

Mapping landscapes of the mind: A cadastral conundrum in the Native Title era

Graeme Neate

President, National Native Title Tribunal

**Presented at the UN-FIG Conference on Land Tenure and Cadastral
Infrastructures for Sustainable Development, Melbourne, Australia
25-27 October 1999**

ABSTRACT

When the Crown progressively assumed sovereignty over different parts of Australia, groups of Aboriginal and Torres Strait Islander peoples had their own laws and customs which made them traditional owners of different parts of the land. Despite more than two centuries of colonisation, traditional links to land have survived and are exercised in some places. Through the prism of their cultural heritage, traditional owners of the land see geological features and items of vegetation as instances of Dreamtime activity. The stories, the songs, the ceremonies and the language are embedded in the land but are maintained in the minds of successive generations of traditional owners. The features of the landscape can be observed by all, but their meaning and significance is known to the few. In that sense, the traditional estates of indigenous groups are landscapes of the mind.

The legal recognition of indigenous peoples' rights and interests in land, and laws providing for the recognition and protection of areas of particular significance to indigenous Australians, have generated the need to precisely describe the location and extent of indigenous interests in land. That requirement gives rise to numerous issues about how indigenous peoples' rights are to be recorded and how competing land use disputes are to be resolved.

Surveyors need to understand that:

- the rights and interests of indigenous people in their traditional country will not necessarily accord with conventional legal notions of property;
- in some areas two or more groups of people may have mutually recognised traditional rights and interests;
- in some areas the boundaries of traditional estates may be clearly defined by reference to natural features, but elsewhere the boundaries are imprecise, permeable and periodically negotiable.

It may not be possible to plot traditional estates or significant sites by conventional cartographic means, or record them cadastrally. Rather than attempt to record such estates and sites by using cadastral boundaries, it may be better to note, by references to areas mapped for other purposes, which group has (either alone or with others) which traditional rights and interests.

Keywords and phrases: Native Title Law, Indigenous people, Bogor Declaration

1 INTRODUCTION

Australia is a land of contrasts, and the way people see and think about the land is influenced by their cultural background.

Early European settlers and explorers expressed a variety of responses to the landscape. Some first impressions were not favourable. In 1788, soon after a settlement was established on the east coast, Major Robert Ross wrote to Under-Secretary Nepean, "I do not scruple to pronounce that in the whole world there is not a worse country than what we have yet seen of this. All that is contiguous to us is so barren and forbidding that it can in truth be said, here Nature is reversed ...".¹ The Surgeon-General of the colony, John White, was no less flattering when he wrote two years later of "a country and place so forbidding and so hateful as only to merit execration and curses".²

Yet others saw a rare beauty in this "land of wonder and delight ... a new creation".³ Convict artist Thomas Watling waxed eloquent:

"Perhaps nothing can surpass the circumambient windings and romantic banks of narrow arm of the sea that leads from this to Parramatta, another settlement about fourteen miles off. The Poet may there descry numberless beauties; nor can there be fitter haunts for the imagination. Arcadian shades, or classic bowers, present themselves at every winding to the ravished eye. Overhead the most grotesque foliage yields a shade, where cooling zephyrs breathe every perfume. Mangrove avenues, and picturesque rocks, entwined with non-descript flowers. In short, were the benefits of the least equal to the specious external, this country need hardly give place to any other on earth. ... Should the curious Ornithologist, or the prying Botanist, emigrate here, they could not fail of deriving ample gratification in their favourite pursuits in this luxuriant museum."⁴

Explorers set out to open up and map the country. They searched for places for agricultural and pastoral pursuits. Some searched for a great inland sea. There was much disappointment, despair, even death, as Europeans came to grips with the demands of the land.

In September 1845, explorer Charles Sturt turned back from the Simpson Desert in central Australia and wrote:

"It is impossible to find words to describe the terrible nature of this dreadful Desert. The view from one of the ridges is perhaps the most terrific and cheerless that man ever gazed upon. The ridges run as straight as an arrow 330°, rising from an immense black plain in long fiery lines."⁵

But the terror and despair of the inland was matched by the welcoming expanses of the coast along which most of the Australian population congregates, the lushness of

¹ Quoted in A H Chisholm (ed) *Australia: Land of Wonder*, Angus & Robertson, 1979, p16.

² Surgeon-General White to Mr Skill, 17 April 1790, quoted id.

³ Rev T F Palmer to Rev J Joyce in England, 15 December 1794, quoted id.

⁴ Thomas Watling to his aunt in Dumfries, 1793, quoted id.

⁵ Quoted in Land Tribunal, *Aboriginal Land Claim to Simpson Desert National Park*, 1994, para 23.

the tropics, the wonders of snow clad ranges and the “clean, lean, hungry country” and “bony slopes” of the tableland areas.⁶

A young Englishman who worked as a gold-seeker, drover and mounted policeman in the 1850s in New South Wales and Victoria wrote rapturously of:

“A new heaven and a new earth! Tier beyond tier, height above height, the great wooded ranges go rolling away westward, till on the lofty skyline they are crowned with a gleam of everlasting snow. To the eastward they sink down, breaking into isolated forest-fringed peaks and rock-crowned eminences, till with rapidly straightening lines they fade into the broad grey plains, beyond which the southern ocean is visible by the white sea-haze upon the sky.

All creation is new and strange. The trees, surpassing in size the largest English oaks, are of a species we have never seen before. The graceful shrubs, the bright-coloured flowers, ay, the very grass itself, are of species unknown in Europe; ...”⁷

With the European explorers and settlers came the artists and writers. They too had to grapple with a landscape that was both unfamiliar and intriguing. Much of the finest Australian art has been and is devoted to the landscape, or has the land as a key element.⁸ But the cultural background of the observer has conditioned how the land is viewed. Australian art critic Robert Hughes has described one early romantic view of Port Jackson as “pure self-hypnosis” which could be explained in the following way:

“Cultivated thought in England, after news of the Tahitians on their island paradise, saw the South Seas as a reincarnation of the Virgilian Golden Age. Most visitors had their schema already fixed for them”⁹

According to Hughes,

“This still happens, but the schema is different. Instead of the green Virgilian meadow with ruined gazebos and Noble Savages, we have the implacable desert of antipodean weirdness”¹⁰

Thus, English art critic Sir Kenneth Clark could write:

“In this dry land there are no dark woods (I do not consider the jungle authentically Australian), no thick, sappy substances; the forms of gravity are continually denied by flying foxes and bounding Kangaroos”¹¹

⁶ See “South of my days” by Judith Wright reprinted in M O’Conner (ed) *Two Centuries of Australian Poetry*, Oxford University Press Australia, 1988, p 67.

⁷ H Kingsley, *The Recollections of Geoffry Hamlyn*, 1859, quoted in A H Chisholm (ed), *Australia: Land of Wonder*, op cit, p 18.

⁸ For example, see E Lynn *The Australian Landscape and its Artists*, Bay Books, Sydney, 1977.

⁹ R Hughes, *The Art of Australia*, Pelican, 1970, p 30.

¹⁰ Id.

Our composers also have drawn inspiration from the land. Peter Sculthorpe, who has written pieces evocative of the land,¹² was recently quoted as saying he is spending his life “trying to find what the spirit of the landscape – physiological, psychological, spiritual – means to me”.¹³

The contrast between British values about landscape and Australian values is captured in a poem learned by many Australian school children:

“The love of field and coppice,
Of green and shaded lanes,
Of ordered woods and gardens
Is running in your veins.
Strong love of grey-blue distance,
Brown streams and soft, dim skies -
I know but cannot share it,
My love is otherwise.

I love a sunburnt country,
A land of sweeping plains,
Of ragged mountain ranges,
Of droughts and flooding rains.
I love her far horizons,
I love her jewel-sea,
Her beauty and her terror -
The wide brown land for me!”¹⁴

The significance of the land for indigenous Australians has been noted in the draft preamble which the Prime Minister is urging us to adopt for inclusion in the Australian Constitution. The text speaks of:

“honouring Aborigines and Torres Strait Islanders, the nation’s first people, for their deep kinship with their lands and continuing cultures which enrich the life of our country.”

In the meantime, the Council for Aboriginal Reconciliation, established in 1991,¹⁵ has as its vision:

“A united Australia which respects this land of ours, values the Aboriginal and Torres Strait Islander heritage, and provides justice and equity for all.”

¹¹ Quoted id.

¹² From his *Sun Music* pieces of the 1960s to the successive *Port Essington*, *The Fifth Continent*, *Kakadu*, *Nourlangie*, and recently premiered *Great Sandy Island* : see M Hannan, *Peter Sculthorpe His Music and Ideas 1929-1979*, UQP.

¹³ M Shmith “Sallywag at 70”, *The Weekend Australian*, 24-25 April 1999, pp 16-18.

¹⁴ “My Country” by Dorothea Mackellar in *The Closed Door*, 1911.

¹⁵ *Council for Aboriginal Reconciliation Act 1991* (Cth).

On 3 June 1999, the Council released its final draft Declaration for Reconciliation¹⁶ that repeats that vision and mentions the history of land ownership in these terms:

“We value the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of traditional lands and waters.

We respect and recognise continuing customary laws, beliefs and traditions.

And through the land and its first peoples, we may taste this spirituality and rejoice in its grandeur.

We acknowledge this land was colonised without the consent of the original inhabitants.”

Both the draft preamble to the Constitution and the draft Declaration for Reconciliation recognise the significance of the land for Aboriginal and Torres Strait Islander peoples. But what does the land mean to indigenous Australians, those whose ancestors preceded the European and other settlers by millennia?

2 TRADITIONAL ABORIGINAL LINKS TO LAND

A book published in 1985 records some thoughts of a senior Bunitj man from the Gagudju language group whose traditional country is in Kakadu National Park in the Northern Territory. They point to the interlinking of people and land and language, of sacred significance and physical form, of life and death, and the need to pass the knowledge and law of the land from generation to generation.

“Each man he stay ...
stay on his own country.
He can’t move his country ...
so he stay there,
stay with his language.”¹⁷

This ground and this earth ...
like brother and mother.

...

We like this earth to stay,
because he was staying for ever and ever.

¹⁶ The functions of the Council for Aboriginal Reconciliation include “to consult Aborigines and Torres Strait Islanders and the wider Australian community on whether reconciliation would be advanced by a formal document or formal documents of reconciliation” and, having consulted, if the Council considers such a document would benefit the Australian community as a whole, to make recommendations to the relevant Commonwealth Minister “on the nature and content of, and manner of giving effect to, such a document or documents”: *Council for Aboriginal Reconciliation Act 1991* (Cth) s 6(1)(g) and (h).

¹⁷ B Neidjie, S Davis, A Fox, *Kakadu Man ... Bill Neidjie*, Mybrood P/L, 1985, p 37.

We don't want to lose him.
We say 'Sacred, leave him.'¹⁸

...

My children got to hang onto this story.
This important story.
I hang onto this story all my life.
My father tell me this story.
My children can't lose it.

White European want to know ...
asking 'What this story?'
This not easy story.
No-one else can tell it ...
because this story for Aboriginal culture.

...

Our story is in the land ...
it is written in those sacred places.
My children will look after those places,
that's the law.¹⁹

Earth ...
like your father or brother or mother,
because you born from earth.
You got to come back to earth.
When you dead ...
you'll come back to earth.
Maybe little while yet ...
then you'll come to earth.
That's your bone,
your blood.
It's in this earth
same as for tree.²⁰

...

Rock stays,
earth stays.
I die and put my bones in cave or earth.
Soon my bones become earth ...
all the same.
My spirit has gone back to my country ...
my mother."²¹

¹⁸ Ibid, p 46.

¹⁹ Ibid, p 47.

²⁰ Ibid, p 51.

²¹ Ibid, p 62.

Aboriginal leader Patrick Dodson has written:

“Land gives you the essence of who you are. It relates you to the country, to the other people who were born and bred there. It is like a great mosaic or jigsaw puzzle, various parts contributing to an intelligible whole. Dreaming tracks and sacred sites are part of the law and part of day-to-day living. The spirit you have is related to that and relates back to the land.”²²

It is apparent that at the times when the Crown progressively assumed sovereignty over different parts of Australia, Aboriginal people and Torres Strait Islanders had their own local laws and customs which made them traditional owners of much, if not all, of the land mass. The nature of the land influenced the nature and intensity of land use, but variations in ecology and the poor capacity of some areas to support large numbers of people did not mean that those areas were unoccupied or unowned. Even the “dreadful Desert” with sand ridges “in long fiery lines” described by Charles Sturt was the home for Aboriginal people, whose residential structures, physical artefacts and bones remain preserved in the landscape and whose descendants retain traditional links to the land.²³

For many indigenous people, their traditional land has spiritual as well as economic and other significance. As Patrick Dodson observed, features of the land include dreaming tracks and sacred sites, the places where creative heroic ancestors visited and acted or left evidence of their passage or presence. Songs, stories and ceremonies record the mythological history of the land. By singing the songs, telling the stories and performing the ceremonies, the inheritors of that cultural knowledge keep alive the spirit of the land – they “look after” their country.

Through the prism of their cultural heritage, the traditional owners of the land see geological features and items of vegetation as instances of Dreamtime activity. Rock formations, trees, sandhills, caves, waterholes and plains assume particular significance in the minds of their traditional owners. The stories, the songs, the ceremonies and the language are embedded in the land but maintained in the minds of successive generations of traditional owners. Rights to knowledge about land and rights to the land are intertwined, regulated by traditional laws and customs. Access to knowledge about the land is restricted. Only certain people can fully know the country. Outsiders will have little, if any, of that knowledge. The features of the landscape can be observed by all, but their meaning and significance is known to the few. In that sense, the traditional estates of indigenous groups are landscapes of the mind.

The challenge for a European mind is to try to comprehend and describe the nature of Aboriginal links to land. An anthropologist, Deborah Bird Rose, has written about the notion of “country” in Aboriginal thinking.

²² P Dodson, *The Age*, 3 November 1987, reprinted in S Torre (ed) *The Macquarie Dictionary of Australian Quotations*, The Macquarie Library Pty Ltd, 1990, p 5.

²³ See Land Tribunal, *Aboriginal Land Claim to Simpson Desert National Park*, 1994.

“Country in Aboriginal English is not only a common noun but also a proper noun. People talk about country in the same way as they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for country, and long for country. People say that country knows, hears, smells, takes notice, takes care, is sorry or happy. Country is not a generalised or undifferentiated type of place, such as one might indicate with terms like ‘spending a day in the country’ or ‘going up the country’. Rather, country is a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life. Because of this richness, country is home, and peace; nourishment for body, mind, and spirit; heart’s ease.”²⁴

In a similar vein, the difficulty of understanding and describing the relationship between Aboriginal people and their traditional land was well expressed by the late Professor WEH Stanner in his 1968 Boyer Lectures “After the Dreaming”. Stanner wrote:

“No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word ‘home’, warm and suggestive though it be, does not match the Aboriginal word that may mean ‘camp’, ‘hearth’, ‘country’, ‘everlasting home’, ‘totem place’, ‘life source’, ‘spirit centre’ and much else all in one. Our word ‘land’ is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The Aboriginal would speak of ‘earth’ and used the word in a richly symbolic way to mean his ‘shoulder’ or his ‘side’. I have seen an Aboriginal embrace the earth he walked on. To put our words ‘home’ and ‘land’ together into ‘homeland’ is a little better but not much. A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we call ‘land’ we took what to them meant hearth, home, the source and locus of life, and everlastingness of spirit. At the same time it left each local band bereft of an essential constant that made their plan and code of living intelligible. Particular pieces of territory, each a homeland, formed part of a set of constants without which no affiliation of any person to any other person, no link in the whole network of relationships, no part of the complex structure of social groups any longer had all its co-ordinates. What I describe as ‘homelessness’, then, means that the Aborigines faced a kind of vertigo in living. They had no stable base of life; every personal affiliation was lamed; every group structure was put out of kilter; no social network had a point of fixture left.”²⁵

²⁴ D B Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness*, Australian Heritage Commission, 1996, p 7.

²⁵ WEH Stanner, *After the Dreaming*, 1968 Boyer lectures, ABC, 1969, pp 44-45 reprinted in WEH Stanner, *White Man Got No Dreaming*, 1979, p 230.

The practical need for the Australian community generally, and lawyers in particular, to try to understand the nature of indigenous peoples' links to land has been precipitated by the development of laws which:

- allow indigenous Australians to claim certain parcels or categories of land under Federal, State and Territory statutory land rights schemes
- recognise the continuing existence of native title rights and interests over areas of Australia where native title has not been extinguished
- provide for the recognition and protection of areas of land which are of particular significance to indigenous Australians, including sacred sites.

The passage from Professor Stanner is significant not only in its own terms but because it was subsequently quoted²⁶ and cited²⁷ in High Court judgments dealing with a statutory scheme for the grant of land to traditional Aboriginal owners.

This paper focuses on the legal requirements for describing the extent of Aboriginal or Torres Strait Islander interests in areas of land or significant sites and some of the issues that arise when trying to map the boundaries of areas that are thought and spoken about but rarely demarcated on the ground. In various ways it addresses the question: can cadastral techniques be used to map the landscapes of the mind?

3 LEGAL RECOGNITION OF INDIGENOUS PEOPLES' RIGHTS IN LAND – A BRIEF OVERVIEW

When the Crown progressively assumed sovereignty over the land mass of what is now Australia,²⁸ no treaties were negotiated with any of the groups of indigenous people. Until 1992, courts assumed that Australia was *terra nullius* and gave no formal recognition to indigenous rights and interests in land. Following a 1971 decision that the doctrine of communal native title did not form, and never had formed, part of the law of any part of Australia,²⁹ the Federal Parliament enacted a statute allowing land claims and land grants in the Northern Territory based on traditional Aboriginal ownership of land. State and Territory legislation also conferred a range of legal rights on indigenous Australians over parts of the country.

The legislation dealt with a range of issues including:

- the categories of land available for claim or grant (eg vacant Crown land, reserves, National Parks)
- the basis on which land is available for claim or grant (eg traditional affiliation, historical association, need, compensation)

²⁶ *The Queen v Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 356-7 per Brennan J.

²⁷ *Gerhardy v Brown* (1985) 57 ALR 472 at 522 per Brennan J.

²⁸ British claims to sovereignty occurred in different places in 1788, 1825, 1829, 1831, 1873 and 1879. See MH McLelland "Colonial and State Boundaries in Australia" (1971) 45 *Australian Law Journal* 671; G Neate "Proof of Native Title" in B Horrigan and S Young (eds) *Commercial Implications of Native Title*, 1997, Federation Press, 254-258.

²⁹ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, Supreme Court of the Northern Territory (Blackburn J).

- the method for processing and resolving claims to land (eg land claim hearings, administrative process)
- the form of title to be granted (eg freehold, leasehold)
- the reservations (if any) from title (eg minerals)
- who holds title to the land (eg land trusts)
- any special conditions restricting access to Aboriginal land
- any restrictions on dealings with title to Aboriginal land
- any special conditions that apply to mineral exploration and mining on Aboriginal land.

The legislation varied from jurisdiction to jurisdiction – and even from area to area within a jurisdiction – as did the rights conferred on the people to whom, or on whose behalf, title to land was granted.

In *Mabo v Queensland (No 2)*³⁰ the High Court of Australia held that “the common law of Australia recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlements of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands.” The *Native Title Act 1993*, subsequently enacted by the Federal Parliament, has established a national scheme for the recognition and protection of native title and for the grant of other interests in land. Complementary State and Territory legislation forms part of the national legislative scheme.

For the purposes of this paper, some brief observations about native title are appropriate.

Although native title is recognised by the judgments and statutes of the general law of Australia, its source is in the traditional laws and customs of the group of people who have a connection with a particular area of land or waters.³¹

Because native title rights and interests come from traditional laws and customs, the content of those rights and interests will not necessarily equate to other forms of property under the general law. For the same reason, native title rights and interests may vary from place to place and group to group around Australia.

Native title is different from statutory land rights titles. Under statutory land rights schemes, groups of indigenous Australians are granted a fee simple title or a lease by the Crown. Native title is something which groups of indigenous Australians already have. Native title laws exist to identify and protect what already exists. The Crown grants nothing, as native title is not the Crown’s to grant.

Native title is fragile and can be extinguished by a range of valid acts of the Crown. Consequently, the law will not recognise native title rights and interests where as a matter of law native title has been extinguished – irrespective of whether indigenous Australians retain traditional links to and use of it.

³⁰ (1992) 175 CLR 1.

³¹ See *Native Title Act 1993* (Cth) s 223 definition of native title; also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, *Wik Peoples v Queensland* (1996) 187 CLR 1, 141 ALR 129; *Fejo v Northern Territory* (1998) 156 ALR 721.

In some areas, native title might survive in a limited form where there are overlapping legal interests which do not extinguish native title. The High Court and the Parliaments have recognised that there are non-extinguishing tenures which give title holders certain legal rights which prevail over native title rights where there is an inconsistency between the two. Where there is no inconsistency, the native title rights and interests survive.

The law on native title is developing. New cases throw up new issues for resolution. But the High Court and other Courts have given clear guidance on major issues and we can expect more certainty in the relatively near future.

4 LOCATING TRADITIONAL COUNTRY ON THE GROUND

(a) Requirements for descriptions and surveys under statutory land rights laws and native title legislation

The need to precisely describe the location and extent of indigenous land interests arises in various circumstances. For example, land rights legislation under which titles are issued provides for the registration of land grants in various States and Territories.³² The legislation contains requirements for the description of land on those titles.

Native title legislation also requires clear descriptions of areas where native title is claimed to exist.

(b) Statutory land rights titles

Examples of the legal requirements for the description of land for land grant purposes are found in statutory land rights schemes in the Northern Territory and Queensland.

³² For a discussion of all relevant statutes, see “Interests in Land” in *Halsbury’s Laws of Australia*, Volume 1, Butterworths.

Northern Territory: Fee simple title to Aboriginal land in the Northern Territory is granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Schedule 1 to the Act describes various parcels which have been granted without the need to follow the land claim process. The land is described either in detailed metes and bounds terms or by reference to numbered Survey Plans lodged with the Surveyor-General in Darwin. Regulations may amend Schedule 1 by modifying any description of an area of land in Part 2, 3 or 4 of that Schedule. “Modifying” includes the substitution of a description or diagram for another description or diagram. Such regulations, however, may not modify the description of an area of land after title in the land has been vested in a Land Trust under the Act.³³

Aboriginal people may make traditional land claims³⁴ to areas of “unalienated Crown land”³⁵ or “alienated Crown land” in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals.³⁶ Traditional land claims are heard by an Aboriginal Land Commissioner.³⁷ If the Commissioner finds that there are Aboriginals who are the traditional Aboriginal owners of the land,³⁸ the Commissioner must recommend to the relevant Commonwealth Minister that the land be granted.³⁹ Where a Commissioner makes such a recommendation and the Minister is satisfied that the land, or part of the land, should be granted to a Land Trust (or Trusts) for the benefit of the relevant Aboriginals in relation to that land, the Minister establishes a Land Trust (or Trusts) and recommends to the Governor General that a grant of an estate in fee simple be made.⁴⁰ The Governor General may execute a deed of grant of an estate in the land, subject to certain statutory reservations and exclusions.⁴¹ Because the claimable land falls within certain categories, its boundaries are usually described by reference to the boundaries of neighbouring properties, such as pastoral leases, or, in the case of an Aboriginal owned pastoral lease, the lease itself. Other descriptions will be called for where the

³³ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 77C. See *Aboriginal Land Rights (Northern Territory) (Land Description) (16 Mile (Bond Springs) Locality) Regulations 1992*; *Aboriginal Land Rights (Northern Territory) (Land Description) (Birdum (Jommet Block) Locality) Regulations 1991*; *Aboriginal Land Rights (Northern Territory) (Land Description) (Mt Kathleen Locality) Regulations 1992*; *Aboriginal Land Rights (Northern Territory) (Land Description) (Mt Solitaire Locality) Regulations 1992*; *Aboriginal Land Rights (Northern Territory) (Land Description) (Ranken River Locality) Regulations 1991*; *Aboriginal Land Rights (Northern Territory) (Land Description) Regulations – Consolidated to 24 September 1993*.

³⁴ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 3, 50.

³⁵ “Unalienated Crown land” is Crown land in which no person (other than the Crown) has an estate or interest, but does not include land in a town: *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3(1).

³⁶ “Alienated Crown land” is Crown land in which a person (other than the Crown) has an estate or interest, but does not include land in a town: *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3(1).

³⁷ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 49-54D.

³⁸ “Traditional Aboriginal owners” in relation to land, are defined to be “a local descent group of Aboriginals who:

(a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and

(b) are entitled by Aboriginal tradition to forage as of right over that land.”

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 3(1).

³⁹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 50(1)(a).

⁴⁰ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 11.

⁴¹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 12.

Commissioner makes a recommendation in favour of part only of the land claimed.⁴² Although there is a clear description of the land claimed, there can be difficulty in locating on the ground apparently precise boundaries, such as the Northern Territory/Queensland border.⁴³

Queensland: The *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* provide ways in which land may be described when a fee simple title or lease is granted or transferred. The *Aboriginal Land Act* references will be quoted in this paper.

Transferable land comprises Deed of Grant in Trust land, Aboriginal reserve land, Aurukun Shire lease land, Mornington Island Shire lease land, and available Crown land declared by regulation to be transferable land.⁴⁴ Such areas will usually have been identified in a way which allows them to be described sufficiently clearly when a deed of grant is being prepared. Survey of the land is not required before transfer. The Act provides:

“Deed of grant to be prepared

27.(1) The registrar of titles must prepare such deeds of grant in fee simple as the Minister considers necessary and directs over transferable lands.

(2) Transferable land need not be surveyed but may be described in a deed of grant in such manner as the Minister directs, and the registrar of titles must enrol and issue the deed of grant accordingly.

...”

Claimable land is available Crown land declared to be claimable under the Act, and transferred land.⁴⁵ It includes areas of National Park land but does not include, for example, tidal land (unless the tidal land is declared to be available for claim). The descriptions of claimable land vary in form. They include references to land as shown on numbered administrative plans (ABL), National Park land as described in Gazette notices of the creation of the national parks or National Park plans, and descriptions of island land above the high water mark.

Where land is successfully claimed and a deed of grant in fee simple is prepared, section 63(2) provides:

“(2) The land need not be surveyed but may be described in the deed of grant in such manner as the Minister directs, and the

⁴² See, for example, Aboriginal Land Commissioner (Toohey J) *Alligator Rivers Stage II land claim*, AGPS, Canberra, 1981, paragraphs 198, 200, 212; Aboriginal Land Commissioner (Olney J) *Finke Land Claim*, AGPS, Canberra, 1991, paragraphs 2.2, 11.1-11.7.

⁴³ See Aboriginal Land Commissioner (Kearney J) *Nicholson River (Waanyi/Garawa) Land Claim*, AGPS, Canberra, paragraphs 10-15, Appendix 1.

⁴⁴ *Aboriginal Land Act 1991* (Qld) ss 12-16.

⁴⁵ *Aboriginal Land Act 1991* (Qld) ss 17-25.

registrar of titles must enrol and issue the deed of grant accordingly.”

Where land is successfully claimed and a lease is prepared, section 64(3) provides that the “land need not be surveyed but may be described in the lease in such manner as the Minister directs”.

Descriptions of land may be amended after a deed of grant or lease takes effect.

“Amendment of description of land

136.(1) If, at any time after a deed of grant under this Act or an Aboriginal (non-transferred land) lease takes effect, greater certainty, by survey or otherwise, is obtained as to the boundaries of the land, the grantees must, on receipt of a written notice to do so by the registrar of titles, surrender to the Crown their deed to, or lease over, the land within such reasonable period as is specified in the notice.

(2) On surrender of the grantee’s deed or lease, a new deed of grant or lease delineating the amended boundaries is to be issued to the grantees.

(3) The new deed of grant or lease is to be issued on the same ground (if any) as the surrendered deed of grant or lease.

(4) The registrar must endorse on the new deed of grant or lease, in the proper order of priority, the instruments under which existing relevant interests arose.”

Survey costs incurred in relation to the preparation of a deed of grant under section 27, 63 or 136 or an Aboriginal lease are to be paid by the State.⁴⁶

(c) Native title law

Because statutory land claim schemes prescribe with particularity the categories of land available for claim (as in the Northern Territory and New South Wales) or the parcels of land available for claim (as in Queensland) there is rarely an issue about whether land has been properly claimed⁴⁷ or the precise boundaries of such a claim. Native title may exist over much more extensive areas of land and a greater variety of land tenures than can be claimed under statutory land claim schemes.⁴⁸ Consequently, care must be taken to describe with sufficient precision lands over

⁴⁶ *Aboriginal Land Act 1991* (Qld) s 137(1).

⁴⁷ See *R v Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 where the issue was whether Crown land which is subject to a grazing licence could be claimed under the *Aboriginal Land Rights (Northern Territory Act 1976* (Cth).

⁴⁸ See for example *Wik Peoples v Queensland* (1996) 187 CLR 1, 141 ALR 129. The *Native Title Act 1993* (Cth), as amended in 1998, defines and lists tenures which are declared to have extinguished native title: see ss 23A, 23B, 237A, 249C, Schedule 1.

which native title is said to exist, either to commence a common law action or to make a claimant application under the *Native Title Act*.

Common law claims: The difficulties in common law actions are well illustrated by the facts in *Coe v Commonwealth (The Wiradjuri Claim)*⁴⁹ where Chief Justice Mason considered an application by the Wiradjuri Aboriginal people for declarations of various kinds including declarations that they are the owners of lands constituting a very large part of southern and central New South Wales.

The lands which were the subject of the action were described in paragraphs 2 and 3 of the statement of claim in these terms:

“2. Since time immemorial, since 1788, since 1813, since 1901 and since within living memory (hereinafter collectively referred to as ‘since time immemorial’) the Wiradjuri people, who are known as Wiradjuri Kooris and who are included in that group of people known as Aboriginal people, are a nation of persons who have continuously lived on and occupied that land now known as central New South Wales, in whole or in part, according to Wiradjuri laws, customs, traditions and practices, with their own language.

3. The Wiradjuri nation have rights to all [land bounded by the common borders it shares with its neighbours ... and extends from the upper reaches of the Wambool (Macquarie) River in its northern border, the Murray River in its southern border, and the Great Dividing Range and the Murrumbidgee (Murrumbidgee) River in its eastern border and the flood plains of the Kalar (Lachlan) River in its western border and comprises approximately 80,000 square kilometres] and have continued to have rights to the said land by reason of their traditional connection to the said land, notwithstanding any wrongful or unlawful extinguishment, forced dispossession, or forced abandonment of the said land pleaded herein.”

Chief Justice Mason considered the description contained in these and subsequent paragraphs as “inadequate” because “it is not possible to identify precisely all boundaries which the plaintiff claims”.⁵⁰ His Honour continued:

“It is also clear that, within the lands claimed, there are countless areas of land and allotments in private ownership, the owners not having been joined as defendants in the proceedings. Without these owners being joined, this Court could not make binding declarations adverse to their interests.

Furthermore, within the lands claimed there are many areas of land which have been dealt with by statutes and are the subject of freehold and other grants of title. Hence, the plaintiff is asserting a claim to many parcels of land in New South Wales which are the

⁴⁹ (1993) 68 ALJR 110.

⁵⁰ (1993) 68 ALJR 110 at 111.

subject of grants of freehold and other title. That is a matter of particular relevance to the plaintiff's assertion of native title in accordance with the decision in *Mabo v Queensland (No 2)* ...".⁵¹

Later in his judgment, Chief Justice Mason wrote:

"This is a *Mabo (No 2)* style native title claim to the Wiradjuri lands *to the extent that such a title has not been extinguished*. The qualification to which I have given emphasis means that the actual lands which are the subject of the claim remain unidentified by the plaintiff except to the extent that they are lands which fall within the lands described in the particulars. The particulars given of this claim identify (a) native title rights to land leased by the Crown pursuant to the *Western Lands Act 1901* (NSW) and (b) native title rights to all Crown lands. The first qualification is that not only should the Wiradjuri lands be described precisely but also that the lands which are the subject of the *Mabo (No 2)* style claim to native title should be described precisely so that it is possible to identify the lands which are the subject of that claim."⁵²

Native Title Act applications: Similar issues have arisen in relation to claimant applications made under the *Native Title Act*.

Section 61A of the *Native Title Act* sets out the restrictions on areas in respect of which certain applications may be made. In particular:

- a native title determination application must not be made in relation to an area for which there is an approved determination of native title⁵³ - in other words, a native title claim cannot usually be made where native title has already been proved to exist;⁵⁴
- a claimant application is not to be made covering previous exclusive possession act areas, that is, areas where a freehold estate or another specified interest in land was granted.⁵⁵

An application to the Federal Court for a native title determination must include:

- “(a) information, whether by physical description or otherwise, that enables the boundaries of:
 - (i) the area covered by the application; and
 - (ii) any areas within those boundaries that are not covered by the application;

to be identified;

⁵¹ (1993) 68 ALJR 110 at 111.

⁵² (1993) 68 ALJR 110 at 119.

⁵³ *Native Title Act 1993* (Cth) s 61A(1).

⁵⁴ See also *Native Title Act 1993* (Cth) ss 67, 68; but see also provisions for revised native title determination applications ss 13, 61.

⁵⁵ *Native Title Act 1993* (Cth) ss 23B, 61A(2).

- (b) a map showing the boundaries of the area mentioned in subparagraph (a)(i).⁵⁶

Those requirements are reflected in the native title determination application — claimant application form, which must include the following schedules:

“Schedule B [see Act, s 62]

Information identifying the boundaries of:

- (a) the area covered by the application; and
- (b) any areas within those boundaries that are not covered by the application.

.....

Schedule C [see Act, s 62]

A map showing the boundaries of the area covered by the application.”⁵⁷

The *Native Title Act* also provides for the establishment of a Register of Native Title Claims. For a claim to be accepted for inclusion on that Registrar it must satisfy each of a number of conditions.⁵⁸ The first of those conditions is that the information and map contained in the application must be:

“...sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters”.⁵⁹

The National Native Title Tribunal’s procedural guidelines identify methods by which descriptions should be provided. They state:

“5.4.12 An external boundary may be considered sufficiently identified for the purposes of this condition where it is identified by way of co-ordinates derived from maps or surveying and mapping technologies such as GPS, land parcel descriptions together with their geographic locations (provided that the actual boundaries of the parcel that the applicant relies upon are described with certainty) or by reference to land otherwise described in suitable material held by a Government, for example in Government Gazette notices.”⁶⁰

As at 20 August 1999, four of the 107 applications that had failed the registration test had done so for reasons including a failure to meet the statutory conditions relating to the identification of claim boundaries.

⁵⁶ *Native Title Act 1993* (Cth) ss 62(2)(a), 62(2)(b).

⁵⁷ *Native Title (Federal Court) Regulations 1998* schedule forms.

⁵⁸ *Native Title Act 1993* (Cth) ss 190B and 190C

⁵⁹ *Native Title Act 1993* (Cth) s 190B(2)

⁶⁰ NNTT Policies, Procedures and Guidelines, Case Management Practice Manual, Consolidated Version 1 – dated 29 June 1999.

One recent registration test decision concerned an application that included:

“...a single map that, on the face of it, shows the external boundary of the area claim. The applicant has also provided a series of twelve cadastral maps, that on the face of it, show sections of the external boundary.”⁶¹

The Registrar’s delegate was not satisfied, however, that the conditions set out by the Act had been met. In particular, the delegate referred to “a serious discrepancy between the written description of the external boundary of the area claimed and the map of this boundary”.⁶²

The Registrar’s delegate also needed to be satisfied that the applicants had adequately identified the areas within the external boundaries that were excluded from the claim. Those areas were identified as areas that had been subject to “certain ‘acts’, extinguishing native title”.⁶³ Those areas were “not visually represented on the map. Neither are the geographic co-ordinates of the excluded areas provided”.⁶⁴ Nevertheless, the delegate believed that the description contained sufficient information to allow the specific parcels of land excluded from the claim to be identified – although it might require considerable research in relation to tenure data.

When considering another matter, Justice Nicholson of the Federal Court examined the use of a description of tenures excluded from a claim by reference to categories of tenure as the basis for identifying internal boundaries.⁶⁵ His Honour held that the requirement to identify the internal boundaries of a claim must be applied to the state of knowledge of an applicant as it could be expected to be at the time the application, or amendment to an application, is made. Therefore, a class or formula approach could be appropriate:

“For example, at the time of an initial application when the applicants had no tenure information... A description of a class or formula character of an area of exclusion ... may be the fullest description that an applicant can give at the time...”⁶⁶

(d) Plotting the boundaries of traditional estates – some conceptual issues

The legislative provisions and associated procedures quoted in the preceding part of this paper seem to assume that the boundaries of native title estates can be delineated precisely. It should be recognised, however, that attempts to locate by survey the extent of traditional land boundaries face practical problems. Among the issues are:

⁶¹ *Bullenbuk-Noongar* WAG6097/98 (Tribunal reference WC96/94) Registration Test Decision 17 March 1999.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Daniels for the Ngaluma People v Western Australia*, Nicholson J, 21 May 1999

⁶⁶ *Ibid* para 32

- (a) whether the traditional land tenure system of the group includes the notion of precise boundaries which are able to be plotted on a map or by any other physical description;
- (b) what a group's traditional notion of boundaries means;
- (c) how one can describe the extent of traditional country when the land of one group overlaps with the land of neighbouring groups.

Questions about whether clear boundaries exist have been the subject of lively academic debate.

In his 1974 book, *Aboriginal Tribes of Australia: Their Terrain, Environmental Controls, Distribution, Limits and Proper Names*, an eminent ethnologist the late Norman B Tindale stressed environmental factors as influencing boundaries. He stated that:

“there is often a high degree of correlation between tribal limits and ecological and geographic boundaries. Divides, mountain ranges, rivers, general ecological and plant associational boundaries, microclimate zone limits, straits and peninsulas often furnish clear-cut and stable boundaries.”⁶⁷

In some places the boundary may run from one named watering place to another or, where the waters are shared by two clans, the habitual camping spots on each side of the water are regarded as limiting such territory, with the water as constituting a neutral ground.⁶⁸ Elsewhere, waterless stretches of country constitute a very characteristic type of boundary.⁶⁹

Yet Dr Nicholas Peterson, in his introduction to the 1976 book *Tribes and Boundaries in Australia*, said that the term boundary is used as a “shorthand term” and that

“many so-called boundaries are not boundaries at all, in a strict sense. The term boundary derives from bound, meaning a landmark indicating the limit of an estate or Territory (OED). Boundaries are thus defined by discontinuities in two dimensional space but by extension have come to be used for reference to the limit of anything, spatial or not. Boundedness has an aesthetic and analytic appeal, because by creating a finite universe it allows for the total exhaustion of a topic in the course of analysis and makes for ease in comparison. It is this intellectual appeal that transforms what are really gradients, clines, areas of integration or zonation into discontinuous or bounded units.”⁷⁰

⁶⁷ NB Tindale, *Aboriginal Tribes of Australia*, University of California Press, 1974, p 56.

⁶⁸ Ibid p 66.

⁶⁹ Ibid pp 66-67.

⁷⁰ N Peterson (ed), *Tribes and Boundaries in Australia*, Australian Institute of Aboriginal Studies, Canberra, 1976, p 6.

In her detailed study, *The Yolngu and their Land: A system of land tenure and the fight for its recognition*, Professor Nancy Williams notes that Yolngu people indicate the character and existence of boundaries both by reference to sites (that have meaning in myth and, among other things, symbolise title to land) and natural features. The degree of precision used to define boundaries is influenced by various factors, including the social relationships of neighbours. The rules regarding permission to enter land not one's own or to use its resources provide additional evidence about the nature of boundaries.⁷¹ Professor Williams notes that boundaries are subject to negotiation and reinterpretation just as are other aspects of land in their relation to people, albeit in the context of myth which gives the features and meanings of boundaries their "moral base and implied changelessness".⁷² She argues that showing the boundary of Yolngu lands as a line would be "inappropriate, as the owners of the lands so bounded could construe it as a breach of good custom".⁷³

More recently, Dr Stephen Davis and Professor Victor Prescott have argued that it is possible to establish that territories over which Aboriginal people exercise primary political influence within Aboriginal tradition are defined either by frontiers zones, or by precise boundaries.⁷⁴ They stated:

"There is a pattern evident in the occurrence of the remaining traditional frontiers and boundaries between Aboriginal groups throughout Australia which reflects a strong match between the physical characteristics of a region and the boundaries and frontiers."⁷⁵

In response, Dr Peter Sutton has argued that the scheme of boundaries and frontiers proposed by Davis and Prescott is simplistic and confuses clans, language groups and other entities, where:

"The equivalent of this kind of mapping in a place such as Melbourne would be a single 'map of political boundaries' that divided the land into a mixture of Anglican parishes, federal electoral seats, suburbs, gaols and local government areas... [without] any hint that in reality they belonged to distinct sets and had overlapping territories."⁷⁶

Sutton argues for an understanding of "the complexities, indeterminacies and multiple layerings that are characteristic of Aboriginal land-tenure systems".⁷⁷

Those passages show that the debate concerns not only whether the notion of a fixed or precise boundary is relevant (let alone mappable) but also whose boundaries are being mapped, in other words, what is the nature of the group whose traditional land is being described in this way.

⁷¹ NM Williams, *The Yolngu and their Land*, AIAS, Canberra, 1986, pp 81-86.

⁷² Ibid, p 81.

⁷³ Ibid, p 19.

⁷⁴ SL Davis and JRV Prescott, *Aboriginal Frontiers and Boundaries in Australia*, Melbourne University Press, 1992, p 132.

⁷⁵ Ibid p 133.

⁷⁶ P Sutton, *Country: Aboriginal Boundaries and Land Ownership in Australia*, Aboriginal History Inc, 1995, p 25.

⁷⁷ Ibid pp 49-50.

Such issues have been considered by Aboriginal Land Commissioners hearing traditional Aboriginal land claims in the Northern Territory and by the Land Tribunal in Queensland. It is apparent from the evidence given in land claim proceedings, that different groups in different parts of Australia have various notions of boundaries, only some of which appear to be directly comparable to the notion of a boundary in an Anglo-Australian legal sense. For those and other reasons, it can be difficult to locate precise boundaries on the ground or on maps.⁷⁸

The land available for claim under a statutory land rights scheme usually bears no relationship to the extent of traditional estates. As the High Court has recognised, the boundaries of claimable land are artificial in the eyes of the claimants.⁷⁹ Usually their traditional country will extend beyond the boundaries of the Crown land, National Park or other parcel which they may claim. In those instances, the boundaries of the claimed land are clearly defined by reference to other forms of tenure and the precise extent of the traditional estate need not be determined.

More complex are the situations where:

- a group claims an area which includes some or all of its traditional estate, but the claimants do not have traditional rights over all the claimable land; or
- neighbouring groups join in a claim to an area where each group has traditional rights to part of the land and they jointly have rights to other parts.

⁷⁸ See, for example, Aboriginal Land Commissioner (Toohey J) *Warlmanpa, Warlpiri, Mudbura and Warumungu Land Claim*, APGS, Canberra, 1982, paragraphs 82-91; Aboriginal Land Commissioner (Kearney J) *Mount Barkly Land Claim*, APGS, Canberra, 1985, paragraph 19; Aboriginal Land Commissioner (Maurice J) *Ti-Tree Station Land Claim*, AGPS, Canberra, 1987 paragraphs 68-69; Aboriginal Land Commissioner (Maurice J) *Jila (Chilla Well) Warlpiri Land Claim*, AGPS, Canberra, 1988, paragraphs 68-9; Aboriginal Land Commissioner (Kearney J) *Murrarji Land Claim*, AGPS, Canberra, 1987, paragraphs 87-88; Aboriginal Land Commissioner (Olney J) *Kidman Springs/Jasper Gorge Land Claim*, AGPS, Canberra, 1990, paragraphs 7.4, 7.6; Aboriginal Land Commissioner (Olney J) *Garawa/Mugularrangu (Robinson River) Land Claim*, AGPS, Canberra, 1991, paragraphs 4.5.6, 4.5.7; Aboriginal Land Commissioner (Olney J) *Wakaya/Alyawarre Land Claim*, AGPS, Canberra, 1991, paragraphs 5.6, 7.8; Aboriginal Land Commissioner (Olney J) *Bilinara (Coolibah-Wave Hill Stock Routes) Land Claim*, AGPS, Canberra, paragraph 6.9; Aboriginal Land Commissioner (Olney J) *Stokes Range Land Claim*, AGPS, Canberra, 1991, paragraphs 5.5.5-5.5.7; Aboriginal Land Commissioner (Kearney J) *Upper Daly Land Claim*, AGPS, Canberra, 1991, Volume 1 paragraph 4, Volume 2 paragraphs 2, 4, Volume 3 paragraph 4; Aboriginal Land Commissioner (Olney J) *Western Desert Land Claim*, AGPS, Canberra, 1991, paragraph 7.2; Aboriginal Land Commissioner (Olney J) *Finke Land Claim*, AGPS, Canberra, 1991, paragraphs 10.2, 11.13-11.16; Aboriginal Land Commissioner (Olney J) *North-West Simpson Desert Land Claim*, AGPS, Canberra, 1992, paragraphs 7.1-7.7; Aboriginal Land Commissioner (Olney J) *Tanami Downs Land Claim*, AGPS, Canberra, 1992, paragraphs 6.4.1-6.4.4; Aboriginal Land Commissioner (Olney J) *North Simpson Desert Land Claim*, AGPS, Canberra, 1993, paragraphs 7.8.1-7.8.4; Aboriginal Land Commissioner (Gray J) *Ngaliwurru/Nungali (Fitzroy Pastoral Lease) Land Claim, Victoria River (Bed and Banks) Land Claim*, AGPS, Canberra, 1994, paragraphs 4.1-4.8, also 3.11.1. For a discussion of the conceptual and practical issues involved in surveying clan boundaries, particularly where there is a strip of land in common ownership, see G K Lindsay "Hermannsburg Aboriginal Land Grants in the Northern Territory", *The Australian Surveyor*, September 1983, Volume 31:472-481.

⁷⁹ See in *re Toohey, ex parte Stanton* (1982) 57 ALJR 73, 44 ALR 94; *The Queen v Kearney; ex parte Jurlama* (1984) 158 CLR 426, 52 ALR 24.

In the former category, Aboriginal Land Commissioners have had to describe the approximate extent of a group's traditional country in order to recommend the grant of part of the land claimed.⁸⁰ Given that it is "always a difficult matter to assign boundaries to Aboriginal estates," there are sometimes occasions when the areas recommended for grant are the result of "a number of arbitrary decisions which are based more upon convenience and common sense than on any precise assessment of the evidence".⁸¹

One recent Queensland land claim illustrates how some of the issues in the latter category arise. A group of Aboriginal people, comprising various sub-groups, claimed Lakefield National Park in far north Queensland. The National Park has an irregular shape and an area of approximately 537,000 hectares. Although the boundaries of the claimed land were fixed by reference to the National Park, there was a question about whether the boundaries of each sub-group's traditional land within the National Park could be determined.⁸²

Evidence was given by claimants about the extent of their sub-group's traditional country and about places within that traditional country. The claimants' representatives were anxious to stress that too much reliance should not be placed on ascertaining and precisely marking on maps the boundaries of the traditional estates of those sub-groups. Indeed they submitted that the only clearly established boundary lines were those that formed the envelope of the claimed land. Any attempt to draw internal boundaries for the National Park on the evidence available to the Tribunal would create artificial lines that would not reflect accurately what older authorities understand to be the relative placement of sub groups' land interests on the Park. In their submission, to find strict boundaries in which some of the claimants have common connections and others are excluded, "would require the Tribunal to ignore a vast quantity of evidence from the claimants and from the expert anthropologists."

One anthropologist, Professor Bruce Rigsby, gave evidence concerning boundaries between clan estates. In his expert opinion, when Aboriginal people use the term "boundary", it has a different meaning from its meaning in standard English (that is, the perimeter or outside limits of a tract of parcel of land). In Aboriginal English the word means the contents of a tract of land, so that people are speaking of what land is within their traditional country. The system is not one of exclusive property rights so much as one of defining tracts of land, places and sites within a system of tenure and of use. His experience with the claimants suggested that people had shown little concern for defining boundaries in the standard English sense. Indeed he asserted that "boundaries in the European sense simply don't exist ... for Aboriginal people in this region". Boundaries are not seen as devices for excluding people, and other people have rights to use land in which a group has a primary interest. People are constantly crossing boundaries, not being repelled or kept out by them.

⁸⁰ See for example, Aboriginal Land Commissioner (Toohey J) *Alligator Rivers Stage II land claim*, AGPS, Canberra, 1981, paragraphs 198, 200, 212; Aboriginal Land Commissioner (Olney J) *Finke Land Claim*, AGPS, Canberra, 1991, paragraphs 2.2, 11.1-11.7.

⁸¹ Aboriginal Land Commissioner (Olney J), *Wakaya/Alyawarre Land Claim*, AGPS, Canberra, paragraph 7.8.

⁸² The following paragraphs are drawn from the Land Tribunal's report on *Aboriginal Land Claim to Lakefield National Park*, 1996, paragraphs 544-548.

Professor Rigsby agreed, however, that the claimant sub-groups could be separated from each other because they are associated with distinct areas within the National Park. Indeed, he acknowledged instances of people saying that their country ends at a geographical feature such as the Normanby River. In those instances the boundary is obvious. There was also no doubt about the traditional rights and interests in relation to specific places within a clan estate.

There are tracts of land in which two or more groups have interests. Such places are called “company land”. People also referred to sub-groups being “boxed up” together. In some instances, the expression seemed to describe people who were closely related and who shared country together. They may be distinguished from other groups whose countries are distinct from each other.

Professor Rigsby nominated various difficulties in attempting to represent the area of each sub-group in that area by reference to lines on a map. In summary:

- (a) because people have not been on some tracts for a long time there are differences of knowledge or opinion about who has interests in what land (for example, where the land of one group ends and the land of the neighbouring group begins);
- (b) there are areas of company land where two groups have interests;
- (c) people are not particularly interested in surveying or otherwise defining rigid boundaries, especially as they enter and use each others land, and may prefer not to be compelled to assist in a survey of boundaries which had previously been the subject of agreement or negotiation under Murri (Aboriginal) Law;
- (d) it is not consistent with Murri Law or Aboriginal practice to survey and fix precise linear boundaries between clan estates for all time;
- (e) the presently understood location of some boundaries may have been influenced by non-Aboriginal factors (for example, although in earlier times there was a set of customary conventional tracks, or Murri roads, used for travelling from clan estate to clan estate along the interstices of such estates, more recent major public roads may have created de facto boundaries which are not necessarily consistent with the classical division of clan estates);
- (f) the division of land along defined boundaries and the grant of freehold titles to parcels of land so bounded could tend to advantage some people and disadvantage others with traditional Aboriginal rights in and responsibilities for the land, with significant social consequences;
- (g) claimants would prefer to receive a grant of all the claimed land and allow Murri Law to operate to determine any internal boundaries.

The same issues are likely to emerge in native title proceedings. Many claimant applications overlap to a substantial extent with other claimant applications. In some instances there is a dispute between groups about the extent of each group’s

traditional country. In other instances, members of a group may be unsure about the extent of their country.

Sometimes the overlap may reflect areas which are traditionally shared. Although an area or particular place may be seen as primarily that of an identifiable group, there may be others with traditional rights and interests in, or responsibilities for, that land. It is not uncommon for sites at the edges of neighbouring estates to be shared by groups or for neighbouring groups to be jointly involved in ceremonial activity there. So, as Justice Toohey pointed out in *Mabo v Queensland (No 2)* and *Wik Peoples v Queensland*, more than one group may utilise the land in accordance with indigenous tradition. For example, one group may be entitled to come on to land for ceremonial purposes while all other rights in the land belong to another group.⁸³ The *Aboriginal Land Rights (Northern Territory) Act 1976* proceeds on the basis that Aboriginal tradition provides for the use of the land by both “traditional Aboriginal owners” (as defined) and other Aboriginal people with traditional rights to enter, use or occupy that land.⁸⁴ Just as significantly, places on the country of one group may be part of a series of sites which are linked by traditional stories, songs and ceremonies. Different groups along the dreaming track may have rights and duties with respect to particular stories, songs and ceremonies, but each is linked to the others.

Judges are recognising that difficulties in defining boundaries need not be fatal to the success of a native title application. In *Ward v Western Australia*, Justice Lee drew on the following passage from Justice Brennan’s decision in *Mabo v Queensland (No 2)*:

“There may be difficulties of proof of boundaries or of membership of the community or of representatives of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law.”⁸⁵

Justice Lee noted that “exigencies of the Aboriginal way of life neither required, nor facilitated, establishment of precise boundaries for territories occupied by Aboriginal societies.”⁸⁶ Later, in the course of a detailed discussion about the boundaries of the Miriung and Gajerrong peoples, he wrote:

“precision is not to be expected in speaking of the boundaries of native title held by a community, particularly when the right to exclude others from land at the outer limits was likely to be shared with neighbouring communities. Miriung and Gajerrong communities were occupants of adjacent territories which overlapped in part and, although they used separate languages, they shared knowledge of Dreaming myths, Dreaming tracks and Dreaming sites and cooperated in ritual and

⁸³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 190, citing *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 273 and reports by Aboriginal Land Commissioners; *Wik Peoples v Queensland* (1996) 141 ALR 129 at 185.

⁸⁴ See *Aboriginal Land Rights (Northern Territory) Act 1976* ss 11, 71; *Re Toohey*; *ex parte Stanton* (1982) 57 ALJR 73 at 77, per Wilson J; 57 ALJR 73 at 79, 44 ALR 206 at 216-17 per Brennan J. See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 190 per Toohey J.

⁸⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 51-52.

⁸⁶ (1998) 159 ALR 483 at 504.

economic activities.”⁸⁷ ... “A degree of indeterminacy is to be expected in the alignment of boundaries of tribal or language units and at the edges of the tribal territory acknowledgment of shared interests will be reflected in descriptions of country affiliation as ‘mixed’ or as ‘half-half’.”⁸⁸

The *Native Title Act*, while apparently allowing that more than one group may have native title rights and interests in an area,⁸⁹ makes it clear that overlapping claims are to be dealt with in the one set of proceedings so that there is only one determination of native title in relation to an area. The relevant sections of the Act provide as follows:

“67 Overlapping native title determination applications

- (2) If 2 or more proceedings before the Federal Court relate to native title determination applications that cover (in whole or in part) the same area, the Court must make such order as it considers appropriate to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding.

Splitting of application area

- (2) Without limiting subsection (1), the order of the Court may provide that different parts of the area covered by an application are to be dealt with in separate proceedings.

68 Only one determination of native title per area

If there is an approved determination of native title (the *first determination*) in relation to a particular area, the Federal Court must not:

- (a) conduct any proceeding relating to an application for another determination of native title; or
- (b) make any other determination of native title; in relation to that area or to an area wholly within that area, except in the case of:
- (c) an application as mentioned in subsection 13(1) to revoke or vary the first determination; or
- (d) a review or appeal of the first determination.

Note: Paragraph 13(1)(a) provides that no native title determination application can be made in relation to an area for which there is already an approved determination of native title.”

⁸⁷ (1998) 159 ALR 483 at 544.

⁸⁸ (1998) 159 ALR 483 at 545.

⁸⁹ A determination of native title, where native title exists, must include a determination of “who the persons, or each group of persons, holding the common or group rights comprising the native title are”: *Native Title Act 1993* s 225.

(e) **Sites, land and land claims**⁹⁰

The traditional estates of Aboriginal people are not undifferentiated tracts of country. The landscape is seen as the result of the creative activity of heroic ancestors who traversed the area. The land generally has a spiritual significance which is reflected in songs, stories and ceremonies about the land and particular sites on the land. Significant sites may provide a focus for determining who are the traditional owners of land, and clusters of sites may provide an indication of the geographical extent of a group's traditional country.

The definition of "traditional Aboriginal owners" in the *Aboriginal Land Rights (Northern Territory) Act 1976*⁹¹ states that traditional Aboriginal owners of land have spiritual affiliations "to a site on the land" and are under a spiritual responsibility for "that site" and for "the land". The definition draws a distinction between a "site" and "the land" for which there is a group of traditional Aboriginal owners. There is no definition of "site" although "sacred site" means:

"A site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition."⁹²

In his Aboriginal Land Rights Commission Second Report Justice Woodward wrote of land generally having significance for Aboriginals but, because of the form and content of myths relating to it, some land is more important than other land. The particular importance of some places arises from their use as a burial ground or important meeting place for ceremonies. In his view, "Because of the Aboriginal's personal identification with his land, such places are even more important to him than are places of worship to members of other religions".⁹³ He recognised that no clear dividing line can be drawn between places which are sacred and those which are not, and other places not designated as "sacred" are still important to Aboriginals in a spiritual sense. "It is not possible merely to protect sacred sites and treat other land as unimportant".⁹⁴

Similar conclusions have been drawn from the evidence in Northern Territory land claim hearings. The first Aboriginal Land Commissioner, Justice Toohey, noted that the words "otherwise of significance" in the definition of "sacred site" emphasise importance as much as holiness.⁹⁵ But within the definition of "traditional Aboriginal owners" the word "site" takes some of its character from the words that follow. Thus it speaks of "a place of some spiritual significance as opposed to one to which people resorted simply to hunt or for some other secular activity", though a

⁹⁰ Much of this section of the paper is taken or adapted from G Neate, *Aboriginal Land Rights Law in the Northern Territory*, APCOL, 1989, pp 66-70. Footnote citations, where adopted, follow the format used in the book.

⁹¹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3(1).

⁹² *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3(1).

⁹³ *Aboriginal Land Rights Commission, Second Report*, para 521.

⁹⁴ *Ibid* para 520.

⁹⁵ Warlpiri land claim, para 68; Limmen Bight land claim, para 49.

sharp distinction cannot always be drawn between secular and spiritual, even in the way Aboriginals speak of some places.⁹⁶

The distinction drawn between “a site” and “the land” apparently caused some difficulty in the presentation of early claims, but a broad view of “site” was taken from the outset. Any tendency, arising from this distinction, to think of sites as particular features of the landscape occupying relatively little space and rendering unimportant the country around them was refuted.⁹⁷

“Whatever justification there may be for giving the word a narrow meaning in legislation aimed at identifying and protecting places of significance there is none within the framework of the Land Rights Act. In my opinion sites should be thought of as places usually possessing some particular feature such as a hill, creek or waterhole, but not delimited by the precise amount of space occupied by that feature ... In considering the existence of sites and their relationship to the land claimed I see no reason to take a narrow approach and every reason to take a fairly broad one.”⁹⁸

Sites, for the purpose of the Land Rights Act, can take many other forms, including naturally occurring rock formations, trees, sandhills, caves and plains. In many instances there will be no evidence of human activity, such as painting or carving, to indicate the importance or physical extent of a site. Indeed the extent of a site will vary, and what is a feature to local Aboriginal eyes (eg a moving sandhill) may not appear so to others. This adds to the unreality of trying to define the extent of a site with too much precision and regarding it as confined to a particular physical feature rather than the physical feature and the land around it.⁹⁹

In riverine areas most sites appear to be located by, or in, rivers.¹⁰⁰ A coastal claim showed most sites to be on the seafront or along rivers.¹⁰¹ In less well watered areas the intensity of sites tends to be greater along the reaches of a river, with fewer sites being found in more arid sandhill country,¹⁰² although “marginal” country is not necessarily country which is insignificant and having a “thin mythological repertoire”. A sparse looking landscape may still be full of significance to the traditional Aboriginal owners.¹⁰³

Land between sites is not necessarily without significance. As one witness stated in a claim to an area of desert, “The country is was and will be because of dreaming activity and solely because of that. That is what the country is ... it has been there eternally and is constantly maintained by dreaming activity.” He stressed that the country between sites cannot be omitted, for it “just as much has the dreaming

⁹⁶ Finniss River land claim, para 176; and see paras 184-5, 203, 227; Alligator Rivers land claim, paras 91, 177; Warlmanpa land claim, para 195.

⁹⁷ Warlpiri land claim, para 69.

⁹⁸ Ibid paras 70, 71.

⁹⁹ Uluru land claim, para 71; Utopia land claim, para 71; Roper Bar land claim, para 170.

¹⁰⁰ Daguragu land claim, para 65; Daly River land claim, para 78, Roper Bar land claim, paras 42-6.

¹⁰¹ Limmen Bight land claim, para 60.

¹⁰² Utopia land claim, para 70.

¹⁰³ Warlmanpa land claim, para 147; Kaytej land claim, para 43.

inherent in it as the sites themselves”.¹⁰⁴ Another anthropologist suggested that people expressed their relationships to land through ritual which involved the drawing together of major sites so that the land between them is “thought of as minimised in some way by the heightening of these two places which you are celebrating in the ritual or talking about in your stories or identifying in terms of the way you name people. All the country belongs but it shrinks in people’s minds.”¹⁰⁵ That is, the land is thought of as part of one or other major site.

A recent native title determination includes, among the important native title rights and interests of the common law holders, the right to:

- preserve sites of significance to the native title holders and other Aboriginal people on the determination area
- maintain the cosmological relationship beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the determination area and special and sacred sites, to ensure the continued vitality of culture, and the well being of the native title holders.

“Site of significance” is defined in the native title determination to mean “a site or area of land or water that is sacred to the native title holders or is otherwise of significance according to Aboriginal custom and tradition, and includes burial, birth, conception, navel, story and social history sites”.¹⁰⁶

Sites, dreaming tracks and the extent of ‘the land’. The traditional estates of some Aboriginal groups are defined by reference to sites, rather than by linear boundaries. The shape and approximate area of the land can be inferred from the location of sites for which one group has responsibility and the sites of neighbouring groups. Such estates are best described as clusters of points in space, rather than as enclosed, bounded spaces.¹⁰⁷

Other estates are also described by reference to dreaming tracks. Dreaming tracks are the notional pathways on, under or above the land along which the dreamtime creative beings are believed to have passed. Usually they are undefined in the sense that there is no physical feature to indicate a path. Rather their locations are inferred by reference to sites along the way which contained the beings’ sacred essence in places made from their secretions, abandoned personal possessions and blood (now turned to red ochre). The width of a dreaming track is not readily defined, if such definition can have any meaning. Justice Toohey noted in the Warlpiri report “despite the suggestion of one Aboriginal witness (no doubt wishing to be helpful) that the width of a dreaming track is about half a mile wide, it is not possible to view tracks or sites with any exactitude”.¹⁰⁸

As creatures passed through various estates they occasionally met other creatures and, if in the “wrong” country, sometimes changed course. Thus tracks intercept or

¹⁰⁴ Dr D Nash quoted in Warlmanpa land claim, para 84.

¹⁰⁵ Ibid, Dr D Bell quoted at para 91.

¹⁰⁶ *Western Yalanji or “Sunset” Peoples v Pedersen*, unreported decision of the Federal Court (Drummond J) 28 September 1998.

¹⁰⁷ Alyawarra land claim, para 38.

¹⁰⁸ Warlpiri land claim, para 114.

overlap (eg at a site of permanent water)¹⁰⁹ and change direction. Some creatures (such as birds) flew over the land stopping from time to time at what are now sites. Others travelled underground or otherwise avoided certain country.¹¹⁰ If a dreaming stops in the country of another group and has sites within it the people of that dreaming may have rights in those sites, and the people whose country it is may also have rights in the sites. The radius of influence from those sites may fall off more quickly for the people whose country it is not.¹¹¹

Dreaming tracks were particularly important in the traditional pattern of land ownership in arid country where the landowning groups were smaller and more widely dispersed, focusing on places of permanent water. As Dr Nicholas Peterson explained:

“In this context of wide population dispersal and low density it is the tracks that receive the emphasis for it is they which link people together and set up a wider sociality. Lying on a common ancestral track is the basis for social and religious co-operation and creates interdependence because the spiritual responsibility for the track is distributed between the clans lying along it.”¹¹²

In the Uluru land claim the general attributes of estates were described as involving the notion of ancestral tracks linking sites or series of sites into long chains, traversing a number of estates and disappearing beyond the limits of any one person’s knowledge.¹¹³

(f) Conclusion

Law and practice in the area of native title and statutory land rights is directed towards results that are certain, precise and permanent, yet which record the content of indigenous rights and interests in ways that reflect the customary law from which those rights and interests are derived.

The information summarised above points to the imprecision, permeability and periodic negotiability of boundaries between the traditional estates of neighbouring indigenous groups. The position is complicated where groups die out and there is a process of succession to part or all of the group’s territory. Such factors indicate that a cadastral approach to recording traditional indigenous rights and interests in land is not only inappropriate, it is impossible. Rather than attempt to record traditional estates by using cadastral boundaries, the better approach would seem to be to note, by reference to areas mapped for other purposes, which group has (either alone or with others) which traditional rights and interests.

¹⁰⁹ Ibid, para 13.

¹¹⁰ Roper Bar land claim, para 47.

¹¹¹ Warlmanpa land claim, para 96.

¹¹² Warlpiri land claim, para 76.

¹¹³ Uluru land claim, para 39.

5 SACRED SITES

(a) Introduction

Although sacred sites are part of the landscape for traditional owners of the land, the land tenure is often such that the land is not available for claim under a statutory land rights scheme or native title is extinguished in relation to that land. Thus the protection which might flow from the ownership of the site and surrounding areas by traditional owners is not available for many such sites.

Legislation in different jurisdictions within Australia expressly recognizes the existence of sacred sites and provides some level of protection for them irrespective of the tenure of land on which the sites are located. Although some cultural heritage legislation does not refer to “sacred sites”, it may offer protection to them where they come within an area that is differently defined or described.¹¹⁴

For the purposes of this paper, reference will be made only to legislation which refers to “sacred” sites or areas that are of particular significance in accordance with Aboriginal tradition. The discussion focuses on the nature of such sites, the type of legal protection that is accorded to them, and the difficulties in describing with precision (in cadastral terms or otherwise) what is legally protected. The challenges which arise in relation to mapping traditional estates also arise when there is an attempt to put boundaries on a sacred site.

(b) What is a sacred site?

To use a very broad dictionary definition, a sacred site is a place “that is sacred to Aborigines or is otherwise of significance according to Aboriginal tradition”.¹¹⁵ In defining the meaning of a sacred site to the indigenous people of Australia, the *Encyclopedia of Aboriginal Australia* notes that Aboriginal people believe that the entire country was formed by spirit beings and “every geographical feature, however insignificant, is closely associated with the totemic history of the tribe”.¹¹⁶

In some sense, the whole of the landscape can be seen to have a sacred quality.¹¹⁷ Aboriginal leader Patrick Dodson expressed that quality when he said:

¹¹⁴ For example, section 5 the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld) provides for the protection of:

“areas or features within Queensland that -

- (a) have been or are being used, altered or affected in some way by humans; and
- (b) are of significance to humans for any anthropological, cultural, historic, prehistoric or societal reason.”

Similarly, s 44(1) of the *Heritage Act 1977* (NSW) provides for the preservation of places of “historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value”. In practice, however, this Act is not relied on to protect Aboriginal places because of the comprehensive scheme contained in the *National Parks and Wildlife Act 1974* (NSW).

¹¹⁵ *The MacQuarie Dictionary* (3rd ed) 1998, p 1870.

¹¹⁶ KJ Maddock “Sacred Sites”, in D Horton (Gen ed), *Encyclopedia of Aboriginal Australia*, Aboriginal Studies Press 1994, p 962.

¹¹⁷ RM Berndt “Traditional Concepts of Aboriginal Land” in Berndt (ed) *Aboriginal Sites, Rights and Resource Development*, Academy of Social Sciences in Australia, 1982, p 7.

“The limitations of my land are clear to me. The area of my existence, where I derive my existence from, is clear to me and clear to those who belong in my group. Land provides for my physical needs and my spiritual needs. New stories are sung from contemplation of the land. Stories are handed down from spirit men of the past who have deposited the riches at various places, the sacred places...”¹¹⁸

Anthropologists and others have used a variety of formulas to define what is a “sacred site”. One described a sacred site as “a place containing natural features – rocks, etc., that is an important part of a spirit ancestor. The ancestor’s spirit is present at this place, and the degree of importance of the site depends on the episode of the saga that occurred at the site.”¹¹⁹

The late Professor Ronald Berndt described a range of sacredness “from secret-sacred (with limited access) to open sacred. Some are of direct ritual concern; others may not be”.¹²⁰ Likewise, Aboriginal Land Rights Commissioner Mr Justice Woodward drew attention to the fact that certain sites were of greater significance than others and that:

“Land generally has spiritual significance for Aborigines but, because of the form and content of the myth relating to it, some land is more important than other land. Certain places are particularly important, usually because of their mythological significance, but sometimes because of their use as a burial ground or important meeting place for ceremonies.”¹²¹

Justice Woodward went on to say that it might be better to refer to “sites of special significance” although that description “omits the important fact that the significance is not only social and historical, but also spiritual or religious.”¹²²

As noted earlier, the problems with the use of the “site” implying a particular portion of land was also commented upon by Mr Justice Toohey, when Aboriginal Land Commissioner. He considered that the word:

“may mislead by generating a tendency to think of sites as particular features of the landscape occupying relatively little space and rendering unimportant the country around them...In my opinion sites should be thought of as places usually possessing some particular feature such as a

¹¹⁸ Pat Dodson “Aborigines – A Statement of Concern” cited in *Aboriginal Land Rights and Sacred and Significant Sites: First Report from the Select Committee of the Legislative Assembly Upon Aborigines*, Parliament of New South Wales, 1980, p 110.

¹¹⁹ NM Wallace “Living Sacred Sites” (1972), cited in *Aboriginal Land Rights and Sacred and Significant Sites: First Report from the Select Committee of the Legislative Assembly Upon Aborigines*, Parliament of New South Wales, 1980, p 110.

¹²⁰ RM Berndt op cit. P 7.

¹²¹ AE Woodward *Aboriginal Land Rights Commission, Second Report* (1974) AGPS, Canberra, p 100.

¹²² *Ibid* p 100.

hill, creek or waterhole, but not delimited by the precise amount of space occupied by a feature”.¹²³

One consequence of the site/land distinction has been a tendency for non-Aboriginals wishing to exploit the land to conceive of the landscape only in terms of sacred sites. Proposals are drawn up to locate mining infrastructure, roads and the like to avoid identified sites. As anthropologist Professor Robert Tonkinson has noted:

“Aborigines are being forced or persuaded to make distinctions and decisions about land that are more complex than the traditional broad dichotomy into sites and tracts that are secret-sacred and the remainder, accessible to all and of varying mythological and cultural significance. None of this was ‘waste’ land and every part of it had value as a transformed product of the Dreamtime ancestors’ activities. Now, in having to make decisions about ‘more’, ‘less’ and ‘not’ sacred localities and tracts, Aborigines are in effect being asked to ‘desanctify’ land and thus render it eligible for desecration and possible oblivion in the course of mining exploitation.”¹²⁴

In order to minimise these problems, development proposals are sometimes put to the traditional Aboriginal owners and other relevant Aboriginals so that they may clear an area on which development may take place, without publicly disclosing the type and location of adjacent sites.

An illustration of the difficulty in attempting to demarcate significant sites from the land generally is found in the second report on the Ranger Uranium Environmental Inquiry in relation to a project in the Northern Territory in the mid 1970s. The three Commissioners, chaired by Justice Fox, expressly recognised that:

“While sites associated with the spirit beings are particularly important, all the land has religious significance for the Aboriginals; they believe it was formed and given life by the same dreamtime heroes who gave life to the people.”¹²⁵

The Commissioners noted that “sites with particular spiritual associations are commonly referred to as sacred sites” and that such sites might differ considerably in physical characteristics. The sacred sites within the Region being considered which were associated with spirit beings or dreamtime heroes were described as being divided into two categories – those subject to secrecy, taboo, prohibition and danger, and those without these associations. Some in the former category were said to be endangered by the mining company’s activity.¹²⁶ The Commissioners recorded that various attempts had been made to establish a boundary beyond which mining

¹²³ Aboriginal Land Commissioner (Toohey J), *The Warlpiri and Kartangarurru-Kurintji Land Claim* (1979) AGPS, Canberra, para 68.

¹²⁴ R Tonkinson, ‘The Cultural Roots of Aboriginal Land Rights’, in R Jones (ed), *Northern Australia: Options and Implications*, Research School of Pacific Studies, ANU, Canberra 1980, p 112.

¹²⁵ RW Fox, GC Kelleher, CB Kerr, *Ranger Uranium Environmental Inquiry Second Report*, AGPS, Canberra, 1977, p 33.

¹²⁶ *Ibid*, p 35.

company personnel would not go. A line some 700 metres from a particular sacred site was surveyed. A few months later that line was modified to move it 70 metres closer to the site. Later the boundary was modified moving it some 200 metres closer to the site than the original line. In each instance, the Aboriginal man who was responsible for acting as guardian of the site apparently agreed to the modification.¹²⁷ The Commissioners quoted the following passages from the evidence of eminent anthropologists, Professor RM Berndt and Dr CH Berndt, that was “relevant to the problem”:

“A particular site does not consist simply of the actual place associated with a mythic event or where a particular mythic being or djang was metamorphosed, but extends all around that site. Any alien activity within its vicinity should be regarded with the utmost concern. ... The inviolable area should most certainly be extended to at least 1000 to 1500 yards, and should on no account be allowed to be reduced.”¹²⁸

The members of the Commission visited the area, considered all the evidence, and took into account the history of the area before deciding on a “reasonable location” which, although not where the Northern Land Council had asked it be fixed, “should give to the Aboriginal people a comfortable satisfaction that Mt Brockman and the sacred sites on or near it are safe and secure”.¹²⁹

With those observations in mind, it is apparent that the term “sacred site” should be used carefully. Nevertheless, it is a term that is in everyday usage as well as being part of the language of politics and the law.

(c) Legal protection of sacred sites

A range of Commonwealth, State and Territory legislation provides various degrees of legal protection to sacred sites.

Northern Territory: In the Northern Territory, sacred sites are protected under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Northern Territory Sacred Sites Act 1989* (NT). The former Act defines sacred site to mean:

“a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition”.¹³⁰

It is an offence to “enter or remain on land in the Northern Territory that is a sacred site” except as authorized by law.¹³¹ The *Northern Territory Sacred Sites Act 1989* (NT) creates a number of offences in relation to sacred sites including:

¹²⁷ Ibid, p 283.

¹²⁸ Ibid, p 284.

¹²⁹ Ibid, p 284.

¹³⁰ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3.

¹³¹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 69.

- entry onto sacred sites, except in the performance of a function under the Act or otherwise in accordance with the Act (including a certificate or permission or approval under this Act) or the *Aboriginal land Rights (Northern Territory) Act*,¹³²
- work on a sacred site unless in accordance with the conditions of an Authority Certificate or a Minister's Certificate;¹³³
- desecration of a sacred site.¹³⁴

¹³² *Northern Territory Sacred Sites Act 1989* (NT) s 33.

¹³³ *Northern Territory Sacred Sites Act 1989* (NT) s 34.

¹³⁴ *Northern Territory Sacred Sites Act 1989* (NT) s 35.

The Act allows for a defence where it is proved that the defendant had no reasonable grounds for suspecting that the sacred site was a sacred site.¹³⁵ Where, however, the sacred site is on Aboriginal land, that defence is not available unless it is also proved that:

“(a) the defendant's presence on the land comprised in the sacred site would not have been unlawful if the land had not been a sacred site; and
(b) the defendant had taken reasonable steps to ascertain the location and extent of sacred sites on any part of that Aboriginal land likely to be visited by the defendant”.¹³⁶

The maximum penalty provided for an offence is a fine of \$20,000 or imprisonment for 2 years. In the case of a corporate offender the fine is up to \$40,000.¹³⁷ The criminal sanctions provided for in the Act clearly demonstrate the seriousness of the offences and highlight the importance of identifying the location and extent of any site.

The Act established the Aboriginal Areas Protection Authority, which has regulatory and advisory functions¹³⁸. The Authority is required to maintain a Register of Aboriginal Sacred Sites¹³⁹ and is empowered to determine the location and extent of sacred sites in consultation with the traditional custodian or custodians of the sites.¹⁴⁰

Sites included on the Register are described in a number of ways. A general geographic description is used to convey the location and extent of the site by reference to visible geographical features. For example a site might be described as:

“A large rise with an isolated outcrop of quartz located in rugged terrain approx 2km N-N-E of Mt Towns and about 1.5 klm due east from Spring Hill”¹⁴¹

The Register may also include a more detailed description of the site area including the method used to determine the site location and the type of boundary surrounding the site. The various site location methods could include:

- GPS;
- remote mapping;
- dead reckoning;
- map references;
- differential GPS;
- survey;
- on site ID with map;
- on site ID with air photo; or
- existing cadastral boundary.

¹³⁵ *Northern Territory Sacred Sites Act 1989* (NT) s 36(1).

¹³⁶ *Northern Territory Sacred Sites Act 1989* (NT) s 36(2).

¹³⁷ *Northern Territory Sacred Sites Act 1989* (NT) ss 36(1), 36(2).

¹³⁸ *Northern Territory Sacred Sites Act 1989* (NT) ss 5, 6.

¹³⁹ *Northern Territory Sacred Sites Act 1989* (NT) s 10 (d).

¹⁴⁰ *Northern Territory Sacred Sites Act 1989* (NT) ss 10, 27(2)(b).

¹⁴¹ The description is taken from a generic site report sample provided by the Aboriginal Areas Protection Authority.

The accuracy of the recorded location is also given as a range, for example: 10 -50 metres or greater than 200 metres.

New South Wales: The *National Parks and Wildlife Act 1974* (NSW) allows for the declaration of any place that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture, as an Aboriginal place.¹⁴² The Act goes on to state:

“A person who, without first obtaining the consent of the Director-General, knowingly destroys, defaces or damages, or knowingly causes or permits the destruction or defacement of or damage to, a relic or Aboriginal place is guilty of an offence against this Act.”¹⁴³

The Act empowers the Director-General of National Parks to make interim protection orders in respect to areas of land which are, in the Director-General's opinion, of “natural, scientific or cultural significance”.¹⁴⁴

To comply with its statutory duties, the New South Wales National Parks and Wildlife Service maintains an Aboriginal Sites Register, which includes information regarding the site location and Australian Map Grid co-ordinates. The location and extent of sites on the register is recorded using easting and northing co-ordinates and 1:250,000 or 1:100,000 map sheets. At this stage,¹⁴⁵ information regarding the extent of the site is limited to a description identifying the type of site in question, for example, a burial site, a shell midden or an area of stone artefacts.

Victoria: Some areas in Victoria are given legal protection under the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) - the purpose of that Act being “to provide for the vesting in certain Aboriginal communities of certain land at Lake Condah and Framlingham owned by the State of Victoria”.¹⁴⁶ Under the Act, two separate parcels of land were vested in the Kerrup-Jmara Elders Aboriginal Corporation and the Kirrae Whurrong Aboriginal Corporation respectively.¹⁴⁷

The Act provides that each Aboriginal Corporation is to compile a register of sites:

“that are sacred or significant to Aboriginals or any group of Aboriginals and shall record in the register:

- (a) if a site has been specifically identified, the boundaries of the site; or
- (b) if a site is known to exist but has not been specifically identified, the boundaries of the site as it is known to exist.”¹⁴⁸

¹⁴² *National Parks and Wildlife Act 1974* (NSW) s 84.

¹⁴³ *National Parks and Wildlife Act 1974* (NSW) s 90.

¹⁴⁴ *National Parks and Wildlife Act 1974* (NSW) s 91A. Any such interim protection order has effect for such period, being not longer than 2 years, as is specified in the order and ceases to have effect if the area of land subject to the order is reserved or dedicated under this Act or the order is revoked, ss 91D.

¹⁴⁵ Apparently the recording system is being changed.

¹⁴⁶ *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) Long Title.

¹⁴⁷ *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) ss 6, 7.

¹⁴⁸ *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) s 16(1), 24(1).

Section 18 of the Act empowers the Committee of Elders to control “the management or development of any sacred or significant site on the Condah land”.¹⁴⁹ Section 27 of the Act bestows the same powers on the Kirrae Whurrong Aboriginal Corporation, while section 23 allows the Corporation to make by-laws with respect to “the declaration of sacred or significant sites or other areas of significance to Aboriginal people in Framlingham Forest”.¹⁵⁰

South Australia: The principal legal protection for Aboriginal sites in South Australia is provided by the *Aboriginal Heritage Act 1988* (SA), which provides for the protection and preservation of Aboriginal heritage, including Aboriginal sites defined as:

“an area of land -
(a) that is of significance according to Aboriginal tradition; or
(b) that is of significance to Aboriginal archaeology, anthropology or history”.¹⁵¹

The Act goes on to define Aboriginal tradition as the “traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs and beliefs that have evolved or developed from that tradition since European colonisation”.¹⁵²

Criminal sanctions attach to offences with respect to Aboriginal sites, objects and remains. It is an offence to excavate land for the purpose of uncovering any Aboriginal site without the authority of the Minister.¹⁵³ Likewise it is an offence to damage, disturb or interfere with any Aboriginal site without the authority of the Minister.¹⁵⁴ The maximum penalty for an offence under the Act is \$50,000 in the case of a body corporate and \$10,000 or imprisonment for 6 months in any other case.¹⁵⁵

The Minister may also give directions prohibiting or restricting access to, as well as activities on or in relation to, an Aboriginal site or an area surrounding the site.¹⁵⁶

Sites are recorded on the Register of Aboriginal Sites and Objects.¹⁵⁷ A system of colour coded site cards is used to cover a variety of different site types. The card contains simple details relating to the site location, ownership and environmental data. The location of the site is recorded according to 1:100,000 map sheets.

A separate form of legal protection for some Aboriginal sites in South Australia is provided by the *Pitjantjatjara Land Rights Act 1981* (SA) and the *Maralinga*

¹⁴⁹ *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) s 18(1)(b)(ii).

¹⁵⁰ *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) s 23(1)(d).

¹⁵¹ *Aboriginal Heritage Act 1988* (SA) s 3.

¹⁵² *Aboriginal Heritage Act 1988* (SA) s 3.

¹⁵³ *Aboriginal Heritage Act 1988* (SA) s 21.

¹⁵⁴ *Aboriginal Heritage Act 1988* (SA) s 23(a).

¹⁵⁵ *Aboriginal Heritage Act 1988* (SA) ss 23(c)(a), 23(c)(b).

¹⁵⁶ *Aboriginal Heritage Act 1988* (SA) s 24(1).

¹⁵⁷ *Aboriginal Heritage Act 1988* (SA) s 9(2).

Tjarutja Land Rights Act 1984 (SA). Those Acts provide for specific parcels of land to be granted to the Anangu Pitjantjatjara and the Maralinga Tjarutja respectively.

The *Pitjantjatjara Land Rights Act* states that:

“19.(1) A person (not being a Pitjantjatjara) who enters the lands without the permission of Anangu Pitjantjatjara is guilty of an offence and liable to a penalty not exceeding the maximum prescribed by subsection (2).”¹⁵⁸

The Act allows for a maximum penalty, where the offence was committed intentionally, of a fine of \$2,000 plus \$500 for each day during which the convicted person remained on the land after the unlawful entry. In any other case the penalty is a fine of \$200.¹⁵⁹

The *Maralinga Tjarutja Land Rights Act* goes further and allows the Maralinga Tjarutja to compile a register of sacred sites recording:

“(a) where a site has been identified with particularity – the boundaries of the site;
or
(b) where a site is known to exist but has not been identified with particularity – the boundaries of the area within which it is known to exist.”¹⁶⁰

The Act provides that where an application has been made for a mining tenement in respect of a part of the lands and a sacred site or part of a sacred site, registered pursuant to that section, the Minister shall:

“in granting any mining tenement upon the application, make necessary provision for the protection of the sacred site-
(A) in the case of a sacred site that has been identified with particularity – by excluding land from the tenement or imposing conditions on the tenement;
or
(B) in the case of a sacred site that is known to exist but which has not been identified with particularity – by imposing conditions on the tenement to protect the sacred site until it is so identified”.¹⁶¹

Where information is provided as to a sacred site and its location pursuant to the above provisions, conditions can be imposed prohibiting or restricting disclosure of the information. Any person who knowingly contravenes any such conditions is guilty of an offence and is liable to a penalty not exceeding \$5,000.¹⁶²

¹⁵⁸ *Pitjantjatjara Land Rights Act 1981 (SA)* s 19(1).

¹⁵⁹ *Pitjantjatjara Land Rights Act 1981 (SA)* s 19(2).

¹⁶⁰ *Maralinga Tjarutja Land Rights Act 1984 (SA)* s 16(1).

¹⁶¹ *Maralinga Tjarutja Land Rights Act 1984 (SA)* s 22(2)(b).

¹⁶² *Maralinga Tjarutja Land Rights Act 1984 (SA)* s 22(6).

Western Australia: In Western Australia, the *Aboriginal Heritage Act 1972* (WA) applies to, among other things, “any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent”.¹⁶³ Any person who excavates, destroys, damages, conceals or in any way alters an Aboriginal site, without authorization or consent under the Act, commits an offence¹⁶⁴. An Aboriginal site is one to which the Act applies.¹⁶⁵

The Act provides for a penalty of a \$500 fine and/or four months imprisonment for a first offence and \$2,000 and/or twelve months imprisonment for a later offence.¹⁶⁶ It is a defence if the person charged proves that they did not know and could not reasonably be expected to have known, that the place or object to which the charge relates was a place or object to which the Act applies.¹⁶⁷

It is the duty of the relevant Minister to ensure that, so far as is reasonably practicable, all places in Western Australia that are of traditional or current sacred ritual or ceremonial significance to persons of Aboriginal descent should be recorded on behalf of the community, and their relative importance evaluated so that the resources available from time to time for the preservation and protection of such places may be co-ordinated and made effective.”¹⁶⁸

There is a Register of Sites for all protected areas and cultural material.¹⁶⁹ Any person who has knowledge of the existence of any site to which the Act applies or might reasonably be suspected to apply is required to report its existence unless there is reasonable cause to believe the existence of the thing or place in question to be already known to the Registrar.¹⁷⁰ The Act provides for an advisory body known as the Aboriginal Cultural Material Committee.¹⁷¹ The Committee’s functions include evaluating places and objects, recording and preserving traditional Aboriginal lore associated with such places and objects, and recommending to the Minister places and objects of special significance to persons of Aboriginal descent.¹⁷²

The Act also provides a power to examine any Aboriginal site or any place or object that there are reasonable grounds for believing have been traditionally or are currently of sacred, ritual or ceremonial significance to persons of Aboriginal descent.¹⁷³

Commonwealth legislation: Commonwealth legislation provides a national scheme for the possible protection of significant Aboriginal areas from injury or desecration

¹⁶³ *Aboriginal Heritage Act 1972* (WA) s 5(b).

¹⁶⁴ *Aboriginal Heritage Act 1972* (WA) s 17.

¹⁶⁵ *Aboriginal Heritage Act 1972* (WA) s 4.

¹⁶⁶ *Aboriginal Heritage Act 1972* (WA) s 57(1).

¹⁶⁷ *Aboriginal Heritage Act 1972* (WA) s 62.

¹⁶⁸ *Aboriginal Heritage Act 1972* (WA) s 10(1).

¹⁶⁹ *Aboriginal Heritage Act 1972* (WA) ss 10, 38.

¹⁷⁰ *Aboriginal Heritage Act 1972* (WA) s 15.

¹⁷¹ *Aboriginal Heritage Act 1972* (WA) s 28.

¹⁷² *Aboriginal Heritage Act 1972* (WA) s 39(1).

¹⁷³ *Aboriginal Heritage Act 1972* (WA) s 51(1).

where State or Territory legislation provides insufficient protection.¹⁷⁴ The purposes of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) include “the preservation and protection from injury or desecration of areas ... that are of particular significance to Aboriginals in accordance with Aboriginal tradition”.¹⁷⁵

A “significant Aboriginal area” is:

- an area of land in Australia or in or beneath Australian waters;
- an area of water in Australia; or
- an area of Australian waters,

that is an area of particular significance in accordance with Aboriginal tradition.¹⁷⁶ An “area” is defined to include a site,¹⁷⁷ but “site” is not defined. “Aboriginal tradition” for these purposes is defined to be “the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships”.¹⁷⁸

The protection offered under this Act is by way of Ministerial declarations that provide for the “preservation or protection of a specified area from injury or desecration”.¹⁷⁹ There are two types of declaration – emergency declarations and longer term declarations. An authorised officer may also make an emergency declaration in certain circumstances.¹⁸⁰ Breach of a declaration is a criminal offence punishable by a fine not exceeding \$10,000 or imprisonment for a period not exceeding 5 years, or both. In the case of a corporate offender the maximum penalty is a fine not exceeding \$50,000.¹⁸¹

Each type of declaration must “describe the area with sufficient particulars to enable the area to be identified”.¹⁸² An example of a declaration made under section 9 of the Act is the *Aboriginal and Torres Strait Islander Heritage Protection (Boobera Lagoon) Declaration 1998*. In the application for the declaration it was claimed that water skiing on the lagoon, along with the large number of visitors which this brought, constituted a threat to the cultural significance of the lagoon area. The subsequent declaration identifies the area covered by as:

¹⁷⁴ For background to this Act see E Evatt *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, 1998; G Neate “Power, Policy, Politics and Persuasion – Protecting Aboriginal Heritage Under Federal Laws” (1989) 6 *Environmental and Planning Law Journal* 214-248.

¹⁷⁵ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 4.

¹⁷⁶ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 3.

¹⁷⁷ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 3.

¹⁷⁸ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 3.

¹⁷⁹ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 9(1)(a), 10(1)(a).

¹⁸⁰ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 18.

¹⁸¹ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 22.

¹⁸² *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 11(a), 18(2)(c)(i).

“the body of water known as Boobera Lagoon that is:

- (a) approximately 13 kilometres west of the township of Boggabilla, in the MacIntyre River catchment in northern New South Wales; and
- (b) within Reserve No. 160014, a reserve for the Conservation of Aboriginal Cultural Heritage and Public Recreation gazetted under the Crown Lands Consolidation Act 1913 of New South Wales”.¹⁸³

A Minister may not make a declaration under section 10 of the Act unless he or she has received a report in relation to the area from a person nominated by him or her and has considered the report and any representations attached to the report.¹⁸⁴ Among the matters with which a report must deal are:

- the particular significance of the area to Aboriginals
- the extent of the area that should be protected
- the prohibitions and restrictions to be made with respect to the area.¹⁸⁵

An example of a section 10 declaration is that made in relation to the proposed Junction Waterhole dam on the Todd River in the Northern Territory. An application for a declaration claimed that the construction and future operation of the dam would put at risk a number of sacred trees at the base of the dam wall and lead to the permanent inundation of a site considered sacred. In this case the area covered by the declaration was described as:

“The area encompassing all aspects of the physical landscape contained in the bed and banks of the Todd River and extending to the tops of the hills immediately adjacent to the western and eastern banks of the Todd River between the co-ordinates E.387, 378, N.7, 388, 075 and the co-ordinates E.386, 820, N.7, 387, 240, Australian Map Grid Zone 53K, and between the co-ordinates E.386, 820, N.7, 387, 240 and the co-ordinates E.385, 903, N.7, 386, 050, Australian Map Grid Zone 53K.”¹⁸⁶

Another example of a section 10 declaration under the Act is that made in relation to the proposal to build a bridge between the Hindmarsh Island, in South Australia, and the mainland. The declaration, which was made in July 1994, described the area as being:

“The area in the State of South Australia in the County of Hindmarsh, hundreds of Goolwa and Nangkita and which is shown on the published 1:10,000 Map Sheet No. 6626-3 as bounded by a straight line between Australian Map Grid Coordinates Zone 54 299000 East 6068870 North thence South East to 299650 East 6068360 North thence South West to

¹⁸³ *Aboriginal and Torres Strait Islander Heritage Protection (Boobera Lagoon) Declaration* 1998 s 4.

¹⁸⁴ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 10 (1)(c).

¹⁸⁵ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* s (Cth) 10(4).

¹⁸⁶ *Aboriginal and Torres Strait Islander Heritage Protection (Junction Waterhole) Declaration* 1992 schedule 1.

299629 East 6068270 North thence North West to 298959 East 6068750 North thence to rejoin at the commencement point.”¹⁸⁷

The Australian Heritage Commission¹⁸⁸ maintains the Register of the National Estate,¹⁸⁹ which includes a number of sites that are significant to the indigenous peoples of Australia.

Included on the Register is a statement of the location of the site. The description may take a number of forms. In some cases the statement of location may be made using coordinate reference points. Such a case is the Dare Plain Aboriginal Area at Haasts Bluff in the Northern Territory, where the site location is described as:

“About 600ha, 95km south-south-west of Haasts bluff. The area is bounded by straight lines joining the following AMG coordinates consecutively: GU595448, 605432, 645412, 650428, 599455 and commencement point.”¹⁹⁰

Project specific legislation: Other legislation attempts to ensure that appropriate recognition is given to, or action is taken in relation to, sacred sites in the context of particular projects or activities.

The *Aurukun Associates Agreement Act 1975* (Qld), concerns an agreement between a number of mining companies and the State of Queensland to allow certain deposits of bauxite to be explored and brought into production. As part of the agreement, provisions were made that:

“5.(1) The Director and/or Council will from time to time inform the Companies of the location within the Reserve of all relics, sacred sites, contemporary sacred sites and aboriginal sites in upon or within the Reserve.

(2) The Companies will not nor will they cause or permit any employee agent or contractor of the Companies to enter upon, take, deface, damage, uncover, expose, interfere with, be in possession of, or disturb any relic, sacred site, contemporary sacred site, aboriginal site upon or within the Reserve or do any act likely to endanger any such relic or site.”¹⁹¹

The *Telecommunications Act 1997* (Cth) provides that a telecommunications carrier must give written notice of its intention, before it undertakes activities including the inspection of land, installation of facilities and maintenance of facilities where part of that land is, or is included in a “sensitive area”¹⁹². The Act includes in its definition of “sensitive area” an area that is of particular significance to Aboriginal persons, or Torres Strait Islanders, in accordance with their traditions.¹⁹³

¹⁸⁷ *Aboriginal and Torres Strait Islander Heritage Protection (Kumarangk – Hindmash Island) Declaration* 1994 schedule 1.

¹⁸⁸ Established by the *Australian Heritage Commission Act 1975* (Cth).

¹⁸⁹ *Australian Heritage Commission Act 1975* (Cth) s 22.

¹⁹⁰ Register of the National Estate extract for “Dare Plain Aboriginal Area”.

¹⁹¹ *Aurukun Associates Agreement Act 1975* (Qld) Third schedule s 5.

¹⁹² *Telecommunications Act 1997* (Cth) Schedule 3 s 17.

¹⁹³ *Telecommunications Act 1997* (Cth) Schedule 3 ss 17(8)(e)(iv), 27(7)(d)(iv).

The *Melbourne City Link Act 1995* (Vic) provides that the Company and the Trustee involved in the construction of the Melbourne City Link road accept the Project Land and certain other areas “subject to any third party claims or rights, in respect of ... aboriginal sacred sites”.¹⁹⁴

6 INTERNATIONAL INSTRUMENTS AND INDIGENOUS LAND ISSUES

The significance of the matters addressed in this paper is not confined to Australia. Those matters have arisen, or may arise, in some form elsewhere. There is increasing recognition internationally of group rights, particularly the rights of indigenous people.

Four examples illustrate how indigenous peoples’ rights in relation to land are or may be recognised.

(a) ILO Convention 169

Part II of the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries¹⁹⁵ deals with land. That Part is Appendix A to this paper. It refers to the “special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories ... which they occupy or otherwise use” and urges Governments to “take steps as are necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.” It also states that “Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.”

(b) Rio Declaration on Environment and Development

Part of the international debate about environmental issues has focussed on indigenous peoples’ links to land. In its report *Our Common Future*, the World Commission on Environment and Development argued that tribal and indigenous peoples will need special attention as the forces of economic development disrupt their traditional lifestyles. According to the Commission, those lifestyles can offer modern societies many lessons in the management of resources in complex forest, mountain, and dryland ecosystems. The traditional rights of those people should be recognised and they should be given a decisive voice in formulating policies about resource development in their areas.¹⁹⁶

“The starting point for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and the other resources that sustain their way of life – rights they may define in terms that do not fit into standard legal systems. These

¹⁹⁴ *Melbourne City Link Act 1995* (Vic) Schedule 1 cl 4.5(b)(v).

¹⁹⁵ Adopted by the General Conference of the International Labour Organisation, Geneva, 27 June 1989, entered into force 5 September 1991.

¹⁹⁶ World Commission on Environment and Development *Our Common Future* (1987), pp 12, 114-116.

groups' own institutions to regulate rights and obligations are crucial for maintaining the harmony with nature and the environmental awareness characteristic of the traditional way of life."¹⁹⁷

The *Rio Declaration on Environment and Development* (the Rio Declaration),¹⁹⁸ released after the United Nations Conference on Environment and Development in Rio de Janeiro in June 1992, contained a statement of 27 principles on general rights and obligations. Principle 22 states:

“Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”¹⁹⁹

(c) **Draft Declaration on the Rights of Indigenous Peoples**

Over more than 15 years the United Nations Working Group on Indigenous Populations has been developing a Declaration on the Rights of Indigenous Peoples. The latest draft Declaration adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities on 26 August 1994, provides among other things, that:

- Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands which they have traditionally owned or otherwise occupied or used;
- Indigenous peoples have the right to own, develop, control and use the lands and territories which they have traditionally owned or otherwise occupied or used;
- Indigenous peoples have the right to maintain, protect, and have access in privacy to their religious and cultural sites.

The main provisions of the Draft Declaration in relation to land are Appendix B to this paper.

Whether a declaration in those or similar terms will be adopted by the international community remains to be seen. But the fact that such a Declaration is being prepared with the involvement of state parties may influence the development of the domestic law of some countries.

(d) ***The Indigenous Peoples Right Act of 1997 (Phillipines)***

In 1997, for example, the Philippines Congress enacted *The Indigenous Peoples Right Act of 1997*. The policy of the Act is for the State to “recognize and promote

¹⁹⁷ Ibid, p 115.

¹⁹⁸ Adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, 13 June 1992, UN DOC A/CONF 151/26 (Vol 3) at 16, Annex 2 (1992).

¹⁹⁹ For a discussion of these and other documents see G Neate “Looking after country: legal recognition of traditional rights and responsibilities for land” (1993) 16 UNSWLJ 161-222.

all the rights of Indigenous Cultural Communities/Indigenous Peoples” (ICCs/IPs) as enumerated “within the framework of the Constitution” and “within the framework of national unity and development”. The State shall, for example, protect the rights of such communities and peoples “to their ancestral domains to ensure their economic, social and cultural well being and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain”.²⁰⁰ “Ancestral domains” are defined to include lands occupied or possessed by such people or their ancestors since time immemorial and “worship areas”,²⁰¹ and includes “such concepts of territories which cover not only the physical environment but the total environment including the spiritual and cultural bonds to the areas which the ICCs/IPs possess, occupy and use and to which they have claims of ownership”.²⁰² Such people “shall have ... the right to maintain, protect and have access to their religious and cultural sites” and, accordingly, “the State shall take effective measures, in cooperation with the ICCs/IPs concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected”.²⁰³

A process is provided for the delineation and recognition of ancestral domains. Significantly, “Self-delineation shall be the guiding principle in the identification and delineation of ancestral domains”. The ICCs/IPs concerned “shall have a decisive role in all the activities pertinent thereto” and the sworn statement of the elders as to the scope of the territories and agreements made with neighbouring ICCs/IPs “will be essential to the determination of these traditional territories”.²⁰⁴

Proof of Ancestral Domain Claims includes the testimony of elders or community under oath, and other documents directly or indirectly attesting to the possession or occupation of the area since time immemorial by such ICCs/IPs in the concept of owners which shall be any one of the following authentic documents:

- written accounts of the ICCs/IPs customs and traditions;
- written accounts of the ICCs/IPs political structure and institution;
- pictures showing long term occupation such as those of old improvements, burial grounds, sacred places and old villages;
- historical accounts, including pacts and agreements concerning boundaries entered into by the ICCs/IPs concerned with other ICCs/IPs;
- survey plans and sketch maps;
- anthropological data;
- genealogical surveys;
- pictures and descriptive histories of traditional communal forests and hunting grounds;
- pictures and descriptive histories of traditional landmarks such as mountains, rivers, creeks, ridges, hills, terraces and the like; and
- write-ups of names and places derived from the native dialect of the community.

²⁰⁰ *The Indigenous Peoples Right Act of 1997* s 2.

²⁰¹ *The Indigenous Peoples Right Act of 1997* s 3(a).

²⁰² *The Indigenous Peoples Right Act of 1997* s 4.

²⁰³ *The Indigenous Peoples Right Act of 1997* s 33.

²⁰⁴ *The Indigenous Peoples Right Act of 1997* s 51.

On the basis of such investigation and the findings of fact based on them, the Ancestral Domains Office of the National Commission on Indigenous Peoples shall prepare a “perimeter map, complete with technical descriptions, and a description of the natural features and landmarks embraced therein”.²⁰⁵

The text of the relevant statutory provisions is Appendix C to this paper.

7 CONCLUSION

People from different cultures view the landscape in different ways. Land is constantly being reinterpreted. Within a culturally homogenous society different interpretations may develop or be created over time. In societies with different cultural groups sharing the land, there are challenges in accommodating different ways of thinking about and using land.

For surveyors the challenge is more specific and its implications are more precise. There needs to be an understanding that:

- the rights and interests of indigenous people in their traditional country will not necessarily accord with conventional legal notions of property;
- in some areas two or more groups of people may have mutually recognised traditional rights and interests
- in some areas the boundaries of traditional estates may be clearly defined by reference to natural features and elsewhere the boundaries are imprecise, permeable and periodically negotiable.

It may not be possible to plot such traditional estates by conventional cartographic means, or record them cadastrally. Rather than attempt to record traditional estates by using cadastral boundaries, it may be better to note, by references to areas mapped for other purposes, which group has (either alone or with others) which traditional rights and interests.

The Interregional Meeting of Experts on the Cadastre in Bogor, Indonesia, in March 1996 made a number of important statements that are relevant to the matters raised in this paper. The Bogor Declaration states, among other things:

- The issue is not whether cadastral systems are important and essential, but what is the most appropriate form of cadastral system for each country. (paragraph 3.7)
- The flexibility which flows from the vast array of options in designing and establishing an appropriate cadastral system, allows cadastres to record a continuum of land tenure arrangements from private to individual land rights through to communal land rights, as well as having the ability to accommodate traditional or customary land rights. (paragraph 4.5)
- Cadastral systems are not ends in themselves. They support effective land markets, increased agricultural productivity, sustainable economic development, environmental management, political stability and social justice. (paragraph 6.8)

²⁰⁵ *The Indigenous Peoples Right Act of 1997* s 52(d), (e).

- Although different countries have different needs for a cadastre at different stages of development, (paragraph 5.1) in all countries there is a concern that cadastral systems support social justice. (paragraph 5.2)
- Land administrators are called upon to establish appropriate land tenure for all land users, especially for indigenous peoples, women and the poor. (paragraph 3.2)

The Bathurst Declaration on Cadastral Infrastructure and Sustainable Development is being developed in a dynamic environment where the relevance of the Bogor Declaration is being evaluated.

As the Workshop organisers have recognised, we live in a world where there are changes in land rights, responsibilities and restrictions. The increasing formal recognition of indigenous peoples' rights to and responsibilities for land, together with the restrictions on the exercise of those rights and responsibilities, points to the need for a land administration system that stays in touch with the dynamic humankind/land relationship and recognises land policy as a source of social and political stability.

Whatever the expression "customary land tenure" may have meant in the past, it now includes the land tenure systems of indigenous peoples, at least to the extent that those systems are recognised in the broader legal framework.

The legal recognition of indigenous peoples' traditional rights and interests in land gives rise to numerous issues about how those rights are to be recorded and how competing land use disputes are to be resolved. In a world where there are changing social priorities in relation to land ownership and use, how societies deal with those issues will vary from country to country.

As the Bogor Declaration makes clear, and this Workshop demonstrates, the policy and technical challenges are intertwined. Meeting those challenges will draw on the best of the skills, experience and wisdom that participants bring to this Workshop.

Let me encourage you to meet those challenges as you prepare the Bathurst Declaration.

Appendix A

Extracts from ILO Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries

Part II. Land

Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
2. The use of the term “lands” in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities,

and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.
2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.
3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18

1. Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

- (a) The provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
- (b) The provision of the means required to promote the development of the lands which these peoples already possess.

Appendix B

Extracts from Draft United Nations Declaration on the Rights of Indigenous Peoples

Article 12

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international co-operation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such

activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

**Extracts from the Indigenous Peoples Right Act of 1997,
Republic Act No 8371 of the Philippines**

CHAPTER VIII

**DELINEATION AND RECOGNITION OF
ANCESTRAL DOMAINS**

SEC.51 Delineation and Recognition of Ancestral Domains. – Self-delineation shall be the guiding principle in the identification and delineation of ancestral domains. As such, the ICCs/IPs concerned shall have a decisive role in all the activities pertinent thereto. The Sworn Statement of the Elders as to the scope of the territories and agreements/pacts made with neighbouring ICCs/IPs, if any, will be essential to the determination of these traditional territories. The Government shall take the necessary steps to identify lands which the ICCs/IPs concerned traditionally occupy and guarantee effective protection of their rights of ownership and possession thereto. Measures shall be taken in appropriate cases to safeguard the right of the ICCs/IPs concerned to land which may no longer be exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities, particularly of ICCs/IPs who are still nomadic and/or shifting cultivators.

SEC. 52. Delineation Process. – The identification and delineation of ancestral domains shall be done in accordance with the following procedures:

- (a) **Ancestral Domains Delineated Prior to this Act.** – The provisions hereunder shall not apply to ancestral domains/lands already delineated according to DENR Administrative Order No 2, series of 1993, nor to ancestral lands and domains delineated under any other community/ancestral domain program prior to the enactment of this law. ICCs/IPs whose ancestral lands/domains were officially delineated prior to the enactment of this law shall have the right to apply for the issuance of a Certificate of Ancestral Domain Title (CADT) over the area without going through the process outlined hereunder;
- (b) **Petition for Delineation.** – The process of delineating a specific perimeter may be initiated by the NCIP with the consent of the ICC/IP concerned, or through a Petition for Delineation filed with the NCIP, by a majority of the members of the ICCs/IPs;
- (c) **Delineation Proper.** – The official delineation of ancestral domain boundaries including census of all community members therein, shall be immediately undertaken by the Ancestral Domains Office upon filing of the application by the ICCs/IPs concerned. Delineation will be done in coordination with the community concerned and shall at all times include genuine involvement and participation by the members of the communities concerned;

- (d) **Proof Required.** – Proof of Ancestral Domain Claims shall include the testimony of elders or community under oath, and other documents directly or indirectly attesting to the possession or occupation of the area since time immemorial by such ICCs/IPs in the concept of owners which shall be any one (1) of the following authentic documents:
1. Written accounts of the ICCs/IPs customs and traditions;
 2. Written accounts of the ICCs/IPs political structure and institution;
 3. Pictures showing long term occupation such as those of old improvements, burial grounds, sacred places and old villages;
 4. Historical accounts, including pacts and agreements concerning boundaries entered into by the ICCs/IPs concerned with other ICCs/IPs;
 5. Survey plans and sketch maps;
 6. Anthropological data;
 7. Genealogical surveys;
 8. Pictures and descriptive histories of traditional communal forests and hunting grounds;
 9. Pictures and descriptive histories of traditional landmarks such as mountains, rivers, creeks, ridges, hills, terraces and the like; and
 10. Write-ups of names and places derived from the native dialect of the community.
- (e) **Preparation of Maps.** – On the basis of such investigation and the findings of fact based thereon, the Ancestral Domains Office of the NCIP shall prepare a perimeter map, complete with technical descriptions, and a description of the natural features and landmarks embraced therein;
- (f) **Report of Investigation and Other Documents.** – A complete copy of the preliminary census and a report of investigation, shall be prepared by the Ancestral Domains Office of the NCIP;
- (g) **Notice and Publication.** – A copy of each document, including a translation in the native language of the ICCs/IPs concerned shall be posted in a prominent place therein for at least fifteen (15) days. A copy of the document shall also be posted at the local, provincial and regional offices of the NCIP, and shall be published in a newspaper of general circulation once a week for two (2) consecutive weeks to allow other claimants to file opposition thereto within fifteen (15) days from date of such publication: *Provided*, That in areas where no such newspaper exists, broadcasting in a radio station will be a valid substitute: *Provided, further*, That mere posting shall be deemed sufficient if both newspaper and radio station are not available.
- (h) **Endorsement to NCIP.** – Within fifteen (15) days from publication, and of the inspection process, the Ancestral Domains Office shall prepare a report to the NCIP endorsing a favourable action upon a claim that is deemed to have sufficient proof. However, if the proof is deemed insufficient, the Ancestral Domains Office shall require the submission of additional evidence: *Provided*, That the Ancestral Domains Office shall reject any claim that is deemed patently false or fraudulent after inspection and verification: *Provided, further*, That in case of rejection, the Ancestral Domains Office shall give the applicant due

notice, copy furnished all concerned, containing the grounds for denial. The denial shall be appealable to the NCIP; *Provided, furthermore,* That in cases where there are conflicting claims among ICCs/IPs on the boundaries of ancestral domain claims, the Ancestral Domains Office shall cause the contending parties to meet and assist them in coming up with a preliminary resolution of the conflict, without prejudice to its full adjudication according to the section below.

- (i) **Turnover of areas Within Ancestral Domains Managed by Other Government Agencies.** – The Chairperson of the NCIP shall certify that the area covered is an ancestral domain. The secretaries of the Department of Agrarian Reform, Department of Environment and Natural Resources, Department of the Interior and Local Government, and Department of Justice, the Commissioner of the National Development Corporation and any other government agency claiming jurisdiction over the area shall be notified thereof. Such notification shall terminate any legal basis for the jurisdiction previously claimed;
- (j) **Issuance of CADT.** – ICCs/IPs whose ancestral domains have been officially delineated and determined by the NCIP shall be issued a CADT in the name of the community concerned, containing a list of all those identified in the census; and
- (k) **Registration of CADTs.** – The NCIP shall register issued certificates of ancestral domain titles and certificates of ancestral lands titles before the Register of Deeds in the place where the property is situated.

SEC. 53. Identification, Delineation and Certification of Ancestral Lands. -

- (a) The allocation of lands within any ancestral domain to individual or indigenous corporate (family or clan) claimants shall be left to the ICCs/IPs concerned to decide in accordance with customs and traditions;
- (b) Individual and indigenous corporate claimants of ancestral lands which are not within ancestral domains, may have their claims officially established by filing applications for the identification and delineation of their claims with the Ancestral Domains Office. An individual or recognized head of a family or clan may file such application in his behalf or in behalf of his family or clan, respectively;
- (c) Proofs of such claims shall accompany the application form which shall include the testimony under oath of elders of the community and other documents directly or indirectly attesting to the possession or occupation of the areas since time immemorial by the individual or corporate claimants in the concept of owners which shall be any of the authentic documents enumerated under Sec. 52(d) of this Act, including tax delcarations and proofs of payment of taxes;
- (d) The Ancestral Domains Office may require from each ancestral claimant the submission of such other documents, Sworn Statements and the like, which in its opinion, may shed light on the veracity of the contents of the application/claim;
- (e) Upon receipt of the applications for delineation and recognition of ancestral land claims, the Ancestral Domains Office shall cause the publication of the application and a copy of each document submitted including a translation in the native language of the ICCs/IPs concerned in a prominent place therein for at least fifteen (15) days. A copy of the document shall also be posted at the local,

provincial, and regional offices of the NCIP and shall be published in a newspaper of general circulation once a week for two (2) consecutive weeks to allow other claimants to file opposition thereto within fifteen (15) days from the date of such a publication: *Provided*, That in areas where no such newspaper exists, broadcasting in a radio will be a valid substitute; *Provided, further*, That mere posting shall be deemed sufficient if both newspapers and radio station are not available;

- (f) Fifteen (15) days after such publication, the Ancestral Domains Office shall investigate and inspect each application, and if found to be meritorious, shall cause a parcellary survey of the area being claimed. The Ancestral Domains Office shall reject any claim that is deemed patently false or fraudulent after inspection and verification. In case of rejection, the Ancestral Domains Office shall give the applicant due notice, copy furnished all concerned containing the grounds for denial. The denial shall be appealable to the NCIP. In case of conflicting claims among individual or indigenous corporate claimants, the Ancestral Domains Office shall cause the contending parties to meet and assist them in coming up with a preliminary resolution of the conflict, without prejudice to its full adjudication or delineation of the ancestral domains as herein provided, the Director of Lands shall represent the interests of the Republic of the Philippines; and
- (g) The Ancestral Domains Office shall prepare and submit a report on each and every application surveyed and delineated to the NCIP, which shall, in turn, evaluate the report submitted. If the NCIP finds such claim meritorious, it shall issue a certificate of ancestral land, declaring and certifying the claim of each individual or corporate (family or clan) claimant over ancestral lands.

SEC. 54. Fraudulent Claims. – The Ancestral Domains Office may, upon written request from the ICCs/IPs, review existing claims which have been fraudulently acquired by any person or community. Any claim found to be fraudulently acquired by, and issued to, any person or community may be cancelled by the NCIP after due notice and hearing of all parties concerned.

SEC. 55. Communal Rights. – Subject to Section 56 hereof, areas within the ancestral domains, whether delineated or not, shall be presumed to be communally held: *Provided*, That communal rights under this Act shall not be construed as co-ownership as provided in Republic Act No 386, otherwise known as the New Civil Code.

SEC. 56. Existing Property Rights Regimes. – Property rights within the ancestral domains already existing and/or vested upon effectivity of this Act, shall be recognised and respected.