

## A COMPARISON OF NATIVE TITLE LAWS

The nature of individual states, in terms of their constitutional and legal systems, inevitably leads to divergent developments in all fields of law, including native title. Indigenous peoples' rights to land may be recognised through treaty or statute, via the Constitution or by the evolution of judge-made law. Some of the states considered below have a federal system and a written constitution which explicitly distributes powers between federal and state levels. In contrast, others such as New Zealand have a unitary state structure and are not governed by any written constitutional document. In this situation, instead of a balance of powers, a system of legislative supremacy often prevails. Yet further still, some states have submitted themselves to the authority of regional judicial institutions which directly influence the development of their laws. It is these differences, together with, and arising from different colonial histories, which account for the particularities of state laws with respect to native title. Nevertheless, it is always valuable to engage foreign laws, as comparative doctrines may be extrapolated which, while clearly without binding authority, may provide viable alternatives which have not previously been considered by the courts or law-makers. Furthermore, most of the states which are considered below (with the exception of Nicaragua) share a similar common law and colonial history. Therefore, since most of their systems are characterised by the reception of British law, there have been similar judicial developments and regular cross-jurisdictional referencing. This means that these jurisdictions are influenced quite strongly by one another, as well as by other international norms.

The following pages provide a comparative overview of the status of native title law in various countries (with a particular emphasis on common law countries), throughout the world. It includes information and research resources on:

[Australia](#)

[New Zealand](#)

[North America](#)

[Canada](#)

[United States](#)

[Malaysia](#)

[South Africa](#)

[Inter-American System for the Promotion and Protection of Human Rights](#)

### **Australia**

Unlike some other common law countries, the relationship between Indigenous peoples and the Australian state has never had any basis in treaty. In the inaugural case of *Mabo (No 2)* in 1992, the High Court held that native title to land, as sourced from the traditional laws and customs of Indigenous peoples, had survived the Crown's acquisition of sovereignty (see research resource page '[Overturning the Doctrine of Terra Nullius: The Mabo Case](#)'). The High Court referred to cases in other jurisdictions as well as principles of international law in reaching this decision (see research resource page '[Native Title and International Law](#)'). On the other hand, as demonstrated by the *Fejo* decision in 1998 (see research resource page '[Fejo v Northern Territory](#)'); the court has also asserted the inapplicability of foreign jurisprudence to some questions of Australian law. The decision in *Mabo (No 2)* was soon followed by the *Native Title Act 1993 (Cth)*, which also dictated the regime for recognition. Nevertheless, native title law in Australia has developed along different lines to those elsewhere and this has been justified (by law-makers) on the basis of differing colonial histories and styles and structures of government.

Since the 1967 constitutional referendum the Australian federal government has possessed a concurrent power under section 51 (xxvi) of the Australian *Constitution Act* to make laws for Indigenous Australians. Although this was the primary basis of the *Native Title Act 1993 (Cth)*, native title is more broadly protected in Australia via the federal government's 'external affairs' power, upon which the *Racial Discrimination Act 1975 (Cth)* is premised. Despite these vital federal powers with respect to native title law, states maintain, and have in fact exercised, their separate concurrent power over land use and alienation for over two centuries, which has made the application of native title different across jurisdictions.<sup>1</sup>

The High Court decision in *Wik Peoples v Queensland* preserved the possibility for the co-existence of interests, although native title was subordinated to non-Indigenous interests (see research resource page '[Wik: Coexistence, Pastoral Leases, Mining, Native Title and the Ten Point Plan](#)'). This was soon followed by legislative amendments and the so-called '10 Point Plan', which in the interests of legal certainty further sacrificed Indigenous people's rights. Native title in Australia does not always equate to full beneficial title and its content is limited to the rights established according to traditional laws and customs that have survived 200 years of extinguishing acts. With increased legislative activity in the field of native title the court has taken a more restrictive approach, as demonstrated by the *Yorta Yorta* case in 2002 (see research resource page '[Tradition and Authenticity: The Yorta Yorta Case](#)').

Indeed, contrary to the interest in land recognised in Canada, the High Court's decision in *WA v Ward*<sup>2</sup> in 2002 followed a 'bundle of rights' approach (see research resource page '[The Nature and Content of Native Title: The Miriuwung-Gajerrong Case](#)') that makes native title in Australia very susceptible to extinguishment parcel by parcel and right by right.

### Resources

Bartlett, R. 2004, *Native Title in Australia* (2<sup>nd</sup> ed, LexisNexis Butterworths, Brisbane).

Strelein, L. 2006, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, Canberra).

### **New Zealand**

Native title was recognised under the common law of New Zealand as early as 1847 in the case of *R v Symonds*.<sup>3</sup> Apart from confirming the existence of common law native title in New Zealand, this decision also noted its recognition in accordance with the country's founding document – namely, the *Treaty of Waitangi* (1840). Despite thereafter passing legislation (*Native Rights Act 1865 (NZ)*), the terms of which supported Maori native title rights, the case of *Wi Parata*<sup>4</sup> soon reversed the earlier interpretations which favoured the recognition of native title. More specifically, the court found that the Treaty of Waitangi had no effect, and denied the existence of customary law, and in turn, the protection of Maori native title rights and interests.

Notwithstanding the coloniser's empty promise, more recently the treaty has been reaffirmed as a guiding document in the development of government policy and the New Zealand Court of Appeal, in the case of *Attorney-General v Ngati Apa*<sup>5</sup> has again

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<sup>1</sup> Indigenous peoples in Australia do not have an exclusive relationship with the federal government, nor any independent law-making powers.

<sup>2</sup> (2002) 191 ALR 1.

<sup>3</sup> (1847) NZPCC 387.

<sup>4</sup> *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) SC 72.

<sup>5</sup> [2003] 3 NZLR 643.

re-confirmed the potential existence of native title. Therefore, settlements continue to be negotiated through the Maori Land Court, which operates in a tribunal-type manner and facilitates settlement. Nevertheless, native-title holders are now confronted with further legislation which purports to extinguish their native title rights altogether, at least in relation to the foreshore and sea bed.

### Resources

*Australian Indigenous Law Reporter* 2003, 'Court and Tribunal Decisions – New Zealand: *Ngati Apa v Attorney General*' 25.

*Australian Indigenous Law Reporter* 2005, 'Legislative Development – New Zealand: *Foreshore and Seabed Act 2004 (NZ)*' 13.

Boast, R. 2004, 'Maori Proprietary Claims to the Foreshore and Seabed After *Ngati Apa*' *New Zealand University Law Review* 21(1).

Erueti, A. 2003, 'Translating Maori Customary Title into Common Law Title' *New Zealand Law Journal* November 2003: 421-423.

Leane, G. 2004, 'Fighting them on the Benches: the Struggle for Native Title Recognition in New Zealand' *Newcastle Law Review* 8 (1): 65

National Native Title Tribunal, '[Maori customary title](#)' *Native Title Hot Spots* Issue 6

### **North America**

Early British Imperial policy in North America (including both Canada and the United States) recognised indigenous title to traditional lands. This necessitated the purchase of Indian land for the purpose of settlement. The [Royal Proclamation of 1763](#) prohibited the Crown government from issuing any further grants beyond the already existing borders of each colony and required the removal of settlers from designated Indian lands. This early policy marked the beginnings of a culture of treaty and agreement-making which still continues today.

### **Canada**

The Supreme Court of Canada first acknowledged the existence of common law native title in 1973 in the case of [Calder v Attorney General British Columbia](#).<sup>6</sup> This case also confirmed that pursuant to section 91(24) of the [Constitution Act 1867 \(Can\)](#), the federal government has exclusive jurisdiction with respect to Indians and their lands, and that provincial legislatures are thus unable to effect extinguishment of title. The possession of exclusive power led to a coherent federal and national policy approach, which was generally assisted by the federal government's retention of public lands until Indigenous land issues were settled. The policy that followed was aimed at settling native title claims through treaty or agreement. The eastern and central provinces therefore contain generations of treaties that map the expansion of settlement. In British Columbia only a small number of treaties were settled and native title under common law remained a live issue.

In [Delgamuukw v British Columbia](#)<sup>7</sup> the Supreme Court of Canada held that the source of native title lay in the occupation and possession of lands before the assertion of sovereignty, which was in turn derived partly from 'pre-existing systems of aboriginal

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<sup>6</sup> (1973) 34 DLR (3d) 145.

<sup>7</sup> [1998] 1 CNLR 14.

law'.<sup>8</sup> The court likened the right to other proprietary rights and standards of pre-existing treaty settlements, which confer the right to exclusive use and occupation, and more broadly construe (rather than limit to traditional practices) native title to include the right to mineral and other resources held in the land.

There have been historical differences between individual provinces in Canada, but most of those differences have been reconciled by the federal government's Comprehensive Land Claims Policy inaugurated in 1973 and reaffirmed in 1981 (see research resource page '[Comprehensive approaches to agreements and treaties in Canada](#)'). Contemporary settlements in Canada confer freehold title to the land and include the right to mineral resources. A system for the negotiation of self-government agreements has also been instigated which recognises substantive jurisdiction over agreed areas of policy and program delivery.

### Resources

Bartlett, R. 1998, '[The Content and Proof of Native Title: Delgamuukw v Queen in right of British Columbia](#)' *Indigenous Law Bulletin* 19

Bartlett, R. 2001, 'The Different Approach to Native Title in Canada' *Australian Law Librarian* 9(1): 32-41

Bartlett, R. 2004 'Regional Agreement and Settlement in North America', *Native Title in Australia* (2<sup>nd</sup> ed, LexisNexis Butterworths, Brisbane).

Borrows and Rotman, 2003, *Aboriginal Legal Issues – Cases and Commentary* (2<sup>nd</sup> ed, LexisNexis Butterworths)

Neate, G. 1999, 'Three Lessons for Australians from Delgamuukw v British Columbia' *International Law News* (40): 2-40

NTRU Research Resource Page '[Comprehensive approaches to agreements and treaties in Canada](#)'

Tehan, M. 1998, 'Delgamuukw v British Columbia' *Melbourne University Law Review* 22(3): 763-782

### **United States**

The recognition of native title in the United States followed a similar pathway to Canada, or rather vice versa. Power to make laws with respect to Indigenous peoples was similarly vested in the federal government by virtue of a constitutional head of power. A form of native title was recognised by the court as early as 1823 in the case of *Johnson v M'Intosh*.<sup>9</sup> While the title was considered inalienable because of the fact that overarching international sovereignty remained vested in the Crown, the rights conferred were not limited, but rather, seen as exclusive and comprehensive in a form of domestic sovereignty not unlike that of a state or province. Indigenous nations on treaty lands have inherent jurisdiction over their citizens or 'members' and their territory, from criminal justice to taxation. In *United States v Sante Fe Pacific Railroad Co*<sup>10</sup> the court emphasised that indigenous claims to land could be recognised under

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<sup>8</sup> Ibid, [126].

<sup>9</sup> (1823) 8 Wheat 543.

<sup>10</sup> 314 US 339 (1941).

the common law irrespective of 'treaty, statute or any other formal government action'.<sup>11</sup>

Sharing a similar history of treaty-making with Indigenous peoples as Canada, the United States first treaty with an Indian tribe was concluded in 1778. It was a treaty for peace and friendship. The primary goal of continued treaty-making was to obtain Indian lands via purchase. Treaties were eventually superseded by agreements, and after a largely unsuccessful attempt to finally resolve claims via the establishment of a Commission in 1946, contemporary settlements now take the form of legislative enactments supported by tribal elders. In the United States, treaties and agreements did not commonly refer to 'native title' as such, but merely resolved to settle 'land claims'. In *United States v Shoshone Tribe*,<sup>12</sup> the US Supreme Court found that treaty rights to land also encompass rights to mineral and timber resources within the land.

### Resources

Bartlett, R. 2004 'Regional Agreement and Settlement in North America', *Native Title in Australia* (2<sup>nd</sup> ed, LexisNexis Butterworths, Brisbane).

Getches, D. H, C. F. Wilkinson, and R. A. Williams, 1998, *Federal Indian Law* (4<sup>th</sup> ed, West Publishing Co)

McNeil, K. 1997 'Extinguishment of Native Title: The High Court and American Law' *Australian Indigenous Law Reporter* 41.

Williams, R. A. Jnr, 2005, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal history of Racism in America* (University of Minnesota Press)

Williams, R. A. Jnr, 1997, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (Oxford University Press, New York)

## **RECENT OVERSEAS DEVELOPMENTS**

### **Malaysia**

The Indigenous people of Peninsula Malaysia are collectively referred to as *Orang Asli*, which in Bahasa Malaysia means 'original people'. Not unlike the experience in Australia, they had been denied recognition of their traditional title to land for centuries. In fact, it has only been within the last ten years that Malaysian courts have asserted the existence of such rights at common law. Federal legislation, namely the *National Land Code 1965*<sup>13</sup> which is based on Australia's Torrens system of land registration, denied the existence of native title under the formal legal system.

In the case of *Adong bin Kuwau & Ors vs Kerajaan Negeri Johor & Ors*,<sup>14</sup> the Johore High Court declared that the common law recognised *Orang Asli's* native land rights and that those rights are informed by the traditions of the Indigenous peoples. In this case however, the decision was limited to the particular facts in issue, and therefore, to the question of adequate compensation for the loss of crops, rather than for the loss of the land itself. The court relied quite heavily on foreign jurisprudence, but the decision was nonetheless upheld by the Court of Appeal in *Kerajaan Negeri Johor v Adong Kuwau*<sup>15</sup> the following year. Unfortunately, despite recognising the unique value of the

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<sup>11</sup> Ibid at 347.

<sup>12</sup> 304 US 111 (1938).

<sup>13</sup> Act 56 of 1965

<sup>14</sup> [1997] 1 MLJ 418.

<sup>15</sup> [1998] 2 CLJ 665.

land to its Indigenous inhabitants, the claimants were only awarded compensation for economic loss (calculated as per capita poverty level income and multiplied by 25 years), as it was considered too difficult to quantify other loss.

These earlier decisions eventually culminated in the [Court of Appeal](#)<sup>16</sup> in 2005 affirming the decision made by the Shah Alam High Court in [Sagong bin Tasi v The Selangor State Government](#)<sup>17</sup> – a decision rendered in 2002. This case arose from the State's acquisition of the Temuan tribe's land for the purpose of constructing a highway to the Kuala Lumpur International Airport. The plaintiffs were given 14 days to vacate their homes and were offered compensation for the loss of their homes and crops. Despite declining the offer, the tribe was forcibly evicted by the police.

The court held that native title existed at common law, separate and distinct from the aboriginal reserves and areas established under the *Aboriginal Peoples Act 1954*.<sup>18</sup> Under that legislation the state is not required to compensate for the acquisition of land, but common law native title as devised by the court did not fall within its remit. By interpreting the legislation restrictively it avoided a constitutional inconsistency with Article 13 of the *Federal Constitution of Malaysia*, which requires that compensation is given for the compulsory acquisition of land. At the same time however, this meant that due to the common law's recognition of native title, the State was required to provide compensation for acquiring the *land* itself, rather than merely the contents upon the land. Even though native title is *sui generis* in form, the compensation was nonetheless calculated under the *Land Acquisition Act 1960*, which excluded non-economic aspects of loss. Furthermore, the title that was recognised was also confined to the settlement area and did not extend to the jungles at large, where the claimants may have also traditionally foraged or gathered. Apart from recognising native title, the court found that the government had breached its fiduciary duty towards the claimants, and that the other respondents had committed trespass, the nature of which gave rise to exemplary damages.

The fact that the [Sagong Tasi](#) case recognised native title to the land itself, rather than merely ownership of the fixtures upon the land, is of great significance. Nevertheless, there still remain problematic aspects to the decision, such as the issue of compensation and the boundaries of native title recognition. These factors may be ironed-out along with the further development of the law, but the fact that the Selangor government has recently mounted a vigorous appeal to the original decision (arguing that while the Temuan tribe have customary rights over items on the land, consistent with the *Adong* case discussed above, they do not have title to the land itself), does not make the future look promising. In addition, unlike other common law countries, the Malaysian government has not yet established a tribunal or other mechanism designed to facilitate and manage native title claims.

## Resources

Anbalagan, V. 28 April 2006, '[No exclusive land rights for Orang Asli](#)' *New Straits Times*.

*Australian Indigenous Law Reporter* 2002, '[Court and Tribunal Decisions – Malaysia: Sagong bin Tasi v The Selangor State Government](#)' 47.

*Australian Journal of Asian Law* 2001, 'Case note: 'Native Title' in Malaysia: Adong's Case' 3(2), pp. 198-212.

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<sup>16</sup>

<sup>17</sup> [2002] 2 MLJ 591.

<sup>18</sup> Act 134 of 1954.

Bulan, R. 2001, 'Native title as a proprietary right under the Constitution in Peninsula Malaysia: a step in the right direction?' *Asia Pacific Law Review* 9(1), pp. 83-101.

Cheah, W. L. 2004, '*Sagong Tasi: Reconciling State Development and Orang Asli Rights in Malaysian Courts*' *Working Paper Series No. 25* Asia Research Institute, National university of Singapore.

Cheah, W. L. 2004, '*Sagong Tasi and Orang Asli Land Rights in Malaysia: Victory, Milestone or False Start?*' *Law, Social Justice and Global Development* (LGD) (2).

Gray, S. 2002, 'Skeletal Principles in Malaysia's Common Law Cupboard: the Future of Indigenous Native Title in Malaysian Common Law' *Lawasia Journal*, pp. 99-125.

Idrus, R. 'Landmark decision in favour of Orang Asli' *HAKAM National Human Rights Society*.

## South Africa

The demise of apartheid in South Africa precipitated the country's first democratic elections in 1994 and the subsequent adoption of a final written *Constitution*.<sup>19</sup> In order to implement the newly created constitutional right for the restitution of land, the government promptly passed the *Restitution of Land Rights Act 1994*, which was soon complemented by formal policy documents (see the Department of Land Affairs' 1997 *White Paper on South African Land Policy*). Customary title to land has been recognised within the context, and confines, of this legislative scheme, and thus, has evolved upon different foundational objectives to native title in other jurisdictions.

During apartheid Black South Africans were massively deprived and dispossessed of their land. Although comprising approximately 87 per cent of the entire population, they were forced to inhabit a mere 13 percent of the country's territorial stretch. Under section 2 of the *Restitution of Lands Rights Act 1994* (the '*Restitution Act*') a person (or the person's descendent) who was dispossessed of their land as a result of a racially discriminatory law or practice, after the passing of the *Native Administration Act 1913*, may claim restitution. Unlike the recognition of native title in Australia and elsewhere, the restitution of land process is activated *by reason of* dispossession (rather than inhibited by it) and aims at redressing past injustices and achieving reconciliation. Moreover, all land in South Africa may be the subject of a claim as there is no distinction under the *Restitution Act* between state and privately owned land. Of course, restoration of privately held land is often problematic and usually only proceeds on a consensual basis. The Restitution of Land Rights Commission acts on behalf of claimants and the whole procedure is rather straightforward, generally relying upon earlier legal documents to establish entitlement. A Land Claims Court hears all applications under the *Restitution Act* and, pursuant to section 35 (1) of that legislation, it has the power to order a number of remedies, varying from restoration of the land to granting alternative land, providing compensation or including the claimant as a beneficiary of a state housing scheme. Unfortunately, compensation has been calculated according to market value as at the time of dispossession, and the Court's capacity is stretched by the volume of claims.

Although section 1 of the *Restitution Act* construes a 'right in land' rather broadly and includes 'a customary law interest', the restriction of claims to the period post 1913 was a point of contention concerning native title rights. In 2003, the Constitutional Court of South Africa delivered its decision in the *Richtersveld* case. This case involved the

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<sup>19</sup> *Constitution of the Republic of South Africa 1996*

Richtersveld people, who originated from two indigenous groups of people and inhabited the claim area in a nomadic fashion long before Dutch colonisation in 1652. The groups merged into the so-called Nama tribe, lived independently, and under their own political management. The area was placed under British rule through annexation in 1847, and until the discovery of diamonds in the mid-1920s the indigenous inhabitants were left to pursue their traditional lifestyle on the land. The Richtersveld people were gradually denied more and more access to the land as a result of diamond-mining licenses granted by the government. In 1957 a fence was erected around the subject area, and between 1989 and 1994 all of the subject land was vested in Alexkor Limited, a government-owned company.

The claimants initiated their claim unsuccessfully with the Land Claims Court. On appeal to the Supreme Court, it was held that at the time of annexation, the Richtersveld people had a communal 'customary law interest' whose source was the 'traditional laws and customs of the Richtersveld people'.<sup>20</sup> The court drew an analogy between this 'customary law interest' recognised under the *Restitution Act* to aboriginal title rights recognised in other jurisdictions. In fact, the court cited the Australian decisions in *Mabo (No 2)* and *Yorta Yorta*. More specifically, like the Australian jurisprudence, the court found that the change in sovereignty did not itself destroy pre-existing property rights, and that Indigenous people were in fact capable of having recognisable property rights. The Richtersveld people's rights had survived annexation and the government's denial of their rights by granting the mining licenses was racially discriminatory. Therefore, the claimants were entitled to restitution under the *Restitution Act*. The Constitutional Court of South Africa upheld the decision of the Supreme Court and found that the content of the 'interest' was to be determined by 'the history and the usages of the community of Richtersveld'.<sup>21</sup>

While the Supreme Court found the 'customary law interest' under the *Restitution Act* as akin to rights held at common law, and thereby included rights to precious stones and minerals on the land, the Constitutional Court went even further by holding that indigenous law governing land rights is actually part of the 'amalgam of South African Law'. In other words, it is recognised as an independent source of norms *within* the South African legal system. At the same time however, the court required that such law must be established by adducing evidence. Therefore, the end result is not entirely different from the requirements for invoking Indigenous law under Australian and Canadian authority, where indigenous law must be proven as a matter of fact. In addition, it was clear from the courts' judgements that some element of community had to survive the prior dispossession in order to make a claim. Like native title in many other jurisdictions, the court also viewed aboriginal title as subject to sovereign extinguishment by legislative act, and inalienable, except to the state. Lastly, by containing the matter within the confines of the legislation, the Court avoided setting a more general common law precedent for the future recognition of native title.

### Cases

*Richtersveld Community v Alexkor Ltd and Anor* 2001 (3) 1293 (Land Claims Court, 22 March 2001)

*Richtersveld Community & Ors v Alexkor Limited & Anor* (unreported, Supreme Court of Appeal, 24 March 2003)

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<sup>20</sup> *Richtersveld Community v Alexkor Ltd & Anor* (unreported, Supreme Court of Appeal, 24 March 2003), [28].

<sup>21</sup> *Alexkor Ltd v Richtersveld Community* (unreported, Constitutional Court of South Africa, 14 October 2003), [60].

*Alexkor Ltd v Richtersveld Community* (unreported, Constitutional Court of South Africa, 14 October 2003)

### Resources

*Australian Indigenous Law Reporter*, 2003, 'Court and Tribunal Decisions – South Africa: *Alexkor Ltd v The Richtersveld Community*, Constitutional Court of South Africa' 41.

*Australian Indigenous Law Reporter*, 2001, 'Court and Tribunal Decisions – South Africa: *Richtersveld Community and Anors v Alexkor Ltd and Anor*' 39.

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Mostert, H. and Fitzpatrick, P. 2004, 'Law Against Law: Indigenous Rights and the *Richtersveld Decision*'

Patterson, S. 2004, 'The Foundations of Aboriginal Title in South Africa? The *Richtersveld Community v Alexkor Ltd Decisions*' *Indigenous Law Bulletin* 18.

### **Inter-American System for the Promotion and Protection of Human Rights**

Thirty-five American states are members of the [Organisation of American States](#), through which many have also ratified the [American Convention on Human Rights](#). Pursuant to this Convention individuals who have exhausted domestic remedies are able to petition the Inter-American Commission on Human Rights through a complaint procedure. Following an assessment by the Commission, and in the absence of appropriate remedial action by the state concerned, the Commission may, on behalf of victims, submit cases to the Inter-American Court of Human Rights. Even though enforcement is more difficult on the international level, the decisions of the court are legally binding upon state parties to the treaty. In addition, the provisions of the Convention are analogous to other international human rights instruments, and arguably, have acquired the status of international customary law.

#### [The Case of the Mayagna \(Sumo\) Awas Tingni Community v. Nicaragua](#)

On 31 August 2001, the Inter-American Court of Human Rights (IACtHR) delivered its judgment involving the native inhabitants of the Atlantic coast region of Nicaragua. The Awas Tingni Community sought to have its communal property rights (according to traditional patterns of land use and occupancy) recognised by the Nicaraguan government via a prompt demarcation of those lands, and monetary compensation for the infringement of the Community's territorial rights.

Despite general constitutional and statutory provisions in Nicaragua which recognised the rights of Indigenous peoples to possess, use and enjoy their community lands, and to exercise free choice in decision-making concerning those lands, the Nicaraguan government granted a concession to a foreign company, which allowed it to exploit resources on the lands, without obtaining the requisite approval. The Awas Tingni community challenged the government's actions in the Nicaraguan Supreme Court to no avail, but eventually succeeded in having their rights acknowledged before the Inter-

American Commission. Since the Nicaraguan government failed to implement the recommendations of the Commission, the Commission submitted the case, on behalf of the victims, to the Inter-American Court for further adjudication. Nicaragua had ratified the [American Convention of Human Rights](#) in 1979 and thereafter accepted the Court's compulsory jurisdiction.

The Inter-American Court of Human Rights delivered a landmark decision, finding that the Nicaraguan government had violated two key provisions of the [Convention](#). First, it failed to make effective the rights of Indigenous peoples to land and resources as they are embodied in the country's [Constitution](#)<sup>22</sup> and legislation. This violated Article 25 of the [Convention](#), which provides for judicial protection, and which, coupled with Articles 1 and 2 of the [Convention](#) requires state parties to adopt domestic measures necessary to secure the enjoyment of the rights in the [Convention](#). Secondly, and more profound in terms of Indigenous rights internationally, the court held that Nicaragua had violated the right to property under Article 21 of the [Convention](#). While Nicaragua did *formally* recognise the communal form of property in its Constitution and legislation, the court interpreted the concept of "property" under Article 21 to also encompass the communal property of Indigenous people as defined by customary land tenure, and stressed that like other international human rights conventions, the [American Convention](#) independently creates obligations, that is, irrespective of the domestic laws of state parties. Again by virtue of Articles 1 and 2 of the [Convention](#), the right to the lands necessitates the right to have those lands officially demarcated according to traditional law and custom.

Although the decision provides a very significant precedent for the region (and beyond), and demonstrates the vitality and authority of the Inter-American system, there are some less promising aspects of the decision. The issue of compensation was not argued comprehensively and was largely rejected on dubious procedural grounds. Secondly, the fifteen-month period for implementation of the decision expired without any demarcation of the lands in sight. This forced the Awas Tingni community to pursue further domestic legal action in order to reach full compliance.

### Resources

Anaya, J and Williams, R. 2001, '[The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System](#)' *Harvard Human Rights Journal* 14. Provides review of native title recognition in all states parties to the American Convention, other American states, and states in other regions of the world, including Australia and Malaysia.

Anaya, J. and Grossman, C. 2002, '[The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples](#)' *The Arizona Journal of International and Comparative Law* 19(1), pp. 1-15.

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Coulter, R. 2002, '[The Awas Tingni Case: The Inter-American Court of Human Rights and Indigenous Peoples](#)' Collective Right to their Land and Natural Resources',

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<sup>22</sup> Excerpts from the *Republic of Nicaragua Political Constitution 1987*.

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Grossman, C. 2001, '[Awás Tingni v. Nicaragua: A landmark Case for the Inter-American System](#)' *Human Rights Brief* 8(3), pp. 2.

Macklem, P. and Morgan, E. 'Indigenous Rights in the Inter-American System: The Amicus Brief of the Assembly of First Nations in *Awás Tingni v. Republic of Nicaragua*', *Human Rights Quarterly* 22, pp. 569.

For a complete list of available documents, press releases and case summary see [http://www.law.arizona.edu/Depts/iplp/advocacy\\_clinical/awas\\_tingni/press.htm](http://www.law.arizona.edu/Depts/iplp/advocacy_clinical/awas_tingni/press.htm)

### **Other Comparative Resources**

Bartlett, R. 2003 'Humpies not Houses or the Denial of Native Title: A Comparative Assessment of Australia's Museum Mentality' *Australian Property Law Journal* 10(2): 83-107

Carstens, M. 2001, 'From Native Title to Self-Determination? Indigenous Rights in Australia and Canada: A Comparison' *Law and Anthropology* (11): 248-281

Dick, D. 1999, 'Comprehending 'the Genius of Common Law': Native Title in Australia and Canada Compared Post-Delgamuukw' *Australian Journal of Human Rights* 5(1): 79-105

Carstens, M. 2001, 'From Native Title to Self-Determination? Indigenous Rights in Australia and Canada: A Comparison' *Law and Anthropology* (11): 248-281  
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Fox, C. 2000, 'Indigenous Self-Government and Sovereignty in Canada: Some Lessons for Australia' *Native Title Newsletter* (3) May/June: 16-18

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