles in particular cemetery sites, access roads and old missions to be vested in local representative Aboriginal organizations incorporated as "councils" and "cooperatives". And finally in 1992, the *Aboriginal Land (Manatunga Land) Act* granted fee simple over a small area of land to the Murray Valley Aboriginal Co-operative Limited, on condition that it continue to be used for Aboriginal cultural purposes.

Queensland:

There have been four main land rights laws in this State, the first being the parallel *Aborigines Act* 1971 and *Torres Strait Islander Act* 1971.[24] These two laws were mainly concerned with providing a framework for indigenous self-management within reserved lands, and so are not so much land rights as local government legislation. Reserves were at this stage vested - like other unalienated Crown lands - in trustees.

The next law, the *Local Government (Aboriginal Lands) Act* 1978, was also mainly concerned with conferring powers of self-management, and the titles to the former reserve lands of Aurukun and Mornington Island were vested (as 50 year renewable leases) in the two new Shire Councils by this Act. Again, this is not so much a land rights law as a self-governance measure.

In 1982 the *Land Act (Aboriginal and Islander Land Grants) Amendment Act* was passed, creating a special landholding system of "deed of grant in trust" (D.O.G.I.T.). Under it, a deed was issued to local Aboriginal and Islander Councils over remaining reserve lands, which they held as

[24] Torres Strait Islanders are the Melanesian inhabitants of Torres Strait, between Australia and Papua New Guinea. The two Acts are substantially the same.

trustees on behalf of the communities resident on the reserves. The final Queensland legislation was passed in 1991 - the *Aboriginal Land Act* and *Torres Strait Islander Land Act.* These two laws create a fairly complex system for the vesting of lands in indigenous communities within the State, but the only aspect of relevance here is the nature of the body in which titles are eventually vested under the Acts. Basically, the legislation is aimed at vesting titles in indigenous groups, and the general position is that the titles are granted to named groups in the name of grantees, by a deed which must show that the land "is held by the grantees for the benefit of the group of Aboriginal people and their ancestors and descendants".[25]

A further provision requires that the grantees named in the deed should act as trustees for the benefit of the nominated group. Before the grantees are appointed there must be consultations with the Aboriginal or Torres Strait Islander group, to ensure that the proposed appointments are consistent with indigenous tradition and the group's views. For the better implementation of the Acts two sets of Regulations have been made, some aspects of which are relevant to this paper. Here, only the Regulation made under the *Aboriginal Land Act* will be considered as the one for Torres Strait Islanders is essentially the same.

One part of the *Aboriginal Land Regulation* 1991 provides a system for the incorporation of land claimants. The claimant group applies to a Registrar, including a copy of its proposed rules. These must provide for a list of matters, including –

(a) the qualifications for membership;
(b) the constitution and functions of the management committee;
(c) the process for decision-making;
(d) the procedure for settling internal disputes;
(e) the procedure for conduct of meetings;
(f) management of the association's funds;
(g) distribution of assets and liabilities upon a winding-up of the association.

The rules may provide for other matters, and may be "based" on Aboriginal tradition. Upon incorporation, the association gains legal status as a body corporate, with the usual powers to borrow, sue and be sued, employ staff, etc., in its corporate name.

A second part of the Regulation provides for land trusts. All titles granted under the Act must be held by the grantees in trust for the benefit of the Aboriginal people concerned, and the Regulation incorporates the grantees as a Land Trust, giving them legal status as a body corporate. The function of the Land Trust is to provide a legal entity by which the grantees may perform their functions and the Regulation goes on to provide that the Land Trust should "hold, invest, use and distribute trust property" for the benefit of the Aboriginal people concerned. The Land Trust can exercise all the powers of an owner in respect of the trust property, but investments of trust property are controlled under the State's general legislation on trusts. The Land Trust can apply to the Supreme Court of Queensland for directions in relation to the management of the trust property or the exercise of the Land Trust's powers.

[25] In the case of Torres Strait Islanders, the Act allows grants to be made to individuals as well as groups. A grant to an individual, however, must show that the land is held for the benefit of the individual and his or her ancestors and dependants.

A third part of the Regulation deals with the Aboriginal decision-making process. It provides that the agreement of the Aboriginal people, where it is required under the Act, is taken to have been given –

> (a) where there is a particular decision-making process under their Aboriginal tradition with respect to the matter in hand, if that process has been followed; or
>
> (b) where there is no such tradition, if the decision was made in accordance with a process adopted by them for the purpose.[26]

Similarly, grantees are required to make their decisions "in a way that is consistent with any Aboriginal tradition". The term "Aboriginal tradition" has the meaning given to it by the Act itself, namely: "Aboriginal tradition is the body of tradition, observances, customs and beliefs of Aboriginal people generally or of a particular group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships."

Western Australia:

Although it is the largest State, with a large Aboriginal population, Western Australia's land rights legislation is the most underdeveloped. The *Aboriginal Affairs Planning Authority Act* 1972 establishes the authority of that name, and vests all Aboriginal reserves in it. The AAPA has almost total control over these areas. The Act also provides for a number of official bodies, one being the Aboriginal Lands Trust. This statutory body, comprised of Aboriginal persons and operating State-wide, can be given the control and management of any former reserved land - if the AAPA so requests.

Northern Territory:

This is another large territory, with a large Aboriginal population. In 1976 the Northern Territory was not yet self-governing, and in that year the Commonwealth made its first attempt to legislate for indigenous rights. Before doing so it commissioned an inquiry - the Aboriginal Land Rights Commission - which consulted widely in the Northern Territory, and produced two reports in the early 1970s. Based on the Commissions' recommendations, the Commonwealth Parliament passed the *Aboriginal Land Rights (Northern Territory) Act* 1976.

The Act provides for three main entities to be involved in holding and managing Aboriginal land titles - the traditional owners of the land in question, Aboriginal Land Trusts and Aboriginal Land Councils. Any land transferred to Aboriginal ownership under the Act is vested in an Aboriginal Land Trust. The three bodies will now be examined:

> (a) Traditional Aboriginal owners: This term is defined in the Act to mean the local descent group with primary spiritual responsibility for sacred sites on the land, and the entitlement under tradition to forage over the land. The Land Councils are required to keep a register, setting out the names of the persons who are the traditional owners of Aboriginal land within their areas.

[26] This formula for Aboriginal group decision-making was adopted from the earlier Northern Territory legislation (see below).

(b) Aboriginal Land Trusts: These are established under the Act, and consist of persons appointed from among the local traditional Aboriginal owners. The Land Trust is a body corporate, and its functions are to hold the title to land being transferred to Aboriginal ownership under the Act, and to exercise its powers as owner for the benefit of the Aboriginals concerned. A Land Trust can only exercise those powers in accordance with directions given to it by the Land Council for the area where the land is situated.

(c) Aboriginal Land Councils: The Act requires that Land Councils be established for different parts of the Northern Territory,[27] with the main functions of consulting with the traditional Aboriginal owners with respect to any proposal relating to the use of their land, and negotiating on their behalf. Land councils also prepare and present land claims, and provide administrative and other assistance to Land Trusts. The membership of Land Councils is chosen by Aboriginals living in the area from among their number. The Councils employ staff (including anthropologists and lawyers), give directions to Land Trusts in carrying out their functions (see above) and receive moneys payable to Land Trusts for the use of land, etc.

The Act requires the Land Councils to ensure that traditional Aboriginal owners of land understand the nature and purpose of any proposal relating to the use of their land, and that they have - as a group - consented to it, before the proposal can proceed. Group consent can be taken to have been given if the decision was made in compliance with their traditional decision-making processes or, in cases where there are no such processes, in accordance with a process adopted by them for the purpose.

New South Wales:

The *Aboriginal Land Rights Act* 1983 creates a 3-tiered structure - the New South Wales Aboriginal Land Council (the State-wide body), Regional Aboriginal Land Councils, and below them Local Aboriginal Land Councils. The membership of these bodies is made up by different methods under the Act:

Local Aboriginal Land Councils are made up of all the adult Aboriginals listed in the roll for the council area. The Act provides for the appointment of office-holders, meetings, voting and so on.

Regional Aboriginal Land Councils are made up of one member of each Local Aboriginal Land Council within the region's area, elected by its membership to represent it on the regional body. Again, provision is made for the appointment of office-holders, etc.

New South Wales Aboriginal Land Council is made up of one member from each Regional Aboriginal Land Council area in the State, elected by members of the Local Aboriginal Land Councils within that region's area.

The functions of these three bodies vary, but the main body in which land titles are vested is the Local Aboriginal Land Council. It is required to implement the wishes of its members as

[27] There are at present four Land Councils covering the Northern Territory.

decided at Council meetings with respect to the management and use of the lands vested in it, and to negotiate with persons wanting to use the land.

Australian Capital Territory:

Under the *Aboriginal Land Grant (Jervis Bay Territory) Act* 1986, the lands transferred to the local Aboriginal community is held by the Wreck Bay Aboriginal Community Council, a body corporate made up of the adult members of the community.

Tasmania:

This was the most recent State to legislate for indigenous land rights. In 1995 the *Aboriginal Lands Act* was passed. It creates the State-wide Aboriginal Land Council of Tasmania, and vests in it certain lands "in trust for Aboriginal persons in perpetuity". The council consists of 8 Aboriginal persons to represent different regions of the State, and detailed provision is made for elections and meetings. The council is required to use and sustainably manage the lands and their natural resources for the benefit of all Aboriginal persons, "in the interests of reconciliation with the broader Tasmanian community" and having regard to the interests of local Aboriginal communities. The Council can nominate a "local Aboriginal group" for a particular area of Aboriginal land, and can delegate its land management powers to the group. Provision is also made for the preparation of management plans, and local Aboriginal groups and persons must be involved in the management of all Aboriginal lands.

This completes the review of Australia's land rights legislation, as it stood at the time of the High Court's Mabo decision in 1992.[28]

(c) Native title

As discussed in the introductory material above, the High Court of Australia in its Mabo judgement found that the common law of Australia recognized the native title of Australia's indigenous peoples in their land, and in 1993 the Commonwealth Parliament passed the *Native Title Act* to protect that title, and establish a mechanism for determining native title claims. In deference to the federal system of government in Australia, the Commonwealth Act envisages the six States and two Territories enacting complementary legislation to address certain native title issues within their respective jurisdictions, but the framework for the regime is the Commonwealth's Act, with which the various State and Territory Acts have to comply. In these circumstances, for present purposes it is only necessary to examine the Commonwealth Act.

To fit this newly-recognized title into a land tenure system which had developed over more than a century in ignorance of its existence was no easy task, and the *Native Title Act* 1993 is long and complex. A vital difference between the State and Territory land rights legislation examined in the previous section and the native title legislation is that the latter is true "land rights" law in the sense of recognizing *existing* rights. The former legislation on the other hand, while it usually related to the ancestral lands of the indigenous groups concerned, was in fact land grants law, where the source of the land titles was the legislation. The source of native titles is customary law, as is clear from the definition of "native title" in the *Native Title Act*, as -

[28] Tasmania's Act of 1995 in fact came later.

> "the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia".

A law which applies to and regulates existing rights must be drafted with great care, lest the rights be reduced or interfered with in an expropriatory or discriminatory way.

In the previous section, it was seen that under land rights legislation titles were granted to bodies ranging from State-wide statutory trusts to locally-constituted groups of traditional owners. The difficulty faced by the framers of the *Native Title Act* was that, in the process of providing for the vesting of native title and its ongoing management, they had to be careful that they did not dispossess anyone who might have native title rights in the land in question. And a particular problem with an exercise like this is that, although native title is by its nature a group title, a legal system like Australia's which concerns itself mainly with property rights as private, individual rights, will be poorly adapted to handling the possible suppression of individual rights in favour of the communal entity of the group. The drafters of the Act could not afford to create a regime for the holding and managing of native title - essentially a group interest - which was vulnerable to challenge by individual members of the group on the basis that their individual rights were impaired.

To deal with this conundrum the Act employs two legal devices already familiar from the land rights legislation - the body corporate and the trust - but it combines their operation differently from the way the State and Territory precedents do. The process starts with a determination of native title being made, at which point the Tribunal (or Federal Court) asks a representative of the native title-holders whether they wish to nominate a "prescribed body corporate" to hold the native title on trust or not. If the nomination is made, the body corporate holds the native title as trustee for the traditional owners concerned. If a trustee is not nominated then they hold the title themselves, but in this event they are still required to nominate a "prescribed body corporate" to carry out the title management functions under the Act (eg, negotiations for mining rights) on their behalf. What the Act is aiming to do is install a legal entity with authority to enter into dealings and otherwise interact with the outside world on the group members' behalf, but it seeks to do this as far as possible in a consensual manner. If the "prescribed body corporate" were imposed on the native title-holding group, it would be open to individual members to challenge its authority on the basis that their rights and interests had been impaired.

So, what are these "prescribed bodies corporate"? The *Native Title Act* does not itself specify what these bodies are, leaving that to be done by follow-up regulations. These are the *Native Title (Prescribed Bodies Corporate) Regulations* 1994.

The Regulations deal with the kinds of bodies which can be prescribed bodies corporate under the Act, the functions of those bodies and requirements for their consultation with the native

title-holders. In prescribing the kinds of bodies, a legal entity under existing legislation - the "Aboriginal association" - is picked up for the purposes of the Act. Aboriginal associations are incorporated under the *Aboriginal Councils and Associations Act* 1976, which will be looked at below.

To qualify as a prescribed body corporate, an Aboriginal association must be incorporated for that purpose, and its membership must be confined to persons proposed to be included in the native title determination. The rules of the association must also provide for its functions as a prescribed body corporate, and include provision for consultation and consent (see below).

The functions of a prescribed body corporate are mainly to act on the native title-holders' behalf in managing the title. If it has been nominated as a trustee (see above), it will actually hold the title in its name, and can manage it in the capacity of native title-holder, subject to the Act's requirements for consultation. If the prescribed body corporate is not a trustee, it can only act as an agent for the native title-holders, and will have to be specifically authorised by them to take action on their behalf. The prescribed body corporate can also hold money on trust and invest it as directed by the native title-holders, enter into agreements authorising future acts affecting the title (including taking part in negotiations for mining rights) and enter into other agreements with governments on the native title-holders' behalf.

The *Native Title Act* imposes requirements on the prescribed body corporate to consult with the native title-holders, and to obtain their consent to dealings in certain circumstances. The Regulations require that the rules of prescribed bodies corporate include provision for such consultations and the gaining of consents. Where there is a particular decision-making process under the tradition of the native title-holders the rules may provide for the decision to be taken in accordance with that process. Otherwise, the rules must provide for consent to be given after a decision is made in accordance with a process adopted by them for the purpose.[29]

The Regulations also impose a requirement that, before a decision is made that will affect native title rights and interests, the prescribed body corporate must ensure that the native title-holders understand "the purpose and nature" of the proposal. To do this the services of another body - the representative Aboriginal or Torres Strait Islander body for the area concerned - are invoked. These are Aboriginal land councils and other local indigenous bodies who have been appointed under the *Native Title Act* to represent people in preparing and presenting native title claims and to assist in any negotiations. Typically these bodies have an indigenous executive, and a staff which includes anthropologists and lawyers. The Regulations require that the representative body for the area concerned be consulted and given the opportunity to make its views on the proposal known. There is no requirement to follow those views, but if an agreement is entered into without the representative body being given the opportunity to make its views known, the agreement is invalid.

The Regulations also make evidentiary provisions protecting third parties. Briefly, the consent of the native title-holders is taken to have been given if it is given in accordance with the rules of the prescribed body corporate concerned, and certificates that necessary consultations have been held and consents given can be relied upon, if signed by the bodies concerned and at least 5 members of the prescribed body corporate.

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[29] This formula for group decision-making was adopted from Queensland and Northern Territory precedents - see above in the text.

In the foregoing treatment of the Regulations it was seen that Aboriginal associations were picked up, as the legal entity specified for incorporation of prescribed bodies corporate. The final law to be examined, therefore, under the native title regime is the *Aboriginal Councils and Associations Act* 1976. This law was enacted by the Commonwealth Parliament at the same time as the *Aboriginal Land Rights (Northern Territory) Act* 1976 (see above). Both laws arose from recommendations of the Aboriginal Land Rights Commission, which found that mainstream arrangements - companies, unincorporated associations, cooperatives and trusts - were either defective or inappropriate for Aboriginal purposes, and called for a "special system" for incorporation of indigenous groups.

The Act was intended to provide a simple, cheap and flexible method for the legal recognition of indigenous groups and communities, and their effective decision-making. In introducing the law the Minister responsible said:

> "What is so important about this measure is that it will recognise cultural differences between Aboriginal and non-Aboriginal societies and enable Aboriginal communities to develop legally recognisable bodies which reflect their own culture and do not require them to subjugate this culture to overriding Western European legal concepts."

The *Aboriginal Councils and Associations Act* 1976 provides for the incorporation of two types of Aboriginal corporation - Aboriginal councils and Aboriginal associations.[30] For present purposes we are only concerned with the latter, for they are the bodies able to become "prescribed bodies corporate" for the purposes of holding and managing native titles (see above). Groups wishing to incorporate as Aboriginal associations must apply to a Registrar, submitting the rules which will regulate their affairs after incorporation.[31] The rules must make provision for certain matters, including –

(a) the qualifications for membership;
(b) the executive offices of the association and how they will be filled;
(c) the procedure for settling disputes between the association and its members;
(d) the constitution and powers of the Governing Committee, and the procedure for its meetings;
(e) the calling of annual and special general meetings; and
(f) how funds are to be managed.

Rules of an association on any matter may be "based on" Aboriginal custom.

The Registrar has considerable discretion over whether a body should be incorporated, and has issued a detailed set of Model Rules which bodies are expected to adopt. The Act sets out minimum limits on membership, and members are disqualified from executive positions if they are bankrupt or have been convicted of certain offences. The Act contains a range of requirements for holding general meetings of the membership, and a broad set of reporting requirements apply.

[30] The term "Aboriginal" is defined to include Torres Strait Islander.
[31] Somewhat confusingly, after incorporation Aboriginal associations are required to be called "Aboriginal Corporations".

The Registrar is given wide discretionary powers to enforce an association's compliance with the Act and its rules. At any time the Registrar can call a general meeting of an association, and can appoint a person to examine its affairs. People can be interrogated, and compelled to answer questions and produce documents. The Registrar may seek injunctions, or appoint an administrator to take over management of an association's affairs. A final option open to the Registrar is to petition a court for the association to be wound up.

Many of the provisions in the *Aboriginal Councils and Associations Act* reflect the fact that bodies are incorporated under this law to perform a wide range of functions. Some are small groups incorporated to gain titles to their traditional lands, but others are regional bodies incorporated to provide government-type services to indigenous communities - health, housing, legal services, training and so on. These bodies handle substantial amounts of public funds, where accountability - both to their indigenous constituency and to the general public - is clearly a primary consideration. But the strict regime designed to give this high level of accountability has been achieved at the expense of "cultural appropriateness", which was, after all, the rationale for having a special incorporation law for indigenous groups in the first place, as noted above.

3. The results

There are two eras in Australia's provision for the land rights of its indigenous peoples - the period before the High Court's Mabo decision in 1992, when land rights depended upon statutory law for their existence; and the period since 1992, when land rights under native title have been recognized by the common law as existing *as of right*, without the necessity for statutory intervention. The *Native Title Act* 1993 was passed by the Commonwealth Parliament to give statutory protection to native title, among other things, but the source of native title is customary law, not the Act. Results in terms of areas returned to indigenous bodies under each period will now be considered.

(a) Under statutory land rights

During the statutory land rights era, legislation was passed around the country which vested an estimated 8.3% of Australia's total land area in a variety of indigenous bodies, under different forms of title to which different powers attached. In many cases Aboriginal reserves were vested in their occupants, the descendants of the traditional owners of the land. Sometimes the titles were vested directly in bodies specified by the legislation, often on trust to be held for the local indigenous communities, while other legislation established a land claims system. Another approach was for title to be vested in indigenous councils, as part of the introduction of forms of local government.

The following is a brief statement of the results during the statutory land rights era around the country -

South Australia: Under the earliest land rights legislation, passed in 1966, title to a number of small reserves was vested in a State-wide Aboriginal land trust established by the Act. During the 1980s two very significant land grants were made - one to the Anangu Pitjantjatjara, a body corporate comprising the traditional owners of an area in excess of 100,000 square kilometres, and the other to the Maralinga Tjarutja, another body corporate comprising the traditional owners of an

adjoining area in excess of 76,000 square kilometres.[32] These two areas make up about 18% of the State.

Victoria: Under five different statutes between 1970 and 1992, small areas of former reserve lands were vested in a range of bodies - trustees, councils, cooperatives and Aboriginal Corporations - to be used for the benefit of the local Aboriginal communities. The total area involved is less than 1% of the State.

Queensland: This State has also had a range of land rights legislation, four Acts being passed between 1971 and 1991. The early laws aimed at introducing forms of local government, incidental to which former reserve lands were vested in either trustees or the councils themselves. Mornington Island (1,190 sq km) and Aurukun (7,500 sq km) were vested in two Aboriginal Shire Councils during this early period, on renewable 50 year leases. In 1982 a new system was introduced, under which remaining reserve lands in the State were vested in trustees on behalf of the resident communities. Some 23,400 sq km of former reserve land in Cape York Peninsula and around the Gulf of Carpentaria, and 560 sq km in the Torres Strait Islands, were granted in trust to be held on behalf of the resident communities, as were smaller areas in the more settled southern parts of the State. Under the most recent legislation of 1991, all these former reserve lands are available for claim, as are about 48,400 sq km of national park lands in the State. Claimed land can be granted to trustees in freehold or leasehold, depending on whether or not the claim is based on customary or historical association, and grants of park lands are conditional on the land being leased back to the Crown.

Western Australia: The legislation vests all former reserve lands in the Aboriginal Affairs Planning Authority, for the use and benefit of Aboriginal communities. It also establishes an Aboriginal Lands Trust to which the Authority may delegate powers, and which can hold title to former reserve lands. A total of over 100,000 sq km is held on trust under leasehold title, but almost twice as much is still held as reserves, much of it in the desert country at the east of the State.

Northern Territory: The two main avenues for return of lands to traditional ownership under the 1976 legislation are by direct grants of former reserve and mission lands and by claims to unalienated Crown lands. A total of more than 500,000 sq km of land has been transferred to Aboriginal land trusts, to be held for the benefit of the traditional owners. Another 12,000 sq km of national parks have been returned to Aboriginal ownership and leased back to the parks administration, under joint management.

New South Wales: By both direct grants of former reserves and claims to surplus Crown lands, the title to many small parcels of land has been transferred to Local Aboriginal Land Councils, but the total area involved is less than 1% of the State.

Australian Capital Territory: Title to 4 sq km of Crown land at Jervis Bay was transferred to the Wreck Bay Aboriginal Community Council, and a further 62.6 sq km of national park is vested in the community but leased back to the Commonwealth, under joint management.

[32] Maralinga land was used for nuclear testing between 1953-1963, and parts of it are unsuitable for human occupation.

Tasmania: Title to a dozen islands and small coastal areas has been vested in the Aboriginal Land Council of Tasmania.

(b) Under native title

The *Native Title Act* has been in force since 1 January 1994. The claims process set up by the Act involves a mediation stage during which attempts are made to reach agreement between all the parties - native title claimants, private interest-holders and governments - for settlement of the claim. Almost all of the claims made so far are caught up in that mediation stage, so tangible results under the native title process are negligible so far. In addition, after a change to conservative government at the national level in 1996, attempts are being made to wind back the legislation, and at the time of writing[33] the fate of the proposed amendments is uncertain. It is estimated that 44% of Australia's total land area is currently under native title claim, while the Government asserts that 78% is "potentially claimable". There is some way to go, however, before a realistic assessment can be made of the extent to which native title will yield meaningful results for indigenous groups in Australia.

IV. CONCLUSIONS

This paper shows that governments in many regions of the world continue to regard indigenous groups as important, and make arrangements to accommodate them within their legal systems. Indigenous peoples themselves are demanding this recognition, as shown for example by the prominence given to traditional institutions and values in the independence constitutions of Pacific Islands states, and more recently the reaffirmation of the group nature of Maori land tenure in New Zealand and the recent passage of the *Indigenous Peoples Rights Act* in Philippines. Governments in some countries are moving towards self-government by indigenous minorities - either in recognition of inherent rights to sovereignty as with tribal governments in the United States, or as part of the devolution of governmental powers as has been negotiated in Canada between the Federal Government and First Nations. The High Court of Australia recently gave belated recognition to the existence of native title - essentially a group interest in land. In many countries, there is a growing awareness of the role indigenous communities can play in the sustainable use of forest resources. All of these developments call for ways of giving effective legal recognition to indigenous groups, and providing for their ongoing self-management.

Three basic approaches have been taken, when dealing with indigenous land-owning groups. The first was basically to ignore the group's existence, and just deal with it on an individual basis. This method is fraught with danger. The foregoing treatment shows many examples where reducing group tenures to no more than a collection of individual rights leads either to permanent land alienation away from the group members, or to the fragmentation of the land into impractically small parcels or shares in parcels. Only when titles in indigenous lands are held by groups can the land be preserved as the asset of the group, with individual members' entitlements to use the land being adjusted over time according to the changing demographics of the group.

[33] This paper was written in February 1998. Since then the *Native Title Amendment Act* 1998 has been passed and a range of complementary legislation enacted by State and Territory Governments. The main matters covered by this paper, however, have not so far been significantly affected.

Besides, attempts to eliminate groups from the customary land tenure equation are ultimately unsuccessful. The author's own research in Papua New Guinea has shown that land tenure conversion - the replacement of customary tenures with full individual freeholds - did not succeed in removing group interests and controls over the land (Fingleton 1980), and perceptions that the Tolai people of Papua New Guinea were selling group land to individuals, as the British land tenure authority S. Rowton Simpson thought, completely overlooked the group dimension of the transactions (Fingleton 1985).

The second approach was to acknowledge the land-owning group's existence, but insist on dealing with representatives of the group. This is not a big improvement on the first approach, for it also seeks to reduce a group to one or a handful of members, who are taken to act on behalf of the group. As seen above, often the trust concept was adopted, to make the individuals "responsible" to the group and to make sure that the group was bound by their actions. The trust is, however, a highly specialised artefact of western jurisprudence, involving particular duties between the trustee and those intended to benefit from the trust. To use the trust to reflect the position of individual members, even leaders, of a customary land-owning group vis-a-vis the membership as a whole is to assume an essential correspondence between the position of trustees under western legal systems and the position of leaders under customary land tenures. There are, however, fundamental differences between the two roles, an obvious one being that a group leader is also a group member, and inevitably there will be conflict between the leader's personal interests and the obligation as trustee to be disinterested.

The third approach is the most genuine attempt to deal with indigenous groups as groups - to convert them into corporate bodies. The mainstream forms used for this purpose include associations, corporations, councils and cooperatives - bodies which differ between themselves in nature, functions and powers under western law. Occasionally the attempt has been made to tailor the legislation to the particular nature, functions and powers of the indigenous body concerned, as in the case of Anangu Pitjantjatjara, the corporate body established in South Australia to hold and manage the ancestral lands of the Pitjantjatjara people. Other legislation has sought to provide legal machinery for the recognition of indigenous groups and communities in general - eg, Australia's *Aboriginal Councils and Associations Act* - or of land-owning groups in particular - eg, Papua New Guinea's *Land Groups Incorporation Act*. But whereas the latter law gives groups considerable flexibility to incorporate their own institutions, concepts and practices into their formal structure, the former intervenes heavily by prescribing many requirements over who may incorporate and how, and the way the group must conduct its affairs after incorporation.

In Australia, the Federal Government acknowledged in the mid-1970s that mainstream bodies were unsuitable for incorporating indigenous groups, and a commitment was made "to develop legally recognisable bodies which reflect [Aboriginal people's] own culture and do not require them to subjugate this culture to overriding Western European legal concepts" (see above). This noble political goal fell down, however, in the hands of the lawyers and officials, who were unable to break free from the concepts, processes and general approach with which they felt comfortable. A wide-ranging review of the law concerned, the *Aboriginal Councils and Associations Act*, found in 1996 that the Act gave almost no room for local cultural variation in corporate structures and decision-making processes, and in fact caused groups to lose control over their affairs (Fingleton et al. 1996).

If the aim of group recognition is to enable indigenous groups to continue to function and provide for their members in a modern context, then a general conclusion that emerges from this review is that the more the legislative regime allows groups to incorporate their own cultural concepts and processes into their formal legal structures, the more likely those structures are to be effective in meeting their members' needs and wishes. The recognizing law must, in other words, be culturally appropriate if it is to serve a useful purpose.

This paper will conclude with a summary of the main legal issues which follow from this basic requirement of cultural appropriateness, making some suggestions for reform and identifying possible areas of research. For many countries, the main suggestion offered here is that they actually do make some provision in their legal systems to recognize the existence of indigenous groups, and the role they play in the management of land, forests, fisheries and other natural resources. A recent World Resources Institute publication on community-based forest management in the Asia-Pacific region notes:

> "Despite new rhetoric on the virtues of community-based resource management, and growth in the number of programs, projects, and, in some instances, even national laws and policies, few nation-states broadly recognize either community-based tenurial rights or forest-dependent peoples' contributions to conservation and sustainable management." (Lynch and Talbott 1995:109)

The contribution of indigenous groups stands to be enhanced if they are effectively included in planning and management, and that means giving them a legal status and giving legal effect to decisions properly made by the group. The main legal issues which that involves will now be considered under five general headings -

a. the recognition process
b. membership
c. functions and powers
d. decision-making
e. dispute settlement.

A. The recognition process

The main matter to bear in mind here is that the process is one of *recognition* of an existing body, not creation of a new body. The aim should be to interfere to the minimum extent necessary in the nature and internal workings of the group. At the same time, legal recognition of a group is meant to be a meaningful step with legal consequences, not just a continuation of the status quo. In the course of giving the indigenous group a legal form and structure there will inevitably be specification of matters hitherto left unspecified, and a certain fixing of things previously left uncertain. In the process there will be a loss of flexibility, but this is the unavoidable cost of giving a customary group recognition under a formal legal system, and the alternative is for the group to succumb under the impact of pervasive trends to westernisation, modernisation and individualisation. In legislative drafting terms, therefore, the objective is to *describe* rather than *prescribe*.

A useful device to this end is to require groups intending to incorporate to prepare a "constitution", or set of rules making provision for the various matters which are fundamental to the group's existence and ongoing operation. In Part II above, it was explained that there are two main dimensions to the problem of group recognition - the external or outsider's interaction with the group, and the internal or insiders' interaction with the group and with each other. These are the fundamental matters to be addressed in a group's constitution, and the best approach is to give the group a large degree of freedom in how it addresses those matters in its constitution. It is useful to contrast here the approach taken in Papua New Guinea under the *Land Groups Incorporation Act*, in South Australia under the two Acts dealing with Pitjantjatjara and Maralinga lands, and in Queensland in 1991 Regulations providing for incorporation of land claimants, with the approach taken under the *Aboriginal Councils and Associations Act*, which has been adopted for the purposes of holding and managing native titles in Australia. Whereas the former laws simply list matters which a group must address in its constitution (qualifications for membership, appointment of a management committee, process of decision-making and how the decisions are evidenced, settlement of disputes, etc), the latter Act lays down many special and demanding requirements about such things as membership, meetings and decisions. This is unnecessary regulation, and it invites illegality by its unrealistic and inappropriate demands.

Another key issue at the recognition stage is what group should be recognized? This depends on the purpose of the recognition, and for land-owning purposes the group should ideally be the one which, under the customary tenure of the area concerned, owns the land, and can make decisions over the land without having to get approval from another group. This is a "rule of thumb", and it is important to get information on the nature of groups and customary tenures in the area concerned before undertaking the recognition process, and to conduct and analyse any field studies and other research to this end.

B. Membership

Again, it is important to recall that the exercise is one of recognition: the group has a natural membership, and the goal is to identify that, not create a new artificial body. Membership is, of course, a crucial matter for the individuals concerned, and under modern conditions of increased population levels and social mobility doubts can arise in individual cases. A number of the laws examined address the matter by requiring groups to specify in their constitutions the qualifications - and sometimes disqualifications - for membership of the group. This approach, in my experience, is far preferable to compiling registers of members, or requiring people to apply for membership. Lists of names may have a purpose (eg, to show the *current* membership), but they present the danger that the list will take the place of the real membership. In a clan or other group based on descent, every birth and every death will make a membership list obsolete. It is far better to set out the criteria for membership, and then a person either is a member according to that criteria or not. Inevitably there will be disputes in borderline cases, but these are best handled by providing a dispute settlement machinery in the group's constitution (see below).

C. Functions and powers

This paper concentrates on customary land-owning groups, and a major issue here is what authority the legally incorporated group has over the customary group's land. In Papua New Guinea, when land groups are incorporated the assets and liabilities of the customary group are transferred to the incorporated land group. That body is given power by the Act to hold and

manage that land, enter into agreements for its use and distribute any products or profits from it. The group may, however, impose limits on those powers in its constitution. Under most of Australia's land rights legislation, the titles to the lands concerned were vested in land trusts or other bodies specifically established by the legislation, and they were given powers of management, use and control over the lands. Restrictions were commonly imposed on that management, ranging from a general requirement to implement "the wishes" of the Local Aboriginal Land Council's members in New South Wales, to more demanding requirements for consultation and the gaining of consents in Queensland and the Northern Territory (see next section). In South Australia, the legislation placed restrictions on the grants of leases or licences to people who were not members of the two tribal groups concerned.

Native title in Australia poses a particular problem, because unlike the statutory land rights regimes, where the titles were creatures of the legislation and so could be vested in any body and controlled in any way the legislators chose, in the case of native titles these were interests in land which already existed under the general law. In providing for the legal recognition of a body to hold and manage native titles, care had to be taken not to deprive individual native title-holders of their existing rights. The difficulty was handled by enabling the native title-holders to first incorporate, and then chose whether to authorise that corporate body to hold their native title on trust, or only act for them as an agent. In any actions taken on the native title-holders' behalf, either as a trustee or agent, strict requirements are laid down for consulting with them and gaining their consent to the proposed course of action.

D. Decision-making

How the group makes its decisions, and how people know about those decisions, are major issues for group insiders and outsiders alike, and there are a number of aspects involved.

1. The role of custom

Indigenous land-owning groups hold their land under customary tenures, so by their nature they will continue to operate under custom. In Papua New Guinea, the law specifies that incorporated land groups shall act in accordance with custom, and they are required to name or otherwise identify the applicable custom in their constitutions. In Australia, where custom is specifically mentioned in the legislation a more restrictive approach has been adopted. In Queensland, for example, the 1991 Regulations provide that rules adopted for the incorporation of Aboriginal and Torres Strait Islander land claimants may be "based" on Aboriginal tradition or Island custom, and a similar provision is made under the Federal *Aboriginal Councils and Associations Act.* This has been interpreted as requiring the rules to spell out the relevant customs. Attempts to write down custom are often counterproductive, removing custom's relativity and adaptability. While unwritten custom may be vexing to the outsider, the groups concerned usually have no difficulty in applying their custom to particular circumstances and gaining an outcome. Any disputes can be resolved under the dispute settlement process (see below).

2. Leadership

All indigenous groups have leaders for various purposes, and land-owning groups usually have members who have special authority in decision-making on land allocation and so on. The tendency in the past has been to identify these "chiefs" or "land controllers" as the representatives

or trustees of the group, and treat them as if they were the group for the purpose of land decisions. More recently, the trend has been to regard a group's leadership as if it were a board of company directors. In Australia, for example, the *Aboriginal Councils and Associations Act* requires a group to specify in its rules the membership and powers of its Governing Committee, and various duties and demanding reporting requirements are imposed on that body, similar to those imposed on directors under general company laws.

But group leaders are not company directors, just as they are not trustees. A better approach is to allow the group the flexibility to identify "the title, composition, membership and manner of appointment of the committee or other controlling body of the group" in its own way in its constitution, as under Papua New Guinea's *Land Groups Incorporation Act.* In Victoria, the special status of Aboriginal elders is recognized by the powers given to them under a 1987 Act over matters of group membership and management of the group's land, and all groups should be entitled to adopt such customary mechanisms in their constitutions.

3. Decision-making processes

The legislation in Papua New Guinea simply requires a group to specify in its constitution "the manner in which the group acts". Much of the Australian legislation, however, has not followed this example, and usually imposes a range of specific requirements for meetings, voting, etc, which derive from western democratic processes and notions of majority rule. These are often quite inappropriate to the values and practices of indigenous groups. Tasmania's 1995 Act, for example, the most recent land rights statute in Australia, lays down many requirements for the election of members to the State-wide Aboriginal Land Council, and has a schedule of provisions with respect to meetings of the Council. Admittedly, the council is intended to be a representative body for the whole State and not an indigenous land-owning group, but no attempt appears to have been made to use other than western democratic ideas about how the body should represent its constituency in a culturally appropriate way. The same can be said for the bodies set up under New South Wales' 3-tiered structure.

Where special provision has been made is in the requirements for consultations and compliance with any traditional decision-making processes, as specified in the Queensland and Northern Territory land rights legislation. The *Aboriginal Land Rights (Northern Territory) Act*, for example, requires the relevant Aboriginal Land Council to consult with the traditional owners with respect to any proposal relating to their land, ensure that they understand the nature and purpose of the proposal, and that they have, as a group, consented to it. In Queensland, under 1991 Regulations, decisions must be taken in accordance with Aboriginal or Torres Strait Islander decision-making processes. Much the same approach has been taken by the Federal *Native Title (Prescribed Bodies Corporate) Regulations* of 1994.

4. Advice and support

Indigenous bodies often suffer from lack of expertise and administrative resources to carry out their functions in a satisfactory manner. In particular, they are unlikely to possess the range of professional skills for informed decision-making within their own indigenous membership. In Australia, this problem has been dealt with in some jurisdictions by setting up land councils or other representative bodies, funded in a variety of ways (from land rates, mining royalties from Aboriginal land, government grants) to engage the lawyers, anthropologists, business advisers and

administrative staff necessary to carry out the advisory and supporting functions. The costs are substantial, but the general point remains that indigenous groups cannot be expected to perform a useful role for their membership and the general community if they are simply given legal recognition and then just left to fend for themselves in the business environment. In Papua New Guinea, in the absence of administrative and professional support for incorporated land groups they have become largely dependent on resource development companies operating in their area to meet these needs. As these are usually the parties they are dealing with regarding access to their resources, this is not an ideal arrangement.

The native title legislation in Australia has taken the precautionary step of making prior consultation with the local Aboriginal land council or other representative body essential to the validity of any agreements entered into with the native title-holding body. There is no requirement to follow the representative body's views, but an agreement entered into without hearing those views is invalid. The provision certainly gives the consultation requirement "teeth", but again the necessary back-up has to be in place before such a precondition can be imposed.

5. Evidentiary provisions

Outsiders need to know that decisions made by the group are validly made, and can be relied on as binding the group. In Papua New Guinea, this was handled by requiring a land group to specify in its constitution "the manner in which its acts are evidenced", and then providing that outsiders dealing with the group are protected when the group acts in accordance with the manner specified in its constitution. The most recent Australian legislation on the subject, the *Native Title (Prescribed Bodies Corporate) Regulations* 1994, goes further in assisting outside parties to know when a group has validly acted. The Regulations require that consultations be held, advice given and consent obtained in certain ways before a decision is made, but these requirements can be taken to have been complied with if a certificate to that effect is signed by at least 5 members of the native title body corporate. Furthermore, a copy of a certificate must be made available upon request to any person having a substantial interest in the decision.

The foregoing provisions seem to go to elaborate lengths to cover group decision-making, but the subject is of great significance to the interests of group members and of outsiders dealing with the group, and it is not safe to give individuals an open-ended authority to act on their group's behalf. The Introduction referred to laws in New Zealand, Africa and Canada which provide for representatives to be appointed and authorised to enter into negotiations, consultations and agreements. At the end of the day, there are obvious practical reasons why a number of representatives should be able to do things on a group's behalf, but their authority so to act needs to be given in quite specific terms and subject to appropriate limitations.

E. Dispute settlement

Disputes which arise within an indigenous group are likely to be particular to the group, and may best be handled by employing customary mechanisms and authorities within the group. The same considerations apply to disputes between the legally-incorporated group and its members. Some laws, therefore, require groups to include in their constitutions the rules for settlement of such internal disputes. Land groups in Papua New Guinea are required to nominate a dispute-settlement authority, which has exclusive jurisdiction to deal with internal disputes concerning the group's land affairs. It is not bound by general law, but must attempt to do "substantial justice"

between all interested persons. Generally, there is no appeal from its decisions. In South Australia, the *Pitjantjatjara Land Rights Act* provides for appointment of a tribal assessor, who handles appeals by members aggrieved by decisions of the Anangu Pitjantjatjara, their corporate body. The assessor is not bound by normal rules of evidence, and is required to observe and give effect to the customs and traditions of the Pitjantjatjara people. Application can be made to a court to compel compliance with a tribal assessor's direction on any matter. Queensland has a useful provision in its 1991 Regulations, enabling the members of a land trust managing Aboriginal or Torres Strait Islander land to apply to a court for directions in relation to the management of the land in the event of difficulty.

As regards research, there is a general need to improve our understanding of the nature and role of indigenous groups. We live in a time of increasing individualism, when communal rights are scorned, and consigned to the scrap-heap of history. This view is based on a fundamental ignorance of the nature of customary tenure systems, with their balancing of group controls and the entitlements of individual members to share in the group's resources. It also perpetuates the mistaken tendency to confuse land tenure with land use - to assume that a communal land tenure system means communal land use. And even modern societies have not dispensed with groups altogether. On the contrary, the joint-stock company lies at the heart of the modern capitalist state, and it is common for land and other natural resources to be held by the state on behalf of the whole community. Tribal groups, clans, village communities and hamlets can continue to perform useful functions for their memberships and the wider society, but they need to be accommodated by the legal system, not shut out like legal misfits.

Acknowledgements:

The author wishes to thank Jon Lindsay, Tony Power and Bob Fisher for their comments on a draft version of this paper.

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