The Status and Rights of Indigenous Peoples in Australia

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1. Introduction

The indigenous people of Australia, the Aborigines and the Torres Strait Islanders, today consist of about 370,000 persons[1]. While the Torres Strait Islanders live on the islands in the far north east of Australia, Aboriginal people and peoples can be found throughout the continent. The legal and factual situation of indigenous Australians varies depending on a number of influences. Also, in Aboriginal and Torres Strait Islander communities the degree of adaptation to western "civilization" shows a big variety. While some persons of Aboriginal or Torres Strait Islander descent still maintain traditional ways of life in the rural areas others have completed higher education and maintain "well respected" jobs in the western industry.

In general, however, it can be said that the situation of persons of Aboriginal and Torres Strait Islander descent is far less advantageous with respect to health, education, housing and income than the situation of the non-indigenous population of Australia.[2] The statistics show that even in the 1990s the life expectancy of Aboriginals and Torres Strait Islanders was far lower (55 years) than the life expectancy of the rest of the population in Australia (75 years). This is due to the poor health conditions experienced by a lot of the indigenous Australians. While nutrition is low, medical support and health care do not reach most of the indigenous communities in the rural areas.[3]

The Australian Aboriginal and the Torres Strait Islander peoples, who have inhabited the continent for at least 50,000 (Aborigines) resp. 10,000 (Torres Strait Islanders) years, have one of the most complex and fascinating cultures of the world. Over recent decades indigenous Australians have sought to regain their cultural confidence and revive some of the traditional cultural traits which had been exercised for ten thousands of years prior to colonization in 1788. The main goal of indigenous Australians today in regaining their cultural traditions and identities is linked to the struggle for their land. While other issues such as social welfare, health care, equal opportunities, political participation and self determination also

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1 About 2 % of Australia's total population.

2 ATSIC, Indigenous Australia Today – An Overview by the Aboriginal and Torres Strait Islander Commission, Canberra 1995.

3 For a statistical overview see Indigenous Australia Today (note 2).

constitute important issues for Aboriginal and Torres Strait Islander people[4], the question of land rights and access to land is crucial. This is due to the fact that Australian Aboriginal and Torres Strait Islander people have a particularly close relationship with the land upon which they currently live and also with land upon which their ancestors lived. The traditional cultures were inseparably linked to the land and its features. [5] Only by living from the land and carrying out the rituals necessary to sustain the land could the indigenous cultures of Australia survive.[6]

Many of these cultures have been purposefully destroyed in the process of colonization. Aboriginal people were removed from the land of their ancestors; they were forbidden to speak their languages and to pass on stories of the dreamtime[7]; and family members, especially children, were separated from another. This meant that indigenous cultural knowledge, which had been transmitted orally, could not be handed down to future generations. After being forced to the brink of cultural extinction, indigenous peoples in Australia are today reclaiming their cultural heritage and re-establishing cultural traditions.

It is against this background that the following analysis of the legal situation of indigenous peoples in Australia must be viewed.

2. *Historical Background*

When Australia was "discovered" by the Europeans it was declared to be *terra nullius*.[8] This notion of international law with respect to acquisition of new lands presupposed that the land discovered was not inhabited by humans and could thus be claimed by the crown as "settled" rather than "conquered". Even though the discoverers and the first settlers had some contact with Aboriginal people in the first years – which in some cases developed into violent fights – these indigenous Australians were not considered to be in possession of the land.[9] On the contrary, the British held that since the Aboriginal cultures had no obvious social structure, there was no requirement to seek permission to use their land.[10] Thus, the Australian continent and Tasmania were settled by force without even raising the question of a possible contract or even by lawful conquest.

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[4] Second Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Canberra 1994, which is also devoted to the problem of Aboriginal deaths in custody.

[5] Blackburn J, *Millirrpum* v *Nabalco Pty Ltd and the Commonwealth of Australia* [1971] 17 FLR 141 (267); Hawke/Gallagher, Noonkanbah, Whose Land, Whose Law, Freemantle 1989, 36; McRae/Nettheim/Beacroft, Aboriginal Legal Issues, Commentary and Materials, Sydney 1991, 45; Wolfe/Bechard/Cizek/Cole, Indigenous and Western Knowledge and Resources Management System, Canada 1992, 18; Australian Law Reform Commission Report No. 31, Vol. 2, 1986, 125 et seq.

[6] Wolfe/Bechard/Cizek/Cole, ibid., 14 und 18; Wiggins, Yale Journal of International Law 18 (1993), 345 (348); Williams, West Virginia Law Review 96 (1994), 1132 (1163).

[7] The Dreamtime being the spiritual, cultural and historical center piece of Aboriginal cultures.

[8] Chesterman, Journal of Legal Pluralism 1998, 61.

[9] Ibid.; Crawford, Australian Law Journal 63 (1989), 392 et seq.

[10] Miller, Emroy International Law Review 12 (1998), 1175 (1191 et seq.).

As a result, many Aboriginal and Torres Strait Islander people were killed, families and tribes became dislocated and the survivors had to withdraw from the coastal areas, into the center of the continent, i.e. the desert areas.[11]

The notion of *terra nullius* was maintained for more than 200 years. Some attempts to challenge the application of this doctrine in the 1970s and 1980s remained futile.[12] It was not until 1992 that the High Court of Australia for the first time renounced the doctrine of *terra nullius* as being applicable to Australia and recognized that the Australian continent was in fact inhabited when the white settlers arrived.[13] This *Mabo* decision was a major turning point in the relationship between indigenous Australians and the settlers of the land.[14]

Hence, no treaties have been concluded between the indigenous peoples of Australia and the white settlers during the time of colonization. Instead, it is only since the *Mabo* Decision that the legal ownership of Aboriginal and Torres Strait Islander people with respect to land and waters have been subject to negotiations and legislation.[15]

3. Legal Status

The legal status of Aboriginal and Torres Strait Islander peoples is not explicitly recognized in the Australian constitution. On the contrary, it is argued that until 1967 the original Australian Constitution excluded indigenous peoples from its definition of Australian citizens.[16]

According to Sec. 51 (26) of the Constitution the Federal Parliament has the power to enact legislation with respect to "the people of any race, for whom it is deemed necessary to make special laws".[17] While a number of statutory laws are devoted to the rights and special needs of indigenous Australians,[18] this legislative power has not yet been employed to establish a comprehensive system of indigenous self-determination or self-government in Australia. The same holds true for state legislation.

In some of the states and territories of Australia some forms of self-government are exercised at a regional level. One example of the exercise of self-government is

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[11] C.f. Miller, ibid., 1175 (1190).

[12] *Coe* v *Commonwealth of Australia* [1979] 53 ALJR 403; *Millirrpum* v *Nabalco Pty Ltd* (note 5); see also Miller (note 10), 1175 (1191).

[13] *Mabo* v *Queensland* [1992] 66 ALJ 408.

[14] Lumb, International and Comparative Law Quarterly 42 (1992), 84 (98); Nettheim, Sydney Law Review 3 (1993), 223; Hill, Human Rights Quarterly 17 (1995), 303; McIntyre, University of New South Wales Law Journal 16 (1993); 57 et seq.; Mansell, Sydney Law Review 31 (1993), 168 et seq.

[15] See below under part 4 for more details of this decision and the implications of the 1992 *Mabo* decision.

[16] The Position of Indigenous People in National Constitutions, Conference Report, June 1993, Council for Aboriginal Reconciliation and Constitutional Centenary Foundation, 4.

[17] C.f. Hanks, University of New South Wales Journal 16 (1993), 45 et seq.

[18] For example the Native Title Act [1993], the Council of Aboriginal Reconciliation Act, the Aboriginal Heritage Protection Act. For more details of these statutory laws see below part 4.

the Kowanyama Aboriginal Community in Northern Queensland.[19] In this community local issues such as environmental practices and law and order problems are being dealt with by the community itself under the leadership of a council of elders.[20]

In the Northern Territory and in Northern Queensland a number of such arrangements can be found at the local level. The most prominent cases of self-government are the lands which are managed by the Aboriginal peoples themselves like Arnhemland in the north of the Northern Territory[21] and the Cape York Peninsula in the north of Queensland. These are also two areas of Australia where indigenous people have been able to maintain traditional ways of life and still exercise them today.

On the federal level, the Aboriginal and Torres Strait Islander Commission (ATSIC) was established by a parliamentary act in 1989/1990.[22] ATSIC is the official body of self-determination for Aboriginal and Torres Strait Islander peoples in Australia. While the main office of ATSIC operates in the federal context in Canberra, there are also 35 regional offices of ATSIC across the continent. ATSIC addresses the most important issues of Aboriginal and Torres Strait Islander peoples in Australia today. It has to be borne in mind, however, that ATSIC is 100 % governmentally funded. Thus, the actual independence of ATSIC as a self-governing body is not recognized by all members of Aboriginal and Torres Strait Islander peoples in Australia.

Apart from ATSIC the Australian Government supports the regional land councils which have been established over the past decades. The land councils operate at the local level and in many cases provide the link between Aboriginal interests and the Australian Local, State and Federal Governments. The councils' main area of activity is the question of land rights but the land councils are also very active in formulating other rights and needs of Aboriginal people in the rural areas of Australia. They have the potential to play an important role in the development of a system of indigenous self-government and self-determination in Australia.

These developments and institutions, however, do not constitute a general recognition of Aboriginal and Torres Strait self-determination or self-government as a legal system of autonomy for indigenous Australians. Also, there is no particular voting system to ensure that Aboriginal representatives are elected into State or Federal Parliament.

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[19] Chantrill, Journal of Legal Pluralism 40 (1998), 23 et seq.

[20] Ibid.

[21] On the basis of the Aboriginal Land Rights (Northern Territory) Act 1976.

[22] The legal basis of ATSIC is the Aboriginal and Torres Strait Islander Commission Act dating from 1989 while in 1990 the Commission was in fact established.

4. Recognition of Aboriginal Customary Law

a. Concept of Aboriginal customary law

Although there is no doubt that Aboriginal customary laws exist,[23] they are very complex conceptually and even more difficult to define in content. When considering the concept of Aboriginal customary laws one has to take into account the fact that the knowledge of these laws has been accumulated by anthropologists rather than by lawyers. Even though in a legal context the requirements of "law" can be understood very widely: "neither a recognizable sovereign nor a simple independent community should be prerequisites for or constitutive of law, rather emphasis should be placed on the processes of dispute resolution in traditional societies, without making the assumption that rules or procedures which may appear similar to those of the general legal system have similar consequences."[24]

But the concept of "law" is somewhat different and even wider for anthropologists: "in the field of anthropology, ..., 'law' tends to be used in a wider sense to comprehend all the main rules which control the behavior of a particular society regardless of any sanction, or of the type of sanction, attached."[25]

This latter approach is much closer to the perception that Aborigines have of law[26] – "Aboriginal Law connotes a body of jural rules and moral evaluations of customary and socially sanctioned behavior patterns"[27] – and it is this conceptual difference which constitutes one of the reasons why Aboriginal customary laws have not yet been legally recognized in Australia.

In Aboriginal cultures, the spiritual life is inseparable from the land that one lives on, with and from.[28] "The usual Aboriginal view holds that human ties to land date from The Dreaming, which is also the time when the world attained the shape it has today. Worldcreative powers (often called totemic spirits or ancestors) descended from the sky, rose from under the ground, or came across the sea to form the earth and establish human institutions. Then, their work complete, they sank into the ground or water, rose to the sky or journeyed into a far-off country. Most of these powers are depicted as having had animal or plant as well as human qualities, and under the former aspect they are prototypes of the various natural species. Because of this, human ties to land are bound up with ties to other forms of life".[29]

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[23] Australian Law Reform Commission, Summary Report No. 31 on the Recognition of Aboriginal Customary Laws (1986), 9; see also Hawke/Gallagher (note 5), 36 et seq.

[24] Blackburn J, *Millirripum* v *Nabalco Pty Ltd* (note 5).

[25] Dickey, Western Australia Law Review, 12 (1976), 350 (350).

[26] Dickey, ibid., 350 (360); Hawke/Gallagher (note 5), 36.

[27] McRae/Nettheim/Beacroft (note 5), 203.

[28] Hawke/Gallagher (note 5), 36; McRae/Nettheim/Beacroft (note 5), 45.

[29] Maddock, The Australian Aborigines, 2nd ed. Ringwood, 1982, 34/35; see also: Myers, Always Ask: Resource Use and Land Ownership among Pintupi Aborigines of the Australian Western Desert, in: Traditional Aboriginal Society, Edwards (ed.), Melbourne 1987, 96 (101).

From this follows that the relationship of the Aborigines towards the land is completely different than that of Europeans, as it is far more intimate and important for everyday and spiritual life. From this spiritual life the customary laws have been developed[30] and just as the land is inseparable from the spiritual life, the laws are part of this spiritual life as well and cannot be separated from either the spiritual life or the land.[31] Thus, it is very difficult to obtain complex knowledge about these aspects of the Aboriginal culture for most of the Dreaming and other spiritual knowledge are secret and not to be shared with anyone who is not authorized by the religion/culture itself.[32] But it can be said, that many sites carry a special significance because a spirit is living there or a Dream has created the site.[33] The meaning of these places entails a special care that is carried out with regard to the land. The other aspect of spiritual life is the existence of sacred sites. These sacred sites and the surrounding country "constituted a prohibited area, ... Within these sacred precincts all hunting and food gathering was forbidden. Even wounded animals could not be pursued into this forbidden zone, which could be entered only for ceremonial purposes."[34] This practice with regard to sacred sites provided inviolable sanctuaries for animals of all kinds.[35]

b. Protection and recognition of Aboriginal customary laws

While the customary laws with respect to the land and the spiritual and ritual life have not been recognized *in toto*, in 1984 the Aboriginal and Torres Strait Islander Heritage Protection Act was enacted, under which indigenous Australians can file applications to have certain sacred areas declared as Aboriginal and Torres Strait Islander Heritage. According to sec. 4 of this Act the purposes are "the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance to Aboriginal tradition". Violations of objects and areas being declared as Aboriginal Heritage are punishable under the Act.[36]

Aboriginal customary laws have also influenced environmental management practices. In some areas in Australia, in particular in the national parks of Kakadu and Uluru in the Northern Territory, traditional Aboriginal fire practices have been incorporated into the main environmental management system of the

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[30] See for the story on the creation of Aboriginal customary law: Dickey (note 25), 350 (362 et seq.).

[31] Hawke/Gallagher (note 5), 35/36 and 41; McLachlan, International and Comparative Law Quarterly, 37 (1988), 368 (372); McRae/Nettheim/Beacroft (note 5), 45; Berndt, Traditional Concepts of Aboriginal Land, in: Berndt (ed.), Aboriginal Sites, Rights and Resource Development, Perth 1982, 1 (7).

[32] McLachlan (note 31), 368 (372).

[33] Myers (note 29), 96 (101).

[34] Strehlow, Culture, Social Structure and Environment in Aboriginal Central Australia, in: Berndt/Berndt (eds.), Aboriginal Man in Australia, Sydney 1965, 143.

[35] Maddock (note 29), 33; Yapp, Natural Resources Journal, 29 (1989), 171 (175).

[36] *Norvill* v *Chapman*, 133 AL 226 (231).

parks.[37] The fire practices used by the Aborigines had to fulfill two purposes: first, they were used to prevent and control wild bushfires; and second, they were used to control the distribution, diversity, and relative abundance of plant and animal resources.[38] By the time the group returned to this part of the land, the vegetation would have recovered from the original usage and the fire and could provide food for the group again.[39] Also, these fires prevent uncontrolled bushfires which can result in major ecological losses. It is mainly for the latter reason that Aboriginal fire practices are employed in environmental management practices today. In the national parks of Kakadu and Uluru, for example, the local indigenous communities are involved in the park management and can thus exercise some of their traditions of caring for the land. [40] The same concept of cooperating with members of the local indigenous peoples and making use of traditional indigenous practices[41] is also employed in the national parks of Nitmulik (Katherine Gorge)[42] and

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[37] Cf. Baker/Woenne-Green/Mutitjulu Community Uluru, The Role of Aboriginal Ecological Knowledge in Ecosystem Management, in: Birckhead/De Lacy/Smith (eds.), Aboriginal Involvement in Parks and Protected Areas, Canberra 1992, 65 (68 et seq.); Yapp (note 35), 171 (174 et seq.); Head, Australian Aborigines and a Changing Environment – Views of the Past and Implications for the Future, in: Birckhead/De Lacy/Smith, 47 (53); see for indigenous fire practices also Coombs, Submission to the Commission on the Walpiri Land Claim, Centre for Resource and Environmental Studies Working Paper: HCC/8, Canberra 1991, 5; Hughes, Environmental Planning Law Journal 12 (1995), 37 (37 et seq.) with further references; Lewis, The Technology and Ecology of Nature's Custodians: Anthropological Perspectives on Aborigines and National Parks, in: Birckhead/De Lacy/Smith, 15 (19 et seq.) and Lewis, Fire Technology and Resource Management in Aboriginal North America and Australia, in: Williams/Hunn (eds.), Resource Managers: North American and Australian Hunter-Gatherers, Canberra 1986, 45.

[38] Lewis, ibid., 45 (45); Yapp (note 35), 171 (175).

[39] Head/Fullagar, Australian Aboriginal Studies 1991, 39 (39).

[40] De Lacy, Society and Natural Resources 7 (1994), 479 (479 et seq.); Meyers, University of Tasmania Law Review 14 (1995), 1 (26); Altman/Allen, Living off the Land in National Parks: Issues for Aboriginal Australians, in: Birckhead/De Lacy/Smith (note 37), 117 (128); Australian Law Reform Commission, Report No. 31 (note 5), 141 et seq.; Rose, Aboriginal Land Management Issues in Central Australia – Central Land Council – Cross-Cultural Land Management Project, Alice Springs 1992, 25 et seq.; Baker/Woenne-Green/Mutitjulu Community Uluru (note 37), 65 (66 et seq.); Beacroft, Aboriginal Law Bulletin 1987, 3; Blyth/deKoning/Cooper, Joint Management of Kakadu National Park, in: Birckhead/DeLacy/Smith (note 37), 263 et seq.; Craig, Environmental Law and Aboriginal Rights: Legal Framework for Aboriginal Joint Management of Australian National Parks, in: Birckhead/DeLacy/Smith (note 37), 137 (141 et seq.); Jackson/Crough, Australian Geographer 26 (2995), 44 (47); Yapp (note 35), 171 (174 et seq.); Stewart, Report under Section 10 (4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 on the Kakadu Conservation Zone, Canberra 1991, 19 et seq., who examines the aspect of cultural heritage under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 with respect to the Kakadu national park.

[41] Naete, University of New South Wales Law Journal 16 (1993), 161 (209 et seq.); see also Australian Law Reform Commission, Report No. 31 (note 5), 145 et seq. and Australian Law Reform Commission, Research Paper No. 15 as well as Boekel/Taylor, Australian Ranger Bulletin 4 (1988), 25 et seq., for further examples.

[42] The territory of the Nitmuluk National Park was leased by the local indigenous community to the government who provided for Aboriginal participation in the park's management. It is provided for in s. 10 (1) (a) Nitmiluk (Katherine Gorge) National Park Act NT 1989 that 8 of the 13 members of the management board of the national park be "traditional Aboriginal owners of the Park

Gurig (Coburg Peninsula)[43]. In this context the Deed of Management between Limilngan-Wulna and the Conservation Commission of the Northern Territory of 1994[44] also deserves mentioning, for it is also aimed at establishing a joint management structure.

These are examples in which an integration of traditional Aboriginal practices into the legal system has succeeded. There are, however, some problems which may occur when trying to recognize Aboriginal customary law. These problems mainly include the conceptual problem – Aboriginal customary laws are closely linked to the spirituality, the diversity problem – there are many different customary rules of Aboriginal communities all over Australia, and the secrecy problem. In order to recognize the customary laws of indigenous peoples the rules have to be known. This is not always possible with respect to Aboriginal customary laws, for Aboriginal cultures employ a complex system of knowledge about the laws. It may depend on the gender or the age of a person whether the laws and the underlying stories of the Dreamtime can be disclosed to these persons. Also, in many Aboriginal communities the information on certain rules are not to be made available to persons who are not members of that particular group.

It may be for these reasons, as well as for political reasons, that even more than a decade after the Report No. 31 of the Australian Law Reform Commission (ALRC) on the Recognition of Aboriginal Customary Laws most of the recommendations of the ALRC have not yet been implemented into the Australian legal system. In 1986, the ALRC undertook a comprehensive research on the subject and published its findings in a report on the recognition of Aboriginal customary laws. In this report, the particularities of Aboriginal customary laws were described and recommendations were developed. The report includes the areas of general principles, rules of Tribal Marriage, Child Custody, Fostering and Adoption, Criminal Law, Traditional Punishments and Sentencing as well as a general regime of recognition and the problems of evidence and procedure, proof of

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Act the protection of territories with particular significance to Aborigines shall be taken into account when establishing the plan of management; also see Blowes, Aboriginal Law Bulletin 2 (1991), 4 (6); Altman/Allen (note 40), 117 (129 et seq.); Australian Law Reform Commission, Report No. 31 (note 5), 144 et seq.

[43] According to the Coburg Peninsula Aboriginal Land and Sanctuary Act NT 1981 this national park has also been established on the lands of the local Aboriginal people who receive annual payments for the use of the park by the Northern Territory. S. 11 of the Act provides for free access and right to use the area of the national park. According to s. 19 (1), 4 of the 8 members of the management board shall be members of the local Aboriginal people. Furthermore, the Coburg Peninsula Aboriginal Land and Sanctuary Act NT 1981 envisages the respect for sites of particular significance for Aboriginal people when establishing the plan of management, s. 27 (4); Blowes (note 42), 4 (5); Altman/Allen (note 40), 117 (129); Billyard, Aboriginal Involvement in Northern Territory Marine Parks, in: Northern Territory University (ed.), Turning the Tide, Darwin 1993, 198 (203 et seq.).

[44] In this case the protected area was handed to the Northern Territory for administrative purposes by the Wulna. According to the Deed of Management 4 of 6 members of the management board are members of the Wulna and the cultural particularities of the Wulna have to be regarded when administering the protected areas.

Aboriginal customary law and forms and procedures of taking advice of Aboriginal Communities.

Due to the problems of recognition of Aboriginal customary laws the ALRC regarded any form of recognition based on a restatement or codification inappropriate.[45] Rather, the Commission adopted a "specific" or "functional" approach to recognition, that is a detailed examination of specific areas of the general law with a view to accommodation of elements of Aboriginal customary laws.[46] This is why, when considering the Aboriginal customary hunting and gathering rights, the Commission also took into account the issue of competing resources.[47] Following this approach a system has to be created that establishes rules of conflict of laws in order to solve conflicts that arise in a coexistent system of laws. It would have to be clear which rules prevail in circumstances when Aboriginal customary laws concerning land protection are irreconcilable with the Australian legal system concerning the environment.

While a general recognition of Aboriginal customary laws is still lacking at the federal and state statutory level, there have been some attempts to recognize some particularities of Aboriginal cultures and legal concepts as for example customary marriages, adoption and sentencing for criminal offences.[48] Examples of such recognition are local indigenous justice groups such as the Kowanyama Aboriginal Justice Group. In 1991 a program was established to enable the Kowanyama Community to delegate matters of local law and order to the community-based local justice group.[49] This group consists of indigenous elders and is devoted to community control and self-management with respect to crime prevention, conflict resolution and offender management. Under the Community Services (Aborigines) Act of 1984 the community councils are enabled to administer their own by-laws for the purposes of ensuring good government in accordance with local Aboriginal custom.[50] This concept has proven rather effective with respect to alcohol abuse-related offences and other frequent law and order problems.[51] The Kowanyama Program provides the justice group with a broad discretion to impose traditional sanctions such as shaming, public humiliation or absence from the

[45] Australian Law Reform Commission, Report No. 31 on the Recognition of Aboriginal Customary Laws (1986), Vol. 1, paras. 202, 460–462, 623.

[46] Ibid., at para. 209.

[47] Australian Law Reform Commission, Report No. 31 (note 5), paras. 881 et seq.

[48] For examples see Australian Law Reform Commission, Summary Report, No. 31, 1986, and Reference Papers No. 1 (Promised Marriage in Aboriginal Society), No. 2 (The Recognition of Aboriginal Customary or Tribal Marriage: General Principles), No. 3 (The Recognition of Aboriginal Tribal Marriage: Areas for Functional Recognition), No. 4 (Aboriginal Customary Law: Child Custody, Fostering and Adoption), No. 6 (Aboriginal Customary Law and Substantive Criminal Law), No. 6A (Appendix: Cases on Traditional Punishment and Sentencing), No. 7 (Aboriginal Customary Law: The Sentencing and Disposition of Offenders).

[49] Chantrill (note 19), 23 et seq.

[50] Ibid., 23 (31).

[51] Ibid., 23 (49 et seq.).

community for a certain time; or even physical punishment in cases of unlawful behavior.[52]

In the absence of a general recognition of Aboriginal and Torres Strait Islander customary laws such approaches at the local level are a first step towards indigenous self-government and the recognition of indigenous laws in Australia.

5. Protection of Indigenous Rights

There is not one particular legal instrument on the State/Territory or Federal level protecting the needs, interests and rights of indigenous Australians. The constitution itself does not provide for such protection but rather confers the legislative power for Aboriginal issues to the Federal Government. This legislative power is not conclusive. Thus, there are some federal laws as well as legal acts of the states and territories with respect to indigenous issues.

a. Legal acts

It would be impossible to discuss all Australian legal acts devoted to the protection and the benefit of Aboriginal People at the federal and the state/territory government. Thus, this section will briefly introduce the main legal acts which have been enacted at the federal level in order to protect the rights of indigenous Australians.

The main laws adopted to protect the needs, interests and rights of Aboriginal and Torres Strait Islander Peoples at the federal level are the Native Title Act of 1993, the Aboriginal Heritage Protection Act of 1984, but also the Racial Discrimination Act of 1975. The Native Title Act sets out a system of rules under which land can be reclaimed by indigenous Australians. This Act and its implications will be discussed in detail below, part 6.

The Aboriginal Cultural Heritage Protection Act is, as mentioned above, aimed at the protection of sacred sites and objects according to Aboriginal culture. Corresponding Acts have been enacted in some of the States and Territories.

Also, mention has to be made to the federal Council of Aboriginal Reconciliation Act of 1991. Under this Act the Council for Aboriginal Reconciliation has been established in "order to promote the process of reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community, based on the appreciation by the Australian community as a whole of Aboriginal and Torres Strait Islander cultures and achievements of the unique position of Aborigines and Torres Strait Islanders as the indigenous peoples of Australia, and by means that include the fostering of an ongoing national commitment to co-operate to address Aboriginal and Torres Strait Islander disadvantage."[53] According to its functions under the Act the council's main task is at the policy level where,

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[52] Ibid., 23 (52).

[53] S. 5 of the Council for Aboriginal Reconciliation Act.

amongst other things, it provides a forum of discussion, undertaking initiatives for the purpose of promoting reconciliation between indigenous and non-indigenous Australians, promoting a better understanding of indigenous cultures and history of Australia as well as advising the Minister on Aboriginal Affairs on policies to promote reconciliation and to discuss these initiatives with members of indigenous peoples.[54] The powers of the council are not explicitly limited but defined to include the invitation of submissions, the holding of inquiries, the organization of conferences, the undertaking of research and statistical surveys and the organization of public education activities.[55] According to Sec. 14 (1) the Council consists of 15 to 25 members of which at least 12 must be Aborigines and 2 Torres Strait Islanders. The Chairperson also must be an Aborigine. Most of the members are appointed by the Governor-General, Sec. 14 (2), the remaining members consist of persons nominated by the Parliament and the Minister for Aboriginal Affairs as well as the Chairperson and Deputy Chairperson of the Aboriginal and Torres Strait Islander Commission. The Act is laid out to conclude its functions by 1st of January 2001 when the Council for Aboriginal Reconciliation Act ceases to exist, Sec. 32.

Apart from these acts which are solely devoted to Aboriginal and Torres Strait Islanders rights reference has to be made to the federal Racial Discrimination Act of 1975. This Act is also an important instrument with respect to the implementation and development of rights of indigenous Australians. The Australian Racial Discrimination Act has incorporated the provisions of the International Convention on Elimination of All Forms of Racial Discrimination (CERD). This international instrument does not provide for any particular protection of indigenous peoples but the underlying principles of CERD ensure the equal treatment of indigenous Australians with other parts of the population.

b. Institutional Protection

In Australia some institutions have been set up over recent decades to provide a forum for indigenous peoples and to enable an advancement of their situation. The most important institutions are ATSIC at the federal and regional level, and the land councils[56] in the respective states and territories. But the Council for Aboriginal Reconciliation[57] and the Native Title Claims Tribunal[58] should also be mentioned as institutions devoted to the protection of the rights of indigenous Australians.

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[54] S. 6 (1) of the Council of Aboriginal Reconciliation Act.

[55] S. 7 (2) of the Council of Aboriginal Reconciliation Act.

[56] See above part 2.

[57] See above under 4.a.

[58] The Native Title Claims Tribunal was established under the Native Title Act of 1993 and will be dealt with in more detail below, part 4.

The Aboriginal and Torres Strait Islander Commission was established in 1990 by the Commonwealth, i.e. the Federal Government. The interests of ATSIC are represented in parliament by the Minister of Aboriginal Affairs. ATSIC is a decentralized organization, combining representative, policy-making and administrative elements. ATSIC is responsible for administering many Commonwealth Government programs for indigenous Australians. These programs are devoted to employment schemes, health and community services, commercial issues such as land acquisition and business enterprises and social justice, including legal aid.

At the moment, about 39 % of the ATSIC staff are indigenous but the goal is to recruit at least 60 % of the staff from Aborigines and Torres Strait Islanders.

Amongst the programs administered and financed by ATSIC the Aboriginal Legal Service deserves particular mention. This Service holds offices all over Australia and provides legal counseling for indigenous Australians.

The legitimacy of ATSIC, however, has been disputed in the past by indigenous Australians as being funded and influenced by the government as well as by non-indigenous Australian representatives for management failures.

Apart from these statutory institutions a number of institutions and positions have been created such as the Institute for Aboriginal Studies in Canberra and the Aboriginal and Torres Strait Islander Social Justice Commissioner. The Social Justice Commissioner derived his mandate from the Human Rights and Equal Opportunities Act of 1986. According to Sec. 46 of this Act the Aboriginal and Torres Strait Islander Social Justice Commissioner prepared an annual report to the government covering the most important issues with respect to social justice for Aboriginal and Torres Strait Islander Peoples. The report of 1994 for example dealt with issues of social justice policy, indigenous health issues and the status of the implementation of the recommendation of the Australian Law Reform Commission on the problem of Aboriginal deaths in custody.[59]

c. Judicial protection

The Australian judicial system has been very hesitant to acknowledge Aboriginal rights and indigenous Australians have only recently begun to use the law as an instrument to ameliorate their situation. Today, there are a number of cases dealing with the rights of indigenous peoples under Australian law. Only a few, however, can be mentioned here.

A turning point in the process of "using the law" has been the *Mabo* decision in 1992. In the *Mabo* decision the High Court held: "Australian common law recognizes 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 or customs, to their traditional lands", and Judge Brennan pointed out: "the facts as known today do not fit the 'absence of law' or 'barbarian' theory

[59] Second Report of the Social Justice Commissioner (note 4), Executive Summary; see also The Royal Commission into Aboriginal Deaths in Custody Final Report, 1991.

underpinning the colonial reception of the common law of England in its relation to indigenous people". From this the conclusion followed: "Where political power has not been exercised to expand the Crown's radical ownership in disregard of native title, there is no reason to deny the law's protection to the descendants of indigenous citizens who can establish their entitlement to appropriate rights and interests that survived the Crown's acquisition of sovereignty."[60] With this decision the High Court for the first time in Australian history parted with the presumption that "when the territory of a settled colony became part of the Crown's dominions, the law of England so far as applicable to colonial conditions became the law of the colony and, by that law, the Crown acquired the absolute beneficial ownership of all land in the territory so that the colony became the Crown's demesne and no right or interest in any land in the territory could thereafter be possessed by any other person unless granted by the Crown."[61] The justification for this change in judicial reasoning was formulated by Judge Brennan in the *Mabo* decision as the necessary modification of the Australian legal systems according to contemporary notions of justice and human rights (especially equality before the law).[62] This case was the origin of the Native Title Act of 1993 which will be discussed below and a number of other initiatives aimed at the improvement of the situation of the indigenous inhabitants of Australia.

Following the *Mabo* decision, the High Court handed down the *Wik* decision in 1996, ruling that a governmental grant of a pastoral lease over a given area does not necessarily extinguish native title over the same area. The question, however, what exactly does constitute a valid extinguishment of native title under the Native Title Act of 1993 was left open by the Court.

6. Particular Rights

As mentioned above, land and environment play a vital role in the cultural identity of Australian Aborigines. Thus, the rights with respect to the land, their cultural sites and traditions are of particular interest to Aboriginal and Torres Strait Islander people.

a. Land rights

The land rights issue has been subject to a lot of controversy over the last years. Prior to the *Mabo* decision of the High Court in 1992 the doctrine of communal native title had been rejected by the courts.[63] Following the *Mabo* decision and

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[60] *Mabo* v *Queensland* (note 13).

[61] See for example Supreme Court of New South Wales, in: *Attorney-General* v *Brown*, (1847) 1 Legge 312 (316); and *New South Wales* v *The Commonwealth (the Seas and Submerged Lands Case)*, (1975) 135 C.L.R. 337 (438 et seq).

[62] See also Webber, Sydney Law Review 17 (1995) 5 et seq.; Hill (note 14), 303 et seq.

[63] *Millirrpum* v *Nabalco Pty Ltd* (note 5); *Coe* v *Commonwealth* (note 12).

the departure from the notion of *terra nullius*, the Federal Government in 1993 enacted the Native Title Act.

The Native Title Act comprises a complex system of recognition of native title claims, setting the conditions for such a claim along with the procedure to have the approved native title claim registered with the National Native Title Registrar. The main objects are according to s. 3 of the Act: "(a) to provide for the recognition and protection of native title and (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings and (c) to establish a mechanism for determining claims to native title and (d) to provide for, or permit, the validation of past acts invalidated because of the existence of native title."

Native title under the Act means "the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where (1) the rights and interests are possessed under traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders, and (2) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs have a connection with the land or waters, and (3) the rights and interests are recognized by the common law of Australia."[64]

In order to have a native title recognized, an application has to be filed with the Native Title Registrar. Should the application be rejected by a presidential member of the Registrar an appeal to the Federal Court is possible. After the application has been registered, persons whose interests may be affected by the application are notified. If no objections are made the National Native Title Tribunal will determine the native title. In case of an objection the National Native Title Tribunal will mediate or refer the matter to the Federal Court. After the determination of native title by the National Native Title Tribunal the native title is registered with the National Native Title Register.[65] It is determined (a) whether native title exists in relation to a particular area of land or waters, (b) if it exists (i) who holds it and (ii) whether the native title rights and interests confer possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others and (iii) those native title rights and interests that the maker of the determination considers to be of importance; and (iv) in any case – the nature and extent of any other interest in relation to the land or waters that may affect the native title rights and interests.[66]

Subsequent to the native title legislation the High Court of Australia handed down the *Wik* v *Queensland* decision in 1996 which is devoted to the relation between pastoral leases and native title claims. The High Court held that native title rights and interests may exist over land which has been subject to a pastoral lease or other forms of Crown lease. If the native title survives, it will co-exist with the other rights with respect to the land. This decision made clear that the

[64] S. 223 Native Title Act.
[65] Part 2 Dev. 1 of Native Title Act.
[66] S. 225 Native Title Act.

doctrine of native title, as being developed in the *Mabo* decision, is applicable to a significant proportion of the land area of Australia. This may be the reason why, in the light of the *Wik* decision, the Federal Government developed a "10 Point Plan" allowing for widespread extinguishment of native title over time, dismantling the right to negotiate for native title holders in respect of pastoral leases and reducing the ability of native title holders to benefit from or enjoy their title. Thus, indigenous Australians have expressed their concern about the introduction of this plan.[67] Based on the 10 point plan, the federal government introduced the Native Title (Amendment) Act in 1998. According to this Act the applications for registration have to be made to the Federal Court instead of the National Native Title Tribunal. Also, the "right to negotiate" with respect to conflicting uses of the land in question was considerably limited. Furthermore, the responsibilities of the National Native Title Tribunal may be assumed by State and Territory bodies to be established by legislative acts. Finally, applicants will be required to confirm that they have the authority of the people, clan or family for whom the application is made.

This legislative change has been subject to a decision by the Committee on the Elimination of Racial Discrimination in March 1999, in which the concern of the Committee about these developments was expressed[68]. The Committee called for urgent action by the government of Australia and kept the matter on its agenda under its early warning and urgent action procedures.

In addition to Federal legislation, land rights legislation has been enacted by the States/Territories. It has to be noted, however, that the situation of most Aboriginal people has not changed dramatically since the land rights legislation has come into effect. This is mainly due to the fact, that the crucial prerequisite for reclaiming land is the providing of evidence that the particular people still holds traditional ties with respect to the land. In many cases, this is impossible because in the early settling years Aboriginal people were removed from their land, cultural groups were torn apart and shipped to other places on the vast continent. Thus, many Aboriginal people did not survive as cultural identities with close relation with their land. Either the people did not exist any longer or the people was far away from its land or the people who could have told the stories of the land and thus enforced the cultural identity did not survive. Many aboriginal cultures have been lost in this process and thus, the special relationship with the land could not be upheld in a lot of cases.

Apart from the strict laws, however, some approaches have been developed. First, the Aboriginal territories have to be mentioned. In the State of Queensland and the Northern Territory vast areas have been set aside for the local Aboriginal peoples to live according to their traditional lifestyle. The Aborigines in these areas have the right to exclude all other persons from entering these lands. While it

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[67] See for example ATSIC, The Ten Point Plan on Wik and Native Title, June 1997, 7.

[68] Decision of the Committee on the Elimination of Racial Discrimination, 18.3.1999, CERD/C/54/Misc.40/Rev.2.

is possible to enter these areas, one has to obtain a special permit from the people on the land and usually, one will only be allowed on the basis of a personal invitation of one of the inhabitants or as a member of a guided tourist group.

Another example of a different land rights approach are the national parks of Kakadu and Uluru. These areas have been handed back to the Aborigines in the late 1980s. At the same time, however, a long term lease was agreed upon by the indigenous holders of the land and the government. Thus, the government is now the lease-holder for these areas on which national parks have been established. There is an annual fee which the government has to pay to the indigenous peoples owning the land. Also, arrangements were taken to integrate the owners of the land into the management of the parks. Thus, on the board of management of Kakadu and Uluru national park there are also members of the Aboriginal peoples owning the land. Also, the traditional owners have an input in the actual management of the park.

b. Fishing/hunting/gathering rights

The particular relationship of Aboriginal and Torres Strait Islander Peoples with the land has already been pointed out.[69] An important part of this relationship even today, as most indigenous inhabitants of Australia have access to the market economy, are traditional fishing, hunting and gathering practices.[70] This is due to the fact that these practices not only constitute a means of subsistence but also form an integral part of Aboriginal and Torres Strait Islander cultures.[71] These practices also form part of rituals, as for example preparing for ceremonies and constitute an important part of the Aboriginal cultural identity. While today many indigenous Australians live in the cities, the majority of indigenous Australians still has its roots in the rural areas and hunting, fishing and gathering practices are used to complement the diets and to pursue cultural traditions.

Traditional Aboriginal hunting, fishing and gathering rights are not generally recognized under Australian law. Even after the Australian Law Reform Commission in 1986 devoted a chapter of its report on the recognition of Aboriginal customary laws to traditional hunting, fishing and gathering rights, these traditions and laws have not been incorporated into the legal system as a whole. There are, however, a number of exemptions from legislation regulating hunting, gathering and fishing rights applying to indigenous Australians.[72] Some of these exemptions

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[69] See above part 3; Hill (note 14), 303 (308).

[70] Sweeney, University of New South Wales Law Journal 16 (1993), 97.

[71] Ibid.

[72] For example: New South Wales Fisheries Act 1902, s. 23 (4); New South Wales Fisheries and Oyster Farms (Amendment) Act 1957, s. 25 A(b); Northern Territory Birds Protection Ordinance 1928, s. 19 (a); Northern Territory Wildlife Conservation and Control Ordinance 1962, s. 54 (1); Northern Territory Wildlife Conservation and Control Ordinance 1966, s. 8; Northern Territory Parks and Wildlife Conservation Act 1976, s. 122; Northern Territory Fish and Fisheries Act 1979, s. 14, 93; Queensland Native Birds Protection Act Amendment Act 1877, s. 1; Queensland Native

are restricted to certain conditions which have to be met in order to qualify for the exemption. Such conditions include the "traditional use", "ceremonial purpose" or "religious purpose".[73] Other conditions can impose the manner of taking such as ensuring that indigenous gathering does not harm the plants or interfere unreasonably with their means of propagation[74] or restricting the taking for community use.[75] But there are also statutory provisions which expressly rule out traditional Aboriginal taking in order to protect wildlife.[76,77]

Indigenous rights to hunting, fishing and gathering can also not be assumed to exist under Australian common law. This was confirmed by the Australian High Court in *Walden* v *Hensler*[78] in 1987. In this case an Aboriginal elder of the Gungalida people in Queensland acting in accordance with Aboriginal custom was charged and convicted for taking a bush turkey in contravention of the Fauna Conservation Act 1974 (Qld). Since this ruling, arguments have been made that after the *Mabo* decision, which expressly includes hunting, gathering and fishing rights and interests into the definition of native title rights and interests, not only Aboriginal land rights but also traditional rights concerning hunting, fishing and gathering are to be recognized at common law.[79] Accordingly, Art. 223 (2) Native Title Act includes hunting, gathering, and fishing rights in the rights and interests which can be subject to native title. Each of these claims to native title however, would have to be determined according to the provisions of the Native Title Act. A general exemption in favour of indigenous hunting, gathering and fishing rights in the Australian legal system can, however, not be found.

Animals Protection Act 1906, s. 9 (c); Queensland Animals and Birds Act 1921, s. 17 (b); Queensland Aborigines and Restriction of the Sale of Opium Act 1927, s. 2; Queensland Fauna Protection Act 1937, s. 24; Queensland Fauna Conservation Act 1952, s. 78; Queensland Fisheries Act 1957, s. 4 (i); South Australia Fisheries Act 1878, s. 14; South Australia Fisheries Amendment Act 1893, s. 8; South Australia Fisheries Act of 1904, s. 22 and 1917, d. 48; South Australia Birds Protection Act 1900, s. 4; South Australia Animals Protection Act 1912, s. 18; South Australia Animals and Birds Protection Act 1919, s. 20 (a), 21; South Australia Fauna Conservation Act 1964, s. 42 (1); Victoria Fisheries and Game Act 1864, s. 39; Victoria Protection of Game Act 1867, s. 12; Victoria Fisheries Act of 1873, s. 39, of 1890, s. 41; of 1915, s. 4; of 1928, s. 4 and of 1958, s. 4; Western Australia Preservation of Game Act 1847 s. 13; Western Australia Fisheries Act of 1899, s. 11 and of 1905, s. 43/56; Western Australia Fauna Protection Act 1950, s. 23; Western Australia Fauna Protection Act Amendment Act 1954, s. 13 (c); Western Australia Wildlife Conservation Act Amendment Act 1976, s. 11; Western Australia Fisheries Act Amendment Act 1975, s. 15.

[73] See for example National Parks and Wildlife Conservation Act 1975 (Cht), s. 70 (1).

[74] See for example National Parks and Wildlife (Hunting and Gathering) Regulation 1985 (NSW), s. 4.

[75] See for example Queensland Community Services (Aborigines) Act 1984, s. 77 (1); Queensland Community Services (Torres Strait) Act 1984, s. 76 (1)(a); Queensland Local Government (Aboriginal Lands) Act 1978, s. 29 (1)(a).

[76] For example Queensland Nature Conservation Act 1992.

[77] For a detailed overview of the specific laws at the Federal and the state level see Sweeney (note 70), 97 (99 et seq.) and Australian Law Reform Commission, Report No. 31 (note 5).

[78] (1987) 163 CLR 561; 61 ALJR 646; 74 ALR 173.

[79] Sweeney (note 70), 97 (103).

Apart from exemptions from statutory provisions on environmental management and protection Aboriginal practices including hunting, fishing and gathering can also be integrated into the system of management and conservation.

As mentioned above, in some national parks, like the Kakadu and Uluru national parks, indigenous communities are involved in the park management and can thus exercise some of their traditional practices.[80] The same concept is applied in the national parks Nitmulik (Katherine Gorge)[81] and Gurig (Coburg Peninsula)[82].[83] Also, reference has to be made to the Deed of Management between the Limilngan-Wulna and the Conservation Commission of the Northern Territory of 1994.[84] These are approaches which enable indigenous Australians not only to maintain their cultural traditions but also to participate in the management and the conservation of the environment allowing for development of the cultural traditions. But the main characteristic of this "cooperation approach" is the recognition of Aboriginal and Torres Strait Islander cultures and the value that is placed on the indigenous knowledge. In practice, this approach is still in the process of being developed but when applied seriously, it could prove to be beneficial to indigenous Australians as well as to the environment.

c. Cultural rights

As discussed above, in 1984 the Federal Government passed the Aboriginal and Torres Strait Islander Heritage Protection Act aimed at the protection of sites and objects of particular significance to Aboriginal peoples. Apart from the protection of these sites and objects from destruction and violation, however, the question of protection of indigenous intellectual property arose. The Aboriginal art industry is perhaps the most successful indigenous industry in Australia.[85] The indigenous art industry in many cases constitutes the only means of self-sufficiency for Aboriginal people and to escape the dependency from government funded assistance. The Aboriginal art industry today gives work to thousands of people, i.e. the artists themselves but also the persons managing the arts and craft centers all over Australia where the indigenous works are being sold. Some objects, like paintings but also fabric designs are being sold internationally as well as nationally.[86] The commercialization of Aboriginal designs has raised the question of copyright protection for indigenous designs.

The first case brought to court was the claim of John Bulun Bulun in 1989.[87] Bulun Bulun's paintings were reproduced on T-shirts by a shirt manufacturer

[80] See the literature above, note 40.
[81] For more detail see above, part 3.
[82] For more detail see above, part 3.
[83] See the literature above, note 41.
[84] For more detail see above, part 3.
[85] Golvan, European Intellectual Property Review 14 (1992), 227.
[86] Cf. ibid.
[87] Golvan, European Intellectual Property Review 11 (1989), 346 et seq.

without Bulun Bulun's permission. When Bulun Bulun brought an action for infringement of copyright and breaches of the Trade Practices Act 1974 in the Federal Court in Darwin the manufacturer and the retailers of the shirts agreed to cease the production of the design and to deliver all remaining stock of the shirt in question. The case was subsequently settled and a substantial payment was made to the artists whose designs had been used.[88] Another case concerned the "Morning Star Pole" which, being a traditional design of the Galpu clan, was – with the later disputed permission of the author – used on the 10$ note by the Reserve Bank of Australia.[89] Subsequently, the indigenous author of the design argued that the right to permit the reproduction of the design rested not only with the author of the design but with the tribal owners of the right. Thus, it was not possible for the author to give a valid permission for the reproduction of the design.[90] These cases demonstrate the underlying problems of assigning copyright protection to Aboriginal art work. Under the Copyright Act of Australia the individual creator is deemed to have a property right in the copyright interest whereas according to Aboriginal law, ownership of rights are understood as collective rights which are managed on a custodial basis according to Aboriginal tradition. Also, under Aboriginal law, only certain artists are permitted within the tribe to depict certain designs. Thus, the legal protection of indigenous art works would have to include the concept of joint ownership of the designs and also take into account the traditional value and significance of some of these designs. While some designs do not carry any particular cultural significance others depict the sacred and secret stories of the respective cultures of the indigenous peoples. Australian copyright and trade mark laws have not yet provided for a protection of indigenous designs which take into account these particularities due to Aboriginal and Torres Strait Islander cultures.[91]

7. Damages

The Australian legal system does not provide for damages based on the colonization as such. As shown in this paper, there are some approaches to "right the wrongs" with respect to the indigenous inhabitants of Australia such as the Council of Reconciliation and the Native Title Act. But monetary compensation for the losses suffered with respect to land, culture and personal grievances is not envisaged by the law.

It is only the Native Title Act of 1993 which provides for compensation under certain circumstances. Under the Act compensation can be claimed for in the case of a native title claim in accordance with the act has been lost, diminished, impaired or in other ways affected by the Act.[92] Compensation according to the Act

[88] Ibid.

[89] Grey, Law Institute Journal 66 (1992), 46.

[90] Golvan (note 85), 227 (229); Grey (note 89), 46.

[91] Cf. Golvan, Aboriginal Law Bulletin, 1992, 5 (8).

[92] S.51 (1) Native Title Act.

shall be monetary compensation and in determining the compensation other payments of compensation under laws of States, Territories and the Commonwealth for "essentially the same act" have to be taken into account.[93] In order to obtain compensation in accordance with the Native Title Act, an application has to be filed with the Native Title Registrar.[94] Also, compensation is provided for in the case of extinguishment of native title in the past[95] or when native title claims fail due to past State or Territory acts.[96] In the latter case compensation may be recovered from the State or Territory.[97] Claims for compensation to be fulfilled by the Commonwealth are to be covered by the Consolidated Revenue Fund.[98]

8. Conclusion and Outlook

In summarizing, one has to acknowledge that over the last few years a number of approaches have been taken to accommodate the needs and rights of indigenous Australians. There still remains a lot to do to right the wrongs of the past. The government(s) of Australia have undertaken some steps into the right direction. But it will be crucial to follow these initiatives and to incorporate the Aboriginal and Torres Strait Islander peoples in the process. There is also a growing number of, partly government funded, initiatives of Aboriginal communities to improve their situation. These initiatives cover all different aspects of life like regaining cultural identity, tracing aboriginal cultural heritage items from museums and collections all over the world, keeping in close contact with other indigenous peoples from all over the world, participating in the international process of formulating indigenous rights, but also developing programs for rural Aboriginal communities, offering training and job opportunities.

Thus, it is a sociological process which can be supported, enhanced, sped up but also slowed down by the law. It will be up to the international community and States like Australia to set the standards needed to ensure the survival of indigenous cultures in today's world.

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93 S. 51 (5) and 49 (2) Native Title Act.
94 S. 50 (2) Native Title Act.
95 S. 17 Native Title Act.
96 S. 20 Native Title Act.
97 S. 20 (3) Native Title Act.
98 S. 53 et seq. Native Title Act.