

# Journal of Indigenous Policy – Issue 8

**Theme: Indigenous Land: the War on Terra**

**Editor: Larissa Behrendt**

**Published in November 2007**

(149 pages)

## Articles:

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### ***Comment on the National Indigenous Council's Indigenous Land Tenure Principles from a Native Title Perspective***

**Jason BEHRENDT** – is a solicitor employed at Chalk & Fitzgerald. The views expressed in this paper are his personal views. This paper is based on a speech which was delivered to Australians for Native Title and Reconciliation on 5 July 2005.

Government interest in improving the ability of Aboriginal people to achieve their personal goals, whether it be individual home ownership on their own country or otherwise, is a matter which should be welcomed. However, it is equally important that any measures aimed at achieving those goals respect the basic human rights of Aboriginal peoples and respect their property interests. A significant development which may guide how the government may approach this issue has been the development of 'Indigenous Land Tenure Principles' ('the NIC Principles') by the National Indigenous Council ('NIC'). The NIC Principles have received broad criticism from Indigenous leaders and this paper will demonstrate why it is not hard to see why.

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### ***After ATSIC***

**Chris GRAHAM** – is the founding editor of the National Indigenous Times. He has won the 2004 Human Rights Award - Print Media Category, the 2005 Walkley Award for Excellence in Indigenous Affairs and a High Commendation at the 2004 Walkley Awards.

There was one over-riding fear when the Howard government abolished a democratically elected Aboriginal board (ATSIC) and replaced it with a hand-picked advisory council - the National Indigenous Council (NIC). Many suspected it would become a rubber stamp for the excesses of a government renowned for its aggressive stance against Aboriginal rights. They weren't disappointed. This article documents the early days of the NIC and the profound effect it had on the future of Australian Indigenous peoples.

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***Howards's End: the real agenda behind the proposed review of Indigenous Land Titles*** (this article was previously published by the Australian Indigenous Law Reporter – Volume 9, Number 4, 2005)

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**Nicole WATSON** – is Nicole Watson is Senior Researcher at the Jumbunna Indigenous House of Learning, University of Technology, Sydney.

This article analyses the Prime Minister's comments in light of his Government's administration of the *Native Title Act 1993* (Cth). It argues that the Liberal Party's ideological opposition to Indigenous land ownership has resulted in native title policy that is heavily biased against native title representative bodies (NTRBs), a philosophy that is likely to be the dominant force behind the Prime Minister's call for privatisation.

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### ***The rising tide for Native Title: a case note on 'Jago v Northern Territory of Australia' (the 'Yulara' case)***

**Eric KNIGHT** – currently reading for a DPhil at Oxford University as an Australian Rhodes Scholar. He has a BA and LLB (Hons I) from the University of Sydney.

This paper outlines how the Yulara case, intended as a test case for compensation from the extinguishment of native title, interrogated the grounds for recognising native title rights and interests. It critically assesses Justice Sackville's application of a 'constructionist approach' to Indigenous laws and customs and the difficulties of cross-cultural communication. It concludes that the troubling findings of his Honour in law and policy should be re-examined on appeal because of their potentially detrimental effect for future applications for native title recognition and protection.

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### ***Distinguishing Native Title and Land Rights: not an easy path to rights OR recognition***

**Norman LAING** – is a Dunghutti man from Kempsey and a Barrister. In 2002 he was one of the first Indigenous graduates of the new Bachelor of Laws and Indigenous Australian Law degrees offered by UTS, specialising in Indigenous and Native Title Law.

This paper provides a summary of the claims process of land rights regimes, highlighting the complexity and difficulties of each process, some of the problems in them, and how if at all possible, we should or could re-conceptualise the processes and assist Indigenous land rights to move forward. The paper also reminds us all why our people fought for so long and so hard to achieve rights in respect of land and title in the first place.

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### ***Creating Conflict: Case studies in the tension between Native Title claims and Land Rights claims***

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**Loretta KELLY**– (BA, LLB (NSW), PhD (SCU)) is a Gumbaynggirr and Danggadi woman from the north coast of NSW. She is a Lecturer in the School of Law

**Larissa BEHRENDT** - is a Eauleyai and Kamillaroi woman. She is Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning, University of Technology, Sydney.

Many of our great Indigenous leaders have understood the connection between the claim to land and its capacity to provide the basis for self-sufficiency and greater independence. This article analyses circumstances and tensions arising from conflicting interests in land rights and native title claims. It looks at how although these both relate to the recognition of Indigenous peoples' rights to land, how they are different from both a socio-political and legal perspective. The paper also presents a number of scenarios that illustrate the conflict that can, and does arise when there are competing claims to land between Aboriginal people.

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### ***Shifting Ground: Why Land Rights and Native Title have not delivered social justice***

**Larissa BEHRENDT**– is a Eauleyai and Kamillaroi woman. She is Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning, University of Technology, Sydney.

**Nicole WATSON** - is a Senior Lecturer at Jumbunna Indigenous House of Learning, University of Technology, Sydney, NSW.

The struggle for land rights has always been a central part of the platform for Aboriginal people. Dispossession and theft of traditional land has been a hallmark of the colonisation process, so it is little wonder that the focus for political movements by Aboriginal people would be on reclaiming that land. The claim for land has always been more than just a desire to reclaim soil. There was always the desire to be able to exercise traditional obligations to lands that Aboriginal people have a cultural and spiritual attachment with. But there has also been an understanding that land is the source of life and of sustainability.

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### ***The Mabo Lecture (delivered on 7th June 2006 at James Cook University)***

**Larissa BEHRENDT** – is a Eauleyai and Kamillaroi woman. She is Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning, University of Technology, Sydney

This lecture explores the barriers to achieving the vision of Aboriginal rights to land that were articulated in the *Mabo* case. These include the re-conceptualising of native title as a regime to give certainty to non-Aboriginal interests, the romanticism of Aboriginal culture that permeated the judgement

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and the fact that, under the judicial system, it is judges who determine what ‘Aboriginal culture’ is. Intricately related to this issue is the way that native title, like other Aboriginal rights and interests, tends to polarise Australians. This lecture will pose the question of why this is so and what this means if real social justice is to be achieved for Aboriginal people.

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### ***APPENDIX: Land Rights and Development Reform in Remote Australia***

**John ALTMAN, Craig LINKHORN and Jennifer CLARKE, and assisted by Bill FOGARTY and Kali NAPIER**

This report was produced for Oxfam Australia and can be viewed on their website: [www.oxfam.org.au](http://www.oxfam.org.au)

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