RE: Margaret Stephenson* INDIGENOUS LANDS AND CONSTITUTIONAL REFORM INAUSTRALIA: A CANADIAN COMPARISON

Dear Members of the Referendum Council

Please get your fellow Referendum Council member, former High Court Chief Justice Murray Gleeson to explain how the High Court has legal jurisdiction to void Sec 25 of the Commonwealth Constitution as a breach of the rule of law inherent in the Constitution as scheduled by Covering Clause 9 of the Constitution Act 1900, which was enacted under and so in accordance with the Magna Carta.

Voiding Sec 25 by High Court legal action to uphold Magna Carta due process is as legally acceptable a way, as is inserting Canadian Sec 35 style provisions into the Covering C lauses of the Act, as a Referendum on Sec 25 and Placitum 51 (xxvi) to uphold the Rule of Law in Covering Clause 9 for due process for Aboriginal people by removing Sec 25 to end legal racism.

The following position taken on the Canadian Constitution Sec 35 refers in particular to the Council's terms of reference.

PROPOSAL FOR RECOGNITION:

Referendum Council

http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s25.html

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 25

Provision as to races disqualified from voting

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s61.html

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 61

Executive power

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Covering Clauses Amendments & NOT the current proposals for repealing Section 51 (xxvi) & annexing a Section 116A for Constitutional recognition

Kaurna Elder Lynette Crocker's Covering Cluases proposal for Kanuk Sec35 style rights

http://thestringer.com.au/mary-graham-calls-for-sovereignty-national-discussion-1595#.VELyzRaTCno

Proposal for amendments to the Australian Constitution to have a formal and legal inclusion of all Aboriginal people within the Australian Constitution.

The following proposal for amendments to the Australian Constitution may meet with the "perceived" necessity to have a formal and legal inclusion of all Aboriginal people within the Australian Constitution. It is based on the terms of the inclusion of the First Nation peoples of Canada in the 1982 new Canadian Constitution and Charter of Rights.

The advantage that this proposal raises is that it enables the recognition of Aboriginal rights in the context of enacting a Charter of Rights to secure the legal and equal recognition of formal Aboriginal rights alongside every other constitutional right set out in the constitution and Charter. It also lays the ground for the representatives of the Aboriginal people to be given a legal identity with a constitutional foundation.

On this basis Aboriginal representatives would have a position from which to call for and to negotiate the settlement of a treaty to finalize all unfinished business.

_____

PROPOSED amendment to the Commonwealth of Australia Constitution Act (1901) by the insertion in Clause 9 of Chapter IX–Charter Enacting Aboriginal Rights to provide for the insertion in the Constitution of placita 129 and 130 to institute provisions recognizing and enforcing the Rights of the Aboriginal Peoples of Australia:

Clause 9 of the Commonwealth of Australia Constitution (1901) is hereby amended to provide for the addition of Chapter IX–Charter Enacting Aboriginal Rights in Clause 9 and the Schedule is amended by the insertion of placita 129 and 130 as follows [see in red italics]:

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT – CLAUSE 9

Constitution [see Note 1]

The Constitution of the Commonwealth shall be as follows:

The Constitution

This Constitution is divided as follows:

Chapter I–The Parliament

Part I–General

Part II–The Senate

Part III–The House of Representatives

Part IV–Both Houses of the Parliament

Part V–Powers of the Parliament

Chapter II–The Executive Government

Chapter III–The Judicature

Chapter IV–Finance and Trade

Chapter V–The States

Chapter VI–New States

Chapter VII–Miscellaneous

Chapter VIII–Alteration of the Constitution

Chapter IX–Charter Enacting Aboriginal Rights

Part I–The Rights of the Aboriginal Peoples of Australia

Part II–The Australian Charter of Rights and Freedoms
Annexure: *A Bill of Rights and Freedoms*
The Schedule
…
[Repeal Section 25] {OR HAVE THE HIGH COURT DECLARE SECTION 25 INVALID UNDER THE RULE OF LAW AS IT DID WITH THE INVESTED POWER OF THE PARLIAMENT UNDER SECTION 101 OF THE CONSTITUTION TO GRANT TO A NON-JUDICIAL 7 YEAR TERM MEMBER APPOINTED TO THE INTER-STATE COMMISSION, SUCH POWERS OF ADJUDICATION AS IT SAW FIT}
…
Chapter IX–Charter Enacting Aboriginal Rights
Part I–The Rights of the Aboriginal Peoples of Australia
129. The Rights of the Aboriginal Peoples of Australia
Recognition of existing Aboriginal, native title and proclaimed rights.
RIGHTS OF THE ABORIGINAL PEOPLES OF AUSTRALIA
(1) The existing Aboriginal, native title and proclaimed rights of the Aboriginal peoples of Australia are hereby recognized and affirmed.
Definition of "Aboriginal peoples of Australia"
(2) In this Act, "Aboriginal peoples of Australia" includes the Torres Strait Islander peoples of Australia.
Land claims agreements
(3) For greater certainty, in subsection (1) "native title and proclaimed rights" includes rights that now exist by way of land claims agreements or may be so acquired.
Aboriginal, native title and proclaimed rights are guaranteed equally to both sexes.
(4) Notwithstanding any other provision of this Act, the Aboriginal, native title and proclaimed rights referred to in subsection (1) are guaranteed equally to male and female persons.
Commitment to participation in constitutional conference.
The government of Australia and the State and territory governments are committed to the principle that, before any alteration is effected to benefit of the Royal Proclamations in respect of the Aboriginal peoples of Australia that have been issued by the Imperial Crown, and including the Letters Patent of 19 February, 1836, establishing South Australia and before any amendment is made to any Imperial Acts with effect on the Aboriginal peoples of Australia, including the "South Australian Foundation Act, 1834, to section 130 of this Act or to this section,
(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Australia and the Premiers of the States and First Ministers of the territories, will be convened by the Prime Minister of Australia; and
(b) the Prime Minister of Australia will invite the representatives of the Aboriginal peoples of Australia to participate in the discussions on that item.
Part II–The Australian Charter of Rights and Freedoms
130. The Australian Charter of Rights and Freedoms
Australian Bill of Rights and Freedoms
AUSTRALIAN CHARTER OF RIGHTS AND FREEDOMS
Whereas Australia is founded upon principles that recognize the supremacy of the Creator and the rule of law:

A Bill of Rights and Freedoms shall apply as annexed hereto subject to the following:
The guarantee by this Charter of certain rights and freedoms which hereby may be provided by the annexed Bill of Rights and Freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, native title and proclaimed or other rights or freedoms that pertain to the Aboriginal peoples of Australia including:
(a) any rights or freedoms of the Aboriginal peoples of Australia that have been recognized by Royal Proclamation that has been issued by the Imperial Crown in respect of the Aboriginal peoples of Australia and including the Letters Patent of 19 February, 1836; and,
(b) any rights or freedoms of the Aboriginal peoples of Australia that now exist by way of land claims, agreements or may be so acquired; and,
(c) any and all rights and freedoms of the Aboriginal peoples of Australia that have been recognized, exist or may be so acquired within the purview of this Constitution or otherwise under or by virtue of the Commonwealth of Australia Constitution Act (1901) as amended hereby.
...
http://www.abc.net.au/radionational/programs/counterpoint/
[http://www.abc.net.au/radio/program-guide/?program=Counterpoint&presenter]
Monday 4pm *Repeated: Friday 1pm*
Presented by Amanda Vanstone [GUEST: Professor Tom Flanagan, Professor Emeritus of Political Science, University of Calgary]

Recognise what? the Canadian experience

In 1982 Canada did what we are still talking about – that is they amended their constitution so Section 35 of the Constitutional act, 1982, recognises and affirms Aboriginal rights.
Monday 13 October 2014 4:40PM
[*www.abc.net.au/radionational/programs/counterpoint/inuit/5802034*]
Inuit resident of Grise Fjord. Grise Fjord is a community on Ellsmere Island, Nunavut, Canada. This is the northernmost community in Canada.
([http://www.abc.net.au/radionational/image/5802034-3x2-340x227.jpg] Yvette Cardozo/Getty)
LISTEN NOW:
http://www.abc.net.au/radio/player/rnmodplayer.html?pgm=Counterpoint&pgmurl=http%3A%2F%2Fwww.abc.net.au%2Fradionational%2Fprograms%2Fcounterpoint%2F&w=http%3A%2F%2Fwww.abc.net.au%2Fradionational%2Fmedia%2F5802062.asx&r=http%3A%2F%2Fwww.abc.net.au%2Fradionational%2Fmedia%2F5802062.ram&t=Recognise%20what%3F%20the%20Canadian%20experience&url=http%3A%2F%2Fwww.abc.net.au%2Fradionational%2Fprograms%2Fcounterpoint%2Fat3f-the-canadian-experience%2F5802062&p=1
DOWNLOAD AUDIO:
http://mpegmedia.abc.net.au/rn/podcast/2014/10/cpt_20141013_1640.mp3
There are around 630 First Nation bands spread across Canada. Half of these are in Ontario and British Colombia and the total population is around 700, 000 people. First Nations includes Intuit and Metis people. In 1982 Canada did what we are still talking about – that is

they amended their constitution so Section 35 of the Constitutional act, 1982, recognises and affirms Aboriginal rights.
Here the vote to do something similar was supposed to happen at the last federal election but has now been put off. So what might we learn from their experience? Are there any pitfalls we should avoid and how has it helped or hindered everyday life for First Nation Canadians?
Prof Megan Davis @mdavisUNSW
1. **Prof Megan Davis @mdavisUNSW** 3h3 hours ago

2. Thanks! Missed this. I'll listen to it before RT. (Not sure Canada & s 35 is a useful comparator). **@SALettersPatent @ILC_UNSW**

https://twitter.com/mdavisUNSW/status/523611150940790784
1. **#DenialNoMore @SALettersPatent** 3h3 hours ago

@mdavisUNSW @ILC_UNSW Check out Kaurna Elder Lynette Crocker's proposal4a KanukSec35 style Constitutional Recognition http://thestringer.com.au/mary-graham-calls-for-sovereignty-national-discussion-1595#.VELyzRaTCno
ANALYSIS:
WHITE AUSTRALIA POLICY COMMONWEALTH OF AUSTRALIA CONSTITUTION Section 25 & Section 61
THE Governor-General as the Queen's representative must ensure the execution and maintenance of this Constitution, and of the laws of the Commonwealth, and this means execute and maintain S25 and S61, which is a self-executing decision.
THE Governor-General as the Queen's representative must likewise ensure the execution and maintenance of the laws of the Commonwealth. which extends to all the laws made by the law of any State allowable under S25 ensuring persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State.
First, due process under the Rule of Law is the absolute mandate of Magna Carta 1297, and has been applicable in Australia since Governor Phillip arrived figuratively on 26 January 1788.
Trial by jury of peers was defined by Blackstone in 1765 under the Rule of Law to extend in due process to every trial in which the life, limb, liberty or property of the subject is put in jeopardy by the Crown.
This was legally required for all colonists and all the Original Inhabitants in amity by the original Royal Instructions for establishing and undertaking the operation of the colony of New South Wales, as they were issued by the Admiralty for George III to Governor Phillip
It was next legally required by the Imperial enactment introducing the Rule of Law in Western Australia in 1832 in what had been until then the truncated portion of New Holland left over from the annexation of the eastern part of New Holland for New South Wales from 26 January 1788.
The legal instigation of the Rule of Law requirement for due process is the absolute mandate of Magna Carta 1297 establishing trial by jury of peers under the Rule of Law that was incipient in the South Australian Foundation Act of 15 August 1834, and as that was first implemented next by the Letters Patent for South Australia of 19 February 1836 in legally excising South Australia from New South Wales on that date, and which was next DIRECTLY required by the legal instrument of the Proclamation of South Australia by Governor Hindmarsh on 28 December 1836 that made all of us Aboriginal people in South Australia and all of us Premiginal Descendants today full Denizens with

the equal rights of equivalent British subjects under Magna Carta to due process and trial by jury of peers in all matters affecting our lives, limbs, liberties or property.
Accordingly, in as far as the Rule of Law prevailed in Australia in the Australian colonies prior to 1 January 1901, the Magna Carta right in due process to trial by jury of peers was inherited by all whom the Crown identified as its subjects under the Commonwealth Constitution as it had been so legally recognized from 28 December 1836 in South Australia until today after being instituted, no matter how falteringly, by Governor Gawler in April 1840 in South Australia.
Secondly, in any Aboriginal person having been put in jeopardy before a jury of non-Aboriginal people by the Crown on any matter affecting life, limb, liberty or property, those Aboriginal people so put in jeopardy have stood in jeopardy of their liberty if not of their life, limb, or property contrary to the Rule of Law and Magna Carta, and apart from and except for that one instance of an Aboriginal jury of peers in South Australia in the trials by Captain O'Halloran in the Coorong over the Maria massacre of 10s of sea-farers shipwrecked in the Coorong prior to then.
At all these trials otherwise since and before, the trial judges have upon no evidence tested upon prior examination, arbitrarily deprived all our Aboriginal people convicted of such charges of our Magna Carta, and after 1 January 1901 of our Australian constitutional, rights under the Rule of Law to trial by jury of our Aboriginal peers which are our birthrights by the law of our birth land
Thirdly, it has been an epoch of malevolent acts done beyond good faith and without fairly listening to our side for our Aboriginal people having been put in jeopardy of their liberty, if not life, limb or property by being arbitrarily put to trial and facing a loss of life, a prison sentence or loss of land before a jury who are not our Aboriginal peers, that has not been conducted as it ought lawfully to have been, by trials solely tried under the Rule of Law upholding the legal matter of our Aboriginal status, but which never has otherwise arisen at these trials before all those juries that unlawfully have judged them contrary to the Rule of Law and against our Magna Carta rights.
This malevolence is exemplary of the Judicatures of Australia in which it is inherent as an arbitrary denial of due process under the Rule of Law, in being simply taken for granted by the trial judge that we have possessed no such legal right.
Fourthly, these wrongs have proceeded on like malevolent judgments of fact that have been made prior to the trial before any judge has first impanelled the non-Aboriginal jury without any prior voire dire examination on the legal matter of our Aboriginal status.
Such arbitrarily pronounced malevolence likewise has repeated itself, without any accompanied prior voire dire examination, as a fait accompli at sentencing, as an ingrained malevolent practice of the seven (7) Australian Crown entities in pursuit of the enactment of Section 25 of the Commonwealth Constitution both prior to an after the federation of the Australian colonies in the Commonwealth:
COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 25:
Provision as to races disqualified from voting For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted
Fifthly, the valid legal premise of this conclusion of malevolence by the Crown in the Judicatures is adherence by unlawful Crown policy and not valid legal decision to the time long honoured indubitable law summarized in the axiom: **quando aliquid mandatur, mandatur et omme per quod pervenitur ad illud [when anything is authorized, everything by which it can be achieved is also authorized]**.
Sixthly, the Imperial Parliament by the enactment of Section 25 of the Commonwealth Constitution impliedly countenanced that the full entities of the Crown in the right of the Australia States, and with legal connivance of the Commonwealth Crown, as had occurred by the unlawful bureaucratic and legal interventions of Mssrs Quick and Garran in the Commonwealth Attorney-General's Department from 1901 onward to remove all Denizen Aboriginal South Australian adult voters from the joint State and Commonwealth electoral roll maintained by the Commonwealth for South Australia, may, by the authority of parliament, enact a law by which “persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State”:
Whereupon, **quando aliquid mandatur, mandatur et omme per quod pervenitur ad illud**, such that the Crown in the executive and the Crown in the judicature also are impliedly authorized to undertake every measure by which what the parliament may do to ensure “persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State” as so determined by responsible self-government without representation for persons of Aboriginal race, and which thereby can be achieved.
Seventhly, the supposed entrenchment of this misconceived supremacy of the right of the Crown to have, hold and execute coeval executive policy as an integral component of juridical policy under the Commonwealth Constitution is sourced from the paramount force of the executive power and authority of the Crown of the **COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 61** whereby

the Queen through the representation of the Governor-General is authorized to execute and maintain the Constitution, including Section 25, and to execute and maintain the laws of the Commonwealth as they are provided for under Covering Clauses 3, 4, 5 and 6 of the Commonwealth of Australia Constitution Act 1901, if not by additional such Clause or Clauses.

Eighthly, the laws of the Commonwealth under Section 61 are not thereby confined solely to laws of the federal parliament of the Commonwealth but extend to the exercise by executive power of the federal Commonwealth and within the jurisdiction of the Executives of the Australia states of the federation, of the authority of the Queen by the Governor-General within the jurisdiction of the Federal Executive under the Rule of Law and severally amongst the jurisdictions of the Executives of all the States under the Rule of Law so as executed and maintained severally by the authority of the Queen:

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 61

Executive power The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - CLAUSE 3

Proclamation of Commonwealth [see Note 2] It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - CLAUSE 4

Commencement of Act The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - CLAUSE 5

Operation of the Constitution and laws [see Note 3] This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - CLAUSE 6

Definitions

"The Commonwealth" shall mean the Commonwealth of Australia as established under this Act

"The States " shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called ***a State*** .

"Original States " shall mean such States as are parts of the Commonwealth at its establishment.

Ninthly, the legal point in issue, against the constitutionally implied power and authority of the Crown to exercise an executive jurisdiction outside the Rule of Law that is there upon being systematically disregarded, is the paramount due process of Magna Carta 1297 under the Rule of Law binding the Crown and as that is required to be accorded subjects of the Crown, and which under the Rule of Law prohibits the Crown in all its manifestations from arbitrarily depriving subjects of their constitutional rights to trial by jury of their peers as their birth right in due process by the law of their birth land whenever their life, limb, liberty or property as a subject is put in jeopardy by the Crown.
Moreover, **qando aliquid prohibetur fieri, prohibetur ex directo et per obliquum** [**when anything is forbidden, it is forbidden to do it directly or indirectly**] is constitutionally entrenched by the Rule of Law under Magna Carta to bind the Crown in parliament as much as in the judicature and in the executive, to prohibit the supremacy of the Crown being expressed as paramount, otherwise than by the Rule of Law. There is no jurisdiction of the judicature or power and authority of the executive that is above the law.
Tenthly, the priority of the Rule of Law in due process by trial by jury of peers arises under the Rule of Law of Magna Carta 1297.
What the Rule of Law under Magna Carta prohibits and is forbidden to the Crown in all its manifestations, is the Crown putting the life, limb, liberty or property of a subject in jeopardy without due process in a trial by jury of peers.
The Crown in the Imperial Parliament in 1900 was so strictly bounden by Magna Carta that it may not have sought indirectly to have achieved in Australia what it was forbidden by Magna Carta to do, and derogate from or abdicate the Rule of Law for its subjects.
Eleventhly, therefore there have been malevolently illegal acts of the Australian Judicatures patently done and undertaken against the Rule of Law beyond good faith, and the due process that is incumbent on the Crown, whenever the judges or justices of all their respective Australian Judicatures decided in trials of our Aboriginal people, without the Crown represented by the judge or justice in that Judicature first, or at all, fairly listening to the side of the Aboriginal person in jeopardy of their life, limb, liberty or property as they case may have been, to put that Aboriginal person outside the Rule of Law in jeopardy of their liberty, if not life, limb or property without a trial by jury of their Aboriginal peers.
Twelfthly, the Crown instead has wrongly proceeded to conduct false trials outside the Rule of Law and due process under Magna Carta, according to the axiom **quando aliquid mandatur, mandatur et omme per quod pervenitur ad illud [when anything is authorized, everything by which it can be achieved is also authorized],** and on the false premises that as the Crown, as was bound under the Rule of Law by Magna Carta, was authorized prior to the federation of Australia within the Union of the peoples of the Commonwealth, which certainly included all Aboriginal Denizens and especially of South Australia, and the six (6) other states of the Federation, by the enactment in 1900 of Section 25 of the Commonwealth Constitution, with power to pass a law in parliament to disqualify persons of any race from voting at elections for the more numerous House of the Parliament of the State**,** as countenanced by the Imperial Parliament, then everything by which this allegedly Imperial authorized policy of the Crown in pursuit of achieving that disqualification, can be achieved, is also authorized, including by arbitrarily denying any if not all Aboriginal persons of our birthright due process, simply in being Aboriginal, and being put to trial before a jury who were not our Aboriginal peers, and not take into account our Aboriginal status in lawfully determining our peers which never arose at such trials before all non-Aboriginal juries.
Finally, the sole way under the Rule of Law, allegedly prevailing in Australia for the benefit of all non-Aboriginal people and all Aboriginal people, to ensure that the civil rights of all non-Aboriginal people in Australia are universally accessed equally without fear or favour, race or creed, faith or religion and as such by all the non-Aboriginal people, is the legal protection provided by the application of Magna Carta (whose 802nd anniversary is 15 June coming) under the Rule of Law as that is ensured by due process and trial by jury of peers in all matters affecting life, limb, liberty and property of all non-Aboriginal people, but which for exactly that reason is universally denied to all of us Aboriginal people in Australia, and which the Australian government system daily now oppressively continues to occupy, despite the evident scientific fact that we having been in continuing possession of our countries across Australia for over 50,000 years according to the latest science published in the Guardian Australia likewise Thursday 9 March 2017 05.01 AEDT (https://wwwtheguardian.com/australia-news/2017/mar/09/aboriginal-dna-study-reveals-50000-year-story-of-sacred-ties-to-land?CMP=share_btn_tw).

The Australian government systems of the law, including the judiciary, policing and corrections are daily denying all of us as Aboriginal people who are being daily oppressed, our lawful access to our universal rights under the Rule of Law to due process and trial by jury of our peers guaranteed by Magna Carta in all matters affecting our lives, limbs, liberties and property because Australia is upholding and acting upon the unlawful intent and illegal purpose against us that is contrary to the Rule of Law and which nevertheless is perceived by the seven (7) Crown entities as being able to be achieved under the Australian Constitution through the entrenchment of such a power to do so by Sections 25 and 61 of the Commonwealth Constitution.

In default of the legal, judicial, policing and corrections systems taking steps to end their pursuit of this unlawful regime against our legal rights under the Rule of Law as provided by Magna Carta, we have no

choice but to seek ASAP our own legal, if not a pro bono, Constitutional Law case in the High Court to have this iniquity in the Australian Constitution exposed for what it is and have it unceremoniously eradicated from it.

The constitutional provision of a seven year term for members of the INTERSTATE COMMISSION by Section 103 of the Constitution was previously determined by the High Court of Australia, constitutionally in pursuance of the separation of powers under Section 72's establishment of the Judicature, to have limited the powers of "adjudication" that validly may be vested by the Parliament directly under Section 101 of the Constitution in the INTERSTATE COMMISSION with the effect that a fundamental part of the express terms of Section 101 of the Constitution that: "***There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder***".

The relevant provision of the Australian Constitution involved has been constitutionally VOIDED by the High Court of Australia in its ordinarily full legal effect and to any legal extent that the vesting of purported judicial powers of "adjudication" by the Parliament as so enacted is valid. The High Court thereby disposed of the full purport of these provisions seemingly to be vested in the Commission by the Parliament, on the ground that their ordinary legal effect was in constitutional breach of the establishment of the Judicature under Section 72 itself, and including the Federal High Court of Australia as that has been mandated under the separation of powers implied by the Constitution to be exclusive of Section 101, and specifically so, owing to and solely on account of the express seven year terms for members of the INTERSTATE COMMISSION that constitutionally were provided for by the very express terms of Section 103: "***The members of the Inter-State Commission:***
(i) shall be appointed by the Governor-General in Council;
(ii) shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity;
(iii) shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office"

The High Court may with LIKE EFFECT and in pursuance of the Rule of Law as preserved by the separation of powers in the Constitution equally VOID any legal effect to the whole of Section 25 of the Commonwealth Constitution without a prior REFERENDUM on the question by the people, so that its imposition of a racist remnant of colonial powers in the Parliaments of States to obviate the Rule of Law, Magna Carta and Due Process and TRIAL BY JURY OF PEERS for the people of any race, including Aboriginal people, is terminated and trials by jury of Aboriginal peers may be mandated by the Rule of Law under Magna Carta duly and so legally in accordance with due process as implicitly within the separation of powers in the Commonwealth.

READING:

Margaret Stephenson* INDIGENOUS LANDS AND CONSTITUTIONAL REFORM INAUSTRALIA: A CANADIAN COMPARISON

REFER ADOPTION OF CANADIAN SECTION 35 ABORIGINAL TITLE SOLUTION TO CONSTITUTIONAL RECOGNITION IN AUSTRALIA

Margaret Stephenson*

INDIGENOUS LANDS AND CONSTITUTIONAL REFORM INAUSTRALIA: A CANADIAN COMPARISON

http://www.austlii.edu.au/au/journals/AUIndigLawRw/2011/22.pdf

Conclusions

Securing the recognition of Indigenous title to traditional lands in both the courts and in legislation has not been easily achieved in Australia. The High Court's recognition of native title in Mabo occurred some 200 years after white settlement. The NTA was enacted by the Commonwealth government only as a political response to the Mabo decision. Statutory Aboriginal title was realized first in Australia in 1976 with the Aboriginal Land Rights (Northern (2011) 15(2) AILR 99Territory) Act 1976 (Cth).

Protecting these Indigenous land rights should be a priority in any constitutional amendment. Alternative means of constitutional amendments that could also achieve land justice for Indigenous Australians have been identified. These alternative means include a constitutional guarantee of 'just terms' applying to the states and territories, as well as native title or alternative settlement mechanisms.133

However, the model provided by section 35 in the Canadian Constitution Act 1982 could afford Indigenous lands in Australia additional protections against extinguishment and infringement by government action. With some modifications as suggested above, this Canadian model could be adapted to the Australian context. Section 35 has been judicially reviewed and interpreted by the Canadian Supreme Court, albeit in a Canadian context.

As discussed, similar interpretations could be anticipated in an Australian context. Section 35(1) of the Canadian Constitution Act 1982 is certainly a model that should be considered in the current debate, as one that could afford and guarantee constitutional protection for Indigenous rights to land in Australia in the future.

http://www.austlii.edu.au/au/journals/AUIndigLawRw/2011/22.pdf Margaret Stephenson*

INDIGENOUS LANDS AND CONSTITUTIONAL REFORM INAUSTRALIA: A CANADIAN COMPARISON

I Introduction

With a sentiment currently growing in Australia that the Constitution requires updating to echo the actuality of

Australia in the 21st century, it is timely to reflect on the constitutional recognition of the rights of the Aboriginal and Torres Strait Islander peoples. Recognition of Aboriginal and Torres Strait Islander peoples in Australia's Constitution will provide the foundation for their future participation in the Australian nation. At present, no constitutional protection is afforded to the rights (including land rights) of the Aboriginal and Torres Strait Islander peoples in the Australian Constitution. The area of recognition and protection upon which I will focus in this paper is that in relation to Indigenous rights and title to land.1

Various forms of recognition and purported protection for Indigenous rights have been included in various nations' constitutions around the world.2

One constitutional model that has been judicially interpreted as affording recognition and protection of Aboriginal rights to land is that contained in Part 11 of the Canadian Constitution Act 1982.

3

It is this model that I will examine, so as to determine the appropriateness of adopting a version of it in the Australian context.4

Constitutional change occurred in Canada in relation to Aboriginal peoples when a collection of provisions entitled 'Rights of the Aboriginal Peoples of Canada' was included in the Canadian Constitution in 1982. These provisions comprise a substantive section that offers protection for Aboriginal and treaty rights (section 35), and a procedural section that promises Aboriginal representation prior to Constitutional amendments (section 35.1).

Section 35 is the more significant provision. It provides:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Metis peoples of Canada.

(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.5

(4) Notwithstanding any other provision of the Act the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.6

At the time of drafting it was intended that section 35 be accompanied by an 'identification and definition' of the rights of Aboriginal peoples. Section 37 required that a constitutional conference be convened within one year of the Act coming into force, to determine the proper interpretation of the rights of Aboriginal peoples.7

While this conference was held in 1983, no clarification/elucidation of the 'identification and definition' Aboriginal and treaty rights was achieved, and these questions were left to the courts to determine. Some minor amendments were, however, made at this conference.8 One of these required that at least two additional conferences be convened prior to April 1987, although three were actually held.9 Section 35.1 of the Constitution Act 1982 includes a commitment by government to convene a constitutional conference, which includes Aboriginal representatives, prior to any amendment being made to any part of the Constitution dealing directly with Aboriginal peoples. Section 25 was designed to protect Aboriginal, treaty and other rights by excluding the section 35 provisions in the Canadian Constitution Act 1982 from forming a part of the Charter of Rights and Freedoms.10

In this article, I will review how the Aboriginal provisions in the Canadian Constitution Act 1982 came about in their present form, how these provisions have been judicially interpreted, and the degree of protection that they offer to Aboriginal and treaty rights in Canada. I will consider whether an amendment to the Australian Constitution in terms similar to the Aboriginal provisions in the Canadian Constitution Act 1982 would provide protection to Indigenous land rights in Australia.

II Constitutional Division of Powers in Canada and Australia

To assess the effect of section 35 of the Canadian Constitution Act 1982, and to evaluate whether a similar provision could afford the requisite protection to Australian Indigenous land rights, it is necessary to have some understanding of the constitutional division of powers in both Canada and Australia.

A Canada

In Canada, exclusive jurisdiction to deal with 'Indians, and Lands reserved for the Indians' is vested in the federal government under section 91(24) of the Constitution Act 1867.11 This comprises two heads of power: one over Indians, whether they reside on reserve lands or not, and another that extends to both Indians and non-Indians where the laws relate to 'Lands reserved for the Indians'. What implications follow from the exclusive federal jurisdiction over Aboriginal title and rights? As the federal government has exclusive jurisdiction in relation to Aboriginal lands, this would mean that, prior to the constitutional entrenchment

of Aboriginal rights in 1982,12 the federal Parliament would have had the exclusive power to extinguish Aboriginal title.13 Another implication of the federal government's exclusive jurisdiction in relation to Aboriginal title is that grants of title issued by the provinces, where Aboriginal title was unextinguished, could potentially be invalid. (In British Columbia, this would involve grants made after 1871, when the colony joined the Confederation.) Given that federal jurisdiction over Aboriginal title is an exclusive jurisdiction under section 91(24) of the Constitution Act 1867, the question is: Does a province have the constitutional power to infringe or regulate Aboriginal title or Aboriginal rights? The answer should be that provincial laws are inapplicable on Aboriginal title lands. The Delgamuukw Court left the question of provincial jurisdiction to infringe or regulate Aboriginal title unclear and unresolved.14 (Note the very different position in Australia, where state and federal governments have concurrent jurisdiction over Aboriginal peoples.)

Provincial legislative powers are set out primarily in section 92 of the Canadian Constitution Act 1867. These include general jurisdiction over property and civil rights. The provinces have no head of legislative power under the Constitution that allows them to legislate for Indians or Indian lands. Section 91(24) of the Constitution Act 1867 protects a 'core' of federal jurisdiction from provincial laws of general application, through the doctrine of interjurisdictional immunity.15 This doctrine prevents the provinces from enacting legislation that affects a vital part of the subject matter within the exclusive federal jurisdiction. Thus, a province cannot enact legislation that directly affects Aboriginal title. In order for provincial laws to affect Aboriginal title, those laws must be laws of general application. It may also be possible for provincial laws of general application that affect Indians to be referentially incorporated into federal law by section 88 of the Indian Act, RSC 1951, c I-5 ('Indian Act').

16 Accordingly, provincial laws relating to Indians or lands reserved for Indians, or those that single out Indians or lands reserved (as opposed to provincial laws of general application) are ultra vires and therefore invalid. However, provincial laws of general application that affect Indian status or capacity, or lands reserved for the Indians, are valid but have to be read down so as to avoid these effects. Such laws can be referentially incorporated into federal law by section 88 of the Indian Act, provided they don't infringe treaty rights.

B Australia

In Australia, the constitutional division of powers is different. In considering Commonwealth and state powers in relation to Indigenous peoples, an understanding of the

general structure of the Australian Constitution is required. The Constitution gives the Commonwealth government an enumerated list of powers, with the residue of possible legislative powers left to the states. This includes jurisdiction over Indigenous lands (although that power is not vested solely in the Commonwealth, but remains concurrently with the states).17 The Commonwealth rarely used this power until the passage of the Native Title Act 1993 (Cth) ('NTA'). Section 109 of the Constitution provides that where there is a conflict of laws, valid federal legislation – which is to say that within the Commonwealth's sphere of responsibility as

defined by the Constitution – will take preference over state legislation. The NTA binds the Commonwealth and each of the states. Section 8 of the NTA provides that the Act 'is not intended to affect the operation of any law of a State or Territory that is capable of operating concurrently with this Act.' Therefore, state laws have to be brought in line with the federal law to avoid inconsistency with the Act.

III How and Why Did Section 35 of the Canadian Constitution Act 1982 Come About?

A Why the Need for Constitutional Reform in Canada?

The Canadian Constitution, by transferring to the Canadian Parliament responsibility for 'Indians, and Lands reserved for the Indians' in the Constitution Act 1867, recognised the unique position of Aboriginal people within Canada.18 In 1969, a White Paper on Indian Policy issued by the Trudeau Government promoted policies for the assimilation of Aboriginal people into Canadian society.19 The overwhelming response from Aboriginal Canadians was a total rejection of the assimilation policies, and a claim for special status to allow Aboriginal peoples to maintain their identity and culture.20 In the 1970s, the Aboriginal movement's increasing political momentum resulted in Aboriginal issues being included in deliberations regarding the new Canadian Constitution. Despite the history of treaties and the development of common law Aboriginal rights, it was evident that issues of justice and fairness in Aboriginal and Crown relationships had not been resolved in Canada.21

Peter Hogg has identified a number of reasons why the need for constitutional protection arose in Canada.22 These include the following (which would also be relevant in arguing for Australian constitutional protection):

- Uncertainties regarding Aboriginal rights, especially as to the definition of Aboriginal rights (although cases have resolved some of these uncertainties, many continue to remain unresolved).23
- Parliamentary sovereignty has meant that Aboriginal rights could be altered or extinguished by a competent

legislative body.
• Aboriginal rights could be extinguished or changed by a constitutional amendment and Aboriginal parties were not guaranteed a right of participation in the Constitutional amending process.24

More recently, Canadian courts have further indicated that the underlying purpose of section 35 is the reconciliation of the pre-existence of Aboriginal societies with the assertion of sovereignty of the Crown.25 In an effort to remedy past injustices and to afford protection to Aboriginal rights, such rights were included in Canada's Constitution Act 1982 when it was patriated from Britain.26 A general protection of Aboriginal rights was contained in section 35.27

B How Did Section 35 of the Canadian Constitution Act 1982 Come to be in Its Present Form?

It was intended by the drafters of section 35 that a conference be held within one year of the enactment of the Constitution Act 1982, to clarify the meaning of 'existing aboriginal and treaty rights'.28 A subsequent constitutional conference held in 1983 was designed to assist in the 'identification and definition' of the rights of Aboriginal peoples and thus provide a supplement by way of amendment to section 35. Although little advancement occurred regarding the identification of the meaning of Aboriginal rights, self-government rights were examined closely, as was their specific named inclusion in the Constitution as Aboriginal rights. A total of four constitutional conferences were held between 1983 and 1987.29 Certain constitutional amendments were approved, and two new subsections were added to section 35 in 1983.30 During this period, the Penner Report was released. It recommended that 'the right of Indian peoples to self-government be explicitly stated and entrenched in the Constitution of Canada'.31 The government responded by drafting a constitutional amendment on self-government at the 1984 conference.32 Although the federal government supported a general right of Aboriginal self-government, it proposed that this be recognised not as an inherent right, but rather that it be contingent on agreements to be negotiated with the federal and provincial governments.33

The Aboriginal delegates raised concerns that proposed financial arrangements for funding self-governing institutions were to be contained in negotiated agreements that would not be entrenched in the Constitution.34 Further conferences on Aboriginal matters were held in 1985 and 1987, but neither resolved nor clarified the constitutional rights of the Aboriginal peoples of Canada.35 Kent McNeil notes that after the discontinuation of the ministers' conferences, the recognition of Aboriginal and treaty rights in section 35 took

on a new significance,36 and today many Aboriginal people

view their inherent right of self-government as an existing Aboriginal right that is entrenched in the Constitution by section 35.37

A final round of constitutional discussions attempting to clarify the meaning of section 35 culminated in the Charlottetown Accord in 1992.38 The Accord proposed that a new section 2 be included in the Constitution Act 1867. This 'Canada clause' would have required that the Canadian Constitution 'be interpreted in a manner consistent with [certain] fundamental characteristics', including that '[t] he Aboriginal peoples of Canada, being the first people to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies and their governments constitute one of three orders of government in Canada.'

Section 2 was also to have included the following non-derogation clauses:

(3) Nothing in this section derogates from the power, rights or privileges of the Parliament or the Government of Canada, or of the legislatures or governments of the provinces, or of the legislative bodies or government of the Aboriginal peoples of Canada, including any power, rights or privileges relating to language.

(4) For greater certainty, nothing in this section abrogates or derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada.

These proposed amendments to the Canadian Constitution would have provided an acknowledgment that Aboriginal peoples governed themselves prior to European settlement and still retain the right of self-government. The Charlottetown Accord would have had a new section 35.1 inserted into the Constitution Act 1982 that did recognise the inherent right of self-government in the Canadian Constitution.39 The proposed section 35.1 stated:

(1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada.

(2) The right referred to in subsection (1) shall be interpreted in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.

The Accord would have further provided, in section 35.2, that the right of self-government includes issues related to jurisdiction, lands and resources, and economic and fiscal arrangements.

The Charlottetown Accord was rejected by the Canadian electorate in a national referendum in 1992. A full discussion

of the Charlottetown Accord is beyond the scope of this article.40 However, the Accord demonstrates that Aboriginal leaders in Canada took an active role in constitutional negotiations, and that the Canadian politicians involved in these negotiations accepted that the Aboriginal peoples' right of self-government is an inherent right that exists independently of the Canadian Constitution. No further constitutional conferences have been held in Canada regarding Aboriginal rights.

IV What Was the Position of Aboriginal Rights in Canada Prior to 1982?

As noted above, section 91(24) of the Constitution Act 1867 vests in the Canadian federal government exclusive power over 'Indians, and Lands reserved for the Indians'. This provides the Canadian federal government with the power to enact laws relating to Indians and Indian lands. For example, the Indian Act encompasses land management matters, including rules relating to the validity of wills and distribution of property on intestacy. This has not been changed by section 35 of the Constitution Act 1982. Prior to the enactment of section 35 in 1982, and by merit of its exclusive jurisdiction in relation to 'Indians' and 'Lands reserved for the Indians', the Canadian Parliament had the sole power to extinguish Aboriginal title or Aboriginal rights, whether they were established at common law, by treaty, or legislatively.41 If extinguishment took place because of legislation, that legislation had to demonstrate a 'clear and plain intention to extinguish. Provinces had no constitutional authority to extinguish Aboriginal rights.42 The provinces have no power in the Constitution over Aboriginal title or Aboriginal rights,43 and accordingly lack power to extinguish these rights.44 Because Aboriginal rights are part of the 'core of Indianness' at the heart of federal jurisdiction under section 91(24), provincial power to extinguish Aboriginal title rights has, in fact, been lacking since Confederation.45 Thus, even prior to Aboriginal rights being protected by the Constitution Act 1982, those rights could not be extinguished by provincial laws.

V What Does Section 35 of the Canadian Constitution Act 1982 Say and Do?

In Canada, section 35(1) constitutionally protects 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada' from the time that Act came into force on April 17, 1982.46 The effect of section 35 is not to define 'aboriginal and treaty rights' but to afford these rights constitutional recognition and protection from future legislative action. Two additional provisions in the Constitution Act 1982 also serve to protect the special status of Aboriginal rights in Canada. Section 35.1 requires that prior to any future

constitutional amendments to the Aboriginal provisions of the Constitution Acts of 1867 and 1982, which are of direct relevance to Aboriginal peoples, a constitutional conference involving participation by representative of the Aboriginal peoples of Canada must be held.

Of relevance is section 25 of the Constitution Act 1982, also included as part of the Canadian Charter of Rights and Freedoms. The Charter is designed to protect individuals against the actions of the governments. Section 25 guarantees that the protection given to individual rights in the Charter will not be interpreted as detracting from the protection of 'aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada'.47 Thus, this section ensures that the Constitution is interpreted in a manner that will respect Aboriginal and treaty rights, and that the equality guarantee in section 15 of the Charter will not affect Aboriginal or treaty rights.48 Section 35 is located outside the Charter, which includes sections 1–34 of the Constitution Act 1982.

VI How Has Section 35 of the Constitution Act 1982 Been Interpreted?

A 'Aboriginal Peoples of Canada'

This phrase is defined to include 'the Indian, Inuit and Metis peoples of Canada' but no further definition is provided.49

B 'Aboriginal and Treaty Rights'

Aboriginal rights and treaty rights are not defined in section 35, so it is necessary to refer to the common law interpretations. Aboriginal title is regarded as a subset of Aboriginal rights. At common law, Aboriginal title has been recognised by the Canadian courts since 1973, with the decision in Calder.50 It was only with the 1997 Supreme Court's decision in Delgamuukw that some key issues regarding Aboriginal title were resolved, and a clearer definition of Aboriginal title emerged. A detailed discussion of Aboriginal rights and title is beyond the scope of this article.

In Delgamuukw, Lamer CJ found that Aboriginal title arises from the physical fact of occupation by Aboriginal peoples prior to the Crown acquiring sovereignty.51 This title is referred to as a possessory title.52 The most significant findings of the Delgamuukw Court were, first, that Aboriginal title is a right to the land itself; second, that 'site specific' Aboriginal rights and Aboriginal title are distinct; and third, that ownership of minerals, forest products and other natural resources is part of Aboriginal title. The Delgamuukw decision appears to guarantee that Aboriginal title-holders now have a clear right to choose how their lands will be used and developed. Despite recognising that Aboriginal title is itself a form of possessory title, the Canadian Supreme Court placed certain limitations on it First, Aboriginal title was held to contain an inherent limit on its range of uses, constraining

its content. Aboriginal title cannot be used for purposes that would destroy Aboriginal peoples' relationship with the land. Therefore, there will be some limits on development, which must be respected. Secondly, Aboriginal title is inalienable except by surrender to the Crown. The Delgamuukw Court confirmed that site-specific rights to engage in particular activities and Aboriginal title are distinct.53 Site-specific Aboriginal rights are practices, customs and traditions integral to the distinctive Aboriginal culture of the group, where the use and occupation of land are not sufficient to support a claim to the land. For example, a right to hunt in a specific area of land that is not Aboriginal title, but rather a site-specific right. Site-specific rights can be established even where Aboriginal title cannot (for example, where the requisites to prove Aboriginal title cannot be established). It is therefore possible that some Aboriginal communities will possess rights protected by section 35 of the Constitution Act 1982, and yet not have title to land. To establish Aboriginal rights that are site-specific, the test to be applied is that from Van der Peet. In that case, the Canadian Supreme Court took a restrictive interpretation of Aboriginal rights and found that prior to any activity being characterised as an Aboriginal right it must be shown to be 'integral to the distinctive culture' of the Aboriginal group claiming that right.54

Is there any difference between the way that constitutionally protected Aboriginal rights have been interpreted and the

way that they should be? Concerns have been raised in the academic literature that the constitutional protection of such rights has adversely affected their definition and interpretation in the Canadian Supreme Court.55 In Sparrow, the Canadian Supreme Court provided some guidance as to how to construe section 35(1) in relation to the definition of Aboriginal rights. Chief Justice Dickson and La Forest J reviewed why section 35 was included in the Canadian Constitution, and noted that until Calder, the legal rights of Aboriginal peoples regarding their lands had largely been ignored.56 Their Honours noted that section 35(1) was included in the Constitution to remedy the fact that Aboriginal rights had been largely ignored, and that Aboriginal rights were to be respected and 'taken seriously'.57 Their Honours concluded that a generous and liberal interpretation of the words of the constitution provision was demanded.58 This approach accorded with the concept of the honour of the Crown.59 In Van der Peet, Lamar CJ approached defining Aboriginal rights by reference to their constitutional protection.60 His Honour stated:

The task of this Court is to define aboriginal rights in a

manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.61

His Honour further treated reconciliation as a governing principle that constrains the Aboriginal rights 'recognised and affirmed' by section 35(1) to 'the crucial elements' of Aboriginal societies, thus requiring the 'specificity' of these rights. His Honour then formulated the 'integral to the distinctive culture test' for Aboriginal rights.62 McNeil and Yarrow argue that:

Because 'aboriginal rights existed and were recognized under the common law' prior to the enactment of section 35(1), the test for identifying and defining them should not depend on section 35(1) and the purposes behind it While Sparrow's purposive approach to the interpretation of the words 'recognized and affirmed' in section 35(1) makes sense because those words relate to the constitutionalization of the rights, this approach should not have been extended in Van der Peet to the definition of the rights themselves. Given that those rights were already in existence, they would have to be definable by a test that could have been applied before section 35(1) was enacted.63

The Canadian Supreme Court could simply have afforded Aboriginal rights protection from extinguishment and infringement. But as Lamar CJ emphasised in Van der Peet, 64

Aboriginal rights are rights from which only one segment of Canadian society benefits. Thus, the constitutionalisation of these rights has led to restrictions in their scope.65

C 'Existing'

Protection under section 35 is given to 'existing' Aboriginal and treaty rights, which is to say those that were in existence on 17 April 1982, when the Constitution Act 1982 came into force. In Sparrow, the Canadian Supreme Court interpreted the word 'existing' as meaning 'unextinguished'.66 According to the Court, Aboriginal rights that had been extinguished before 1982 were not revived, and did not gain the protection of section 35. In other words, section 35 protects only those Aboriginal rights and treaty rights that have not been extinguished prior to 1982. Thus, the Canadian Supreme Court established a restriction on the scope of section 35 on this basis.

(i) Regulation of Aboriginal Rights

Regulation of a right does not amount to a partial extinguishment of that right according to the Canadian Supreme Court in Sparrow. The Court found that regulation by a series of legislative controls and a system of discretionary licensing systems which restricted the Aboriginal right to fish did not amount to extinguishment of that right, as there was no 'clear and plain intention' to extinguish.67 Similarly in R v Gladstone,
68 a regulation that allowed for Aboriginal fishing for food purposes was found not to extinguish an Aboriginal right to fish for commercial purposes.

(ii) Affirmation in a Contemporary Form of Right

The Sparrow Court said that the phrase '"existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time.' The Court held that the protected rights will be 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'.69 The Court further stated

that 'an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.'70 Thus, the Court recognised that rights can evolve to incorporate modern technology and modern commercial forms of business.

(iii) Section 35(3)

This section provides that '[f]or greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.' Because this section includes not only treaty rights that exist now but also treaty rights that 'may be so acquired', future treaty rights can gain constitutional protection. This section was included because of concerns that Aboriginal parties who negotiated land claims agreements after 1982, and who gave up constitutionally protected Aboriginal rights in exchange for new rights granted in the land claims agreements, would not have received constitutional protection for the new rights. Thus, Aboriginal and treaty rights that arise after 1982 will not be excluded from the protection afforded by section 35. The words 'for greater certainty' also suggest that rights based in treaties that do not settle 'land claims agreements' would also be protected by this section.

D 'Recognised and Affirmed'

What does it mean to say that existing Aboriginal and treaty rights are recognised and affirmed? In Sparrow, the Canadian Supreme Court considered that the phrase should be construed to give 'a generous, liberal interpretation', in accordance with the principles that govern the interpretation of Indian treaties and statutes.71 This requires that 'treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.'72 Additionally, the Sparrow Court considered that the phrase

should incorporate the responsibility on the part of the government to act in a fiduciary capacity with respect to Aboriginal peoples, placing some restraint on the Crown.73 Incorporating these principles, the Canadian Supreme Court concluded that section 35 must be interpreted as a constitutional guarantee of Aboriginal and treaty rights, and that any legislation that would abrogate those guaranteed rights would be invalid.74 However, the Court also found that those Aboriginal rights that are recognised and affirmed by section 35 of the Constitution Act 1982 are not absolute.75 The Sparrow Court found that while it is possible for legislation to infringe section 35 constitutionally protected rights, legislative infringements will be invalid if the legislation does not meet the required standard of justification.76

(i) Infringement of Aboriginal Title and Rights

Any legislative infringements or impairments of Aboriginal rights must be justified under the Sparrow test.77 The Sparrow test of justification has two parts. It requires that the government show first that the infringement is in furtherance of a legislative objective that is 'compelling and substantial',78 and second that the infringement is consistent with the special fiduciary relationship between the Crown and the Aboriginal peoples.79 The government is first required to show that a valid reason for making the law exists, for example conserving or managing the resource. A law that is merely in the 'public interest' will not serve a justified objective. Second, where a compelling and substantive objective is demonstrated, the government must show that the law is consistent with the honour of the Crown. For example, Aboriginal claims to fishing would have to have priority over the interests of other groups who do not have an Aboriginal right. Thus, justification in Sparrow involved determining the effect of the order of priorities in relation to fisheries: first, conservation; second, Indian fishing (particularly for food requirements and social and ceremonial purposes); third, non-Indian commercial fishing; and fourth, non-Indian sports fishing. Clearly, the burden of conservation measures should not fall primarily upon the Indian fishery. Additional questions, within the analysis of justification, require consideration as to whether there has been as little infringement as possible in order to affect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented.80 The Court further added that Aboriginal peoples 'would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of [a matter affecting their rights].'81

Sparrow has been confirmed, although slightly modified,

in later decisions.82 In Gladstone, the Supreme Court found that the Sparrow justification test remains good law, but that considerations in relation to priorities can differ. Where an internal limitation exists (for example, where fishing is for food, social and ceremonial purposes), the Sparrow test

applies. If no internal limit exists (for example, where the right is to fish commercially), then the priority rules are modified accordingly.83 In the absence of an internal limit, conservation continues to have priority and after conservation goals are met, objectives that can satisfy justification include 'the pursuit of economic and regional fairness, and the recognition of historical reliance upon, and participation in, the fishery by non-aboriginal groups'.84 In Delgamuukw, Lamer CJ revisited the objectives for the justification test. stating:

> the range of legislative objectives that can justify the infringement of Aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that 'distinctive Aboriginal societies exist within, and are part of, a broader social, political and economic community' … the development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of Aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.85

Most of the activities mentioned by Lamer CJ (for example, agriculture, forestry and mining) are within provincial jurisdiction under section 92 of the Constitution Act 1867. Chief Justice Lamer also considered that both federal and provincial legislatures could infringe Aboriginal title and Aboriginal rights.86

E Extinguishment of Aboriginal Rights

Parliament's power to extinguish legislatively existed only prior to the enactment of the Constitution Act 1982, as after that date it became impossible for Parliament to extinguish constitutionally protected rights.87 However, extinguishment of Aboriginal title can occur in a limited range of circumstances. These include voluntary surrender to the Crown,88 constitutional amendment,89 or by legislation

enacted by the federal Parliament prior to 1982.90 In Sparrow, a standard for the pre-1982 extinguishment of Aboriginal rights (including Aboriginal title) was established. That standard requires that a 'clear and plain intent' to extinguish be shown.91 While the standard of 'clear and plain intent' does not require language that refers expressly to extinguishment of Aboriginal rights, the standard required to establish the requisite intent is high.92

F Self-government

As noted above, the 'inherent right of self-government within Canada' by Aboriginal peoples was agreed to by the Prime Minister, and the provincial premiers and territorial leaders, as well as by the leaders of four national Aboriginal organisations, in the Charlottetown Accord of 1992. The inherent Aboriginal right of self-government would have been an explicit, constitutionally protected right under section 35 of the Constitution Act 1982. The Canadian Supreme Court has yet to give a clear endorsement of this right.93 In Delgamuukw, Lamer CJ did recognise that Aboriginal title land is held communally, that decisions with respect to the management and development of such lands are made by that community, and that Aboriginal title includes 'the right to choose to what uses land can be put'.94 As Slattery has argued, 'since decisions with respect to [aboriginal] lands must be made communally, there must be some internal structure for communal decision-making'; the requirement for a 'decisionmaking structure provides an important cornerstone for the right of aboriginal self-government'.95

VIII Should the Australian Constitution Include a Provision Similar to the Canadian Section 35 for the Protection of Australian Indigenous Lands?

A Context of Indigenous Rights in Australia and Canada

In considering whether to adopt a constitutional provision similar to section 35 of the Canadian Constitution Act 1982, it is important to review the different historical and legal contexts of Indigenous rights in Canada and Australia. In Australia, unlike in Canada, no treaties were signed with the traditional Indigenous land-owners, and initially no recognition was given to their traditional rights. Australia was settled on the basis that the Indigenous peoples had no particular rights to their lands. Today, two forms of Indigenous land tenure exist in Australia: the statutory form of land rights under state and territory legislation;96 and the common-law recognised

traditional ownership rights to land called native title., which is now governed by the Commonwealth under the NTA. No Canadian equivalent to the Australian statutory land rights schemes exists. However, the rights of Aboriginal peoples

in Canada are governed by the Indian Act. Through this Act, the Canadian federal government administers and manages reserve lands the subject of treaties. No Australian equivalent to the reserve land system exists.

The concepts of Aboriginal title (Canada) and native title (Australia) share fundamental jurisprudential similarities that have diverged in certain judicial interpretations.97 In Australia, the rights of Indigenous owners to their traditional lands were first recognised in the High Court's landmark decision in Mabo v Queensland [No2], in 1992.98 The Canadian Supreme Court's 1973 decision in Calder was the first recognition that Aboriginal title existed at common law. Political reactions to each decision also differed significantly in the two jurisdictions. The Australian government's enactment of federal legislation, the NTA, was designed to provide a comprehensive regime in which native title would exist. This legislation provided for the recognition of native title and the establishment of a means for determining it, and also attempted to balance Indigenous rights with the interests of others through the introduction of the future dealings regime for native title land. This legislation is not constitutionally entrenched, and is vulnerable to amendment by the federal government.99 In Canada, the response was not to enact legislation to deal with Aboriginal land, but to establish a comprehensive claims policy for the settlement of outstanding Indigenous land claims.

Canadian comprehensive land claims are based on Aboriginal title, and rights to lands where these rights have not been the subject of treaty or dealt with through other legal means.100 Since 1973, a series of comprehensive claims has been negotiated and concluded in British Columbia, the Yukon and the North West Territories.101 Agreements generally specify the rights of the Aboriginal peoples to their land and resources. Usually, full ownership of lands by the Aboriginal peoples is recognised, often with resourcerevenue-sharing terms.102 In Australia, the NTA promotes the status of Indigenous Land Use Agreements ('ILUAs').103 ILUAs are voluntary agreements, primarily about the use of land, made between a native-title-holder or claimant and other parties. The NTA is deliberately non-prescriptive as to the content of ILUAs, so as to promote flexibility. An ILUA must generally relate to matters involving native title, although it can include any conditions that are not illegal. Agreements can range from small-scale through to large scale regional agreements about land use or management. Matters covered by an ILUA include the recognition of native title, the doing of future acts over native title lands, the manner of exercise of any native title rights in the area, the determination of compensation, and the extinguishment or surrender of native title.104 Where a formal declaration is

made by the Federal Court that native title exists, an ILUA can form part of the package of agreements that record the settlement of a native title application, and demonstrate how the various rights will be exercised 'on the ground'.105 Once an ILUA is registered with the National Native Title Tribunal, it has contractual effect on the parties to it, and becomes legally binding. While registered, the agreement will also bind all native-title-holders in the area covered by the agreement, whether they are parties to the agreement or not.106 Parties to ILUAs can include not only federal and state governments, but also private parties such as companies and individuals. Additionally, although ILUAs must be registered with the National Native Title Tribunal, it is possible that the terms of an ILUA will not be publically available where a confidentiality clause has been inserted. ILUAs differ significantly from comprehensive land claims in Canada in these respects. It is necessary to be mindful of the differences governing Indigenous land title regimes in Canada and Australia when considering the inclusion of a provision equivalent to section 35 in the Australian Constitution.

In the search for appropriate constitutional protection of Aboriginal land rights in Australia, it is important to be mindful of the coverage afforded by the Canadian constitutional model through section 35, which provides that 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'. As discussed above, the Canadian section protects not only Aboriginal lands, but also other Aboriginal rights, arguably including the right of Aboriginal self-governance. In considering the resonance that a provision equivalent to section 35 might have in the Australian context, it should be remembered that the expression 'native title' in Australia includes not only title to land, but also what the Canadians describe as 'site-specific rights' relating to various Indigenous uses of land. Such a provision could further protect these existing Aboriginal rights, including those relating to traditional Indigenous self-governance, particularly in association with land management.

B What Might Constitutional Protection of Land Rights Look Like in the Australian Context?

In considering how to constitutionally protect Indigenous land rights in Australia, we should first consider what form a constitutional protection clause might look like in the Australian context. An example of an Australian equivalent to section 35 might state: 'The existing Indigenous rights and treaty rights of the Indigenous peoples of Australia are

hereby recognised and affirmed.'

Secondly, we should consider what would it mean for Indigenous lands in Australia to include a mirror provision to section 35 in the Australian Constitution. What would be the advantages and disadvantages of including such a section? What protection and advancement would such a clause offer for Indigenous rights in relation to land in Australia? How would such a clause be interpreted by Australian courts? These issues are discussed below.

(i) 'Indigenous People(s) of Australia'107

This phrase could be defined to include 'Aboriginal and Torres Strait Islander' people of Australia. It would not appear to be necessary to include a refinement to this definition.

(ii) 'Indigenous Rights (and Treaty Rights)'

The first issue to consider is whether to include constitutional protection regarding 'treaty rights', given that Australia has not made historical treaties with the Indigenous peoples. It may be prudent to include 'treaty rights' so as to encompass any treaties made in the future. ILUAs made under the NTA could be classified as modern-day treaties. If 'treaty rights' were to be given constitutional protection, then it is suggested that ILUAs be specifically excluded. As discussed above, the Crown need not be a party to an ILUA, which are often simply agreements between private parties. Additionally, many of the terms of such agreements are not subject to public scrutiny. Certainly, ILUAs made between native title parties and private individuals or companies should not be afforded constitutional backing.

A second issue to consider is that instead of simply stating 'Indigenous rights', it may, in the Australian context, be preferable to specifically include 'Indigenous statutory land rights and native title rights', so as to ensure that there is no uncertainty that the provision does apply to all Indigenous lands in Australia.

Thirdly, it would be preferable not to attempt to define Aboriginal land rights and treaty rights in an Australian constitutional provision. Native title is broadly defined in section 223(1) of the NTA to mean 'the communal, group or individual rights and interests' that 'are possessed under the traditional laws acknowledged, and the traditional customs observed' where Aboriginal people have 'a connection with the land or waters' by those laws and customs. In obtaining constitutional protection for Aboriginal rights, there is a potential risk that an over precise categorisation of the nature of Indigenous common law rights could make it difficult for new approaches to interpreting native title or Indigenous rights to emerge.108 As Monahan considers in the Canadian context, '[t]he danger is simply that these judge-made rules may be indirectly constitutionalized through the operation of section 35(1), thereby inhibiting the development of new or

different modes of Aboriginal land rights which will better advance the interests of Aboriginal Canadians.'109 Certainly, there is concern that the constitutionalisation of Aboriginal rights may lead to a narrowing in the interpretation of those rights, as Aboriginal people are the only people in society to enjoy them.110 Would this result in a narrowing of the interpretation of native title by the Courts? In Canada, remember that Aboriginal rights are site-specific rights, and are distinct from Aboriginal title to land. The term 'native title' in Australia encompasses both title to land and site-specific rights. In Canada, although the 'integral to the distinctive culture' test has restricted the interpretation of Aboriginal rights, common law Aboriginal title has continued to evolve, and since Delgamuukw in 1997 has come to encompass 'the right to the exclusive use and occupation of land'.111 In general terms, this is a more generous interpretation of Aboriginal title than we have seen in Australia. In Western Australia v Ward, the High Court of Australia failed to recognise native title as being equivalent to ownership of land, and restricted native title to rights based on the traditions and customs of the particular community.112 It is unclear whether including a clause similar to section 35 in the Australian Constitution would result in constitutionally restricted interpretations of section 223 of the NTA in relation to the concept of native title. Given the particular context in which this occurred in Canada (that of the non-recognition context), it is arguably less likely in Australia.

Fourthly, there is the issue of whether the constitutionalisation of Indigenous land rights would be considered to be a constitutionalisation of the whole process of native title under the NTA. Given that the NTA could be amended, it may need to be stated in any constitutional amendment that the native title process under the Act is not constitutionally protected.

(iii) 'Existing'

As we have seen, the Canadian Supreme Court has interpreted the word 'existing' as meaning 'unextinguished'.113 Thus, protection is given only to those rights that were in existence when the constitutional amendment came into force. An Australian amendment in these terms is likely to be similarly interpreted, and thus would not revive nor offer constitutional protection to previously extinguished Indigenous title or rights. It should also be noted that when the Canadian section 35 was originally proposed, the word 'existing' was not included.114 It was only after a last minute negotiation among governments that the word 'existing' was included. Is the inclusion of the term 'existing' necessary? Given that it was added to section 35 not to avoid the revival of extinguished rights, but on an assumption that the pre-

1982 law would remain unchanged, it would seem prudent to include such a term in any Australian constitutional amendment.

a. Regulation of Aboriginal Rights

Regulation of a right does not amount to a partial extinguishment of that right according to the Canadian Supreme Court.115 This interpretation has also been followed by Australian courts.116

b Affirmation of a Contemporary Form of Right

The Sparrow Court in Canada directly borrowed Slattery's expression in finding that the protected rights will be 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'.117 In Australia, in Members of the Yorta Yorta Community v Victoria, 118 the High Court took a similar approach and found that the Aboriginal 'body of laws' may undergo evolution and development and yet still remain traditional laws and customs of the community The Court rejected the view that native title rights and interests must be frozen in time if they are to remain sufficiently 'traditional' in character.119

c. Would a Section Similar to Section 35(3) be Appropriate?

This section provides that '[f]or greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.' Any current and future treaty rights would gain constitutional protection. As discussed above, ILUAs made under the NTA could arguably be regarded as modern treaty agreements and thus gain the constitutional protection afforded by such a provision if not specifically excluded. Should consideration be given to constitutionally protecting those ILUAs made between government and the native title holders/claimants where the terms of the agreement are publically disclosed? It would seem important that a similar section should be included in any Australian constitutional protection provision, so as to protect any future treaties that are made with governments.120

(iv) 'Recognised and Affirmed'

As we have seen, the Canadian Supreme Court in Sparrow found that section 35 must be interpreted as a constitutional guarantee of Aboriginal and treaty rights. Although the extent of any fiduciary duty or trust obligation owed by the Crown to native title holders has yet to be fully determined in Australia, the non-recognition of a fiduciary duty would not necessarily lead to a substantially different interpretation.121 Arguably, even without a finding that a fiduciary duty exists in Australia, governments in Australia would remain subject to the principle of the 'honour of the Crown'.122 In general terms, it could be expected that similar

interpretations would be given to an equivalent provision. It is possible that Aboriginal rights that are recognised and affirmed by such a constitutional amendment would also not be regarded as absolute in the Australian context; in accordance with the Sparrow Court's interpretation, it is likely that legislation could infringe constitutionally protected Indigenous rights, provided that such legislative infringement meets a required standard of justification.123 In the Australian context there may be a potential question as to whether justified infringements could be in breach of the Racial Discrimination Act 1975 (Cth) ('RDA'), if the particular infringement of Aboriginal title could not be done by government to ordinary title.124 How would justifiable infringements by government fit with the native-titleholder's right to negotiate under the NTA?

Also as we have seen with the discussion of the Sparrow justification test in the Canadian context, it is not entirely clear where the line is between extinguishment and justifiable infringement of Indigenous title to lands.

(v) Extinguishment of Aboriginal Rights

Currently, while no constitutional protection is afforded to Aboriginal land rights or native title in Australia, certain legislative restrictions do exist, both on states and the Commonwealth, in relation to the treatment of native title lands. Extinguishment of native title is subject to the Commonwealth Constitution section 51(xxxi), which requires that Commonwealth laws regarding the acquisition of property provide compensation on 'just terms'. In addition, there is a restriction on the power of extinguishment that in state laws, in that they must be consistent with valid Commonwealth laws. Section 109 of the Commonwealth Constitution would render state legislation invalid in the event of inconsistency, which would include inconsistency with the RDA.

125 Furthermore, section 11(1) of the NTA guarantees that native title cannot be extinguished contrary to the Act. Therefore, any attempt by a state or territory to extinguish or impair native title is subject to both the RDA and the NTA. Section 10 of the RDA requires equality before the law; this requires that native-title-holders be treated in the same manner as are other members of society.126 For example, native-title-holders would be entitled to be consulted and compensated for the loss of their interests.127 While limits have existed on state and territory extinguishments of Indigenous lands since the passage of the RDA, the Commonwealth government has been able to extinguish native title rights. subject only to the 'just terms'

compensation requirement in section 51(xxxi). Additionally, the Commonwealth government, in formulating and implementing policies in relation to Indigenous lands, must be mindful of this 'just terms' requirement in the acquisition of all lands. The inclusion of a constitutional guarantee of 'just terms' compensation for any extinguishment by states and territories would also afford a high level of protection required for Australian Indigenous land rights. State parliaments are currently not subject to any constitutional requirement to provide 'just terms' compensation for compulsory property acquisition.128

Clearly, constitutionally protected rights offer greater safeguards to Indigenous lands than legislatively protected ones. The inclusion of a section-35-type provision would constitutionally protect Indigenous title to lands in Australia, and certainly 'raise the bar' regarding future extinguishment of Indigenous rights. Governments would be unable to extinguish or compulsorily acquire those interests without the Indigenous landholders' consent. The Commonwealth would not be able to 'roll back' the RDA so as to allow dealings with Indigenous lands.129 After the enactment of such a provision, extinguishment of Indigenous title to land would occur in a very limited range of circumstances, such as voluntary surrender to the Crown, or after constitutional amendment.

(vi) Self-government

Aboriginal sovereignty within the Australian nation has been rejected by the High Court of Australia.130 However, it is arguable that Indigenous rights to manage the development and use of their lands as part of native title would gain constitutional protection.

C Mechanisms for Ongoing Discussion of Indigenous Rights and the Constitution

A provision similar to section 35.1 of the Canadian Constitution Act 1982, should be included in the Australian Constitution. Section 35.1 requires that a constitutional conference, involving participation by representatives of the Indigenous peoples, be held prior to any future constitutional amendments to the provisions of the Constitution which deal directly with Indigenous peoples. Further, a provision that allows for additional constitutional meetings between government and Indigenous Australians (where a constitutional amendment is made in Australia) could be included to review the progress of any such amendments.131 Such a provision could be modelled on section 37.1 of the Canadian Constitution Act 1982. This view has been endorsed by the Law Council of Australia.132

VIII Conclusions

Securing the recognition of Indigenous title to traditional lands in both the courts and in legislation has not been

easily achieved in Australia. The High Court's recognition of native title in Mabo occurred some 200 years after white settlement. The NTA was enacted by the Commonwealth government only as a political response to the Mabo decision. Statutory Aboriginal title was realized first in Australia in 1976 with the Aboriginal Land Rights (Northern

Territory) Act 1976 (Cth). Protecting these Indigenous land rights should be a priority in any constitutional amendment. Alternative means of constitutional amendments that could also achieve land justice for Indigenous Australians have been identified. These alternative means include a constitutional guarantee of 'just terms' applying to the states and territories, as well as native title or alternative settlement mechanisms.133 However, the model provided by section 35 in the Canadian Constitution Act 1982 could afford Indigenous lands in Australia additional protections against extinguishment and infringement by government action. With some modifications as suggested above, this Canadian model could be adapted to the Australian context. Section 35 has been judicially reviewed and interpreted by the Canadian Supreme Court, albeit in a Canadian context. As discussed, similar interpretations could be anticipated in an Australian context. Section 35(1) of the Canadian Constitution Act 1982 is certainly a model that should be considered in the current debate, as one that could afford and guarantee constitutional protection for Indigenous rights to land in Australia in the future.

1 The term 'Indigenous peoples' is used in this paper interchangeably with Aboriginal, Indian and, in reference to Canada, First Nations peoples.

2 See for example, the constitutions of Canada, Norway, Bolivia, Brazil, Columbia, Paraguay and Malaysia.

3 Canada Act 1982 (UK) c 11, sch B. On Aboriginal rights under the Canadian Constitution, see generally Kent McNeil, Emerging Justice?: Essays on Indigenous Rights in Canada and Australia (Native Law Centre, University of Saskatchewan, 2001); Peter W Hogg, Constitutional Law of Canada (Caswell, 5th ed, 2007); Patrick Macklem, Canadian Constitutional Law (Edmond Montgomery, 3rd ed, 2003); Patrick J Monahan, Constitutional Law (Irwin Law, 3rd ed, 2006); Bernard W Funston and Eugene Rankin Meehan, Canada's Constitutional Law in a Nutshell (Carswell, 3rd ed, 2003); John Joseph Borrows and Leonard Ian Rotman. Aboriginal Legal Issues: Cases, Materials & Commentary (LexisNexis Canada, 2007); Canada, Royal Commission on Aboriginal Peoples, Report (1996). See also Shaunnagh Dorsett and Lee Godden, A Guide to Overseas Precedents of Relevance to Native Title (Aboriginal Studies Press, 1998); Bradford W Morse (ed), Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada (Oxford University Press, 1985).

4 It is not suggested that the Canadian model would be the only means of providing protection for Indigenous property rights in the Australian Constitution; eg, consideration could be given to the role of the just terms requirement in Australian Constitution s 51(xxxi), both as a provision that gives some protection against acquisitions by the Commonwealth and also in that it applies to all forms of property. So the legal, and ultimately political question, will be whether a just terms requirement that applies uniformly to the Commonwealth and states and whether it is a sufficient and appropriate form of protection for Indigenous property rights in Australia.

5 As inserted by Constitutional Amendment Proclamation, RSC 1983, SI/84-102, sch cl 2.

6 As inserted by Constitutional Amendment Proclamation, RSC 1983, SI/84-102, sch cl 2.

7 Constitution Act 1982 s 37 mandated the holding of First Ministers Conferences regarding s 35. The holding of a Constitutional Conference in s 37 was the basis of the amending formulae for s 35. Now see s 35.1.

8 Constitution Act 1982 ss 35(3), (4) were added. Additionally changes to section 25 Canada Act 1982 (UK) c 11, sch B pt I, s 25 ('Canadian Charter of Rights and Freedoms') (discussed below) included protection for the rights and freedoms arising from both past and future land based claims.

9 The obligation to hold additional conferences was contained in Constitution Act 1982 s 37.1. This section was repealed in 1987: see Constitution Act 1982 s 54.1.

10 Canadian Charter of Rights and Freedoms s 25 protects 'aboriginal, treaty or other rights or freedoms' of Aboriginal peoples from being altered because of the Charter's guarantee of individual and collective rights and freedoms. Section 25 has been interpreted by the Canadian Supreme Court as not affecting questions of which Aboriginal and treaty rights are protected by the Constitution see Ontario (A-G) v Bear Island Foundation [1991] 2 SCR 570.

11 For a discussion of Constitution Act 1867 s 91(24), see generally Hogg, above n 3, ch 28. See also Margaret A Stephenson, 'Canadian Provincial Legislative Powers and Aboriginal Rights Since Delgamuukw: Can a Province Infringe Aboriginal Rights or Title?' (2003) 8 International Trade and Business Law Annual 55; Kent McNeil, 'Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction' (1998) 61 Saskatchewan Law Review 431; Kent McNeil, Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right? (Robarts Centre for Canadian Studies, York University, 1998); Brian Slattery, 'The Constitutional Guarantee of Aboriginal and Treaty Rights' (1983) 8 Queens Law Journal 232; Brian Slattery, 'First Nations and the Constitution: A Question of Trust' (1992) 71 Canadian Bar Review 261

12 Constitution Act 1982 s 35.
13 This was recognised in Delgamuukw v British Columbia [1997] 3 SCR 1010, 1039–40 (Lamer CJ) ('Delgamuukw'). Extinguishment is discussed in detail below. It was also recognised by Lamer CJ in R v Van der Peet [1996] 2 SCR 507, 538 ('Van der Peet') that the enactment of Constitution Act 1982 s 35(1) prevents even Parliament from extinguishing Aboriginal rights.
14 See Stephenson, above n 11: Hamar Foster, 'Aboriginal Title and the Provincial Obligation to Respect It: Is Delgamuukw v British Columbia "Invented Law"?' (1998) 56 Advocate 221.
15 Although more recently the Canadian Supreme Court has limited this doctrine: see Canadian Western Bank v Alberta [2007] 2 SCR 3, in which Binnie and LeBel JJ held that the 'dominant tide' of constitutional interpretation does not favour interjurisdictional immunity: at 32–8. In its place, courts 'should favour, where possible, the ordinary operation of statutes enacted by both levels of government': at 33.
16 This is supported by Dick v The Queen [1985] 2 SCR 309, 330 that Indian Act s 88 applied to referentially incorporate provincial laws that affected Indianness by impairing the status or capacity of Indians (in this case in relation to Indian hunting). The legislation in question was a law of general application and thus applicable to the Indian person by referential incorporation: see Hogg, above n 3, ch 28; Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66 Canadian Bar Review 725, 774–82.
17 In contrast to the position in Canada, the Australian federal government acquired jurisdiction to make laws in relation to Aboriginal affairs by referendum in 1967. Australian Constitution s 51(xxvi) now extends Commonwealth legislative competence to encompass '[t]he people of any race for whom it is deemed necessary to make special laws.' Prior to the 1967 referendum, the states had exclusive power to make laws concerning Indigenous peoples within their respective jurisdictions, while the Commonwealth was expressly excluded from doing so.
18 See Kent McNeil, 'The Decolonisation of Canada: Moving Toward Recognition of Aboriginal Governments' (1994) 7 Western Legal History 113, 118–21. See also Bruce Ryder, 'The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations' (1991) 36 McGill Law Journal 308, 314–20.
19 Statement of the Government of Canada on Indian Policy (1969)
20 The Alberta Indian Association's 'Citizens-Plus' brief was presented to Prime Minister Trudeau and the Canadian government in 1970. This 'Red Paper' became the official position of the National Indian Brotherhood.
21 See, eg, the 1973 Canadian Supreme Court decision in Calder v British Columbia (A-G) [1973] SCR 313 ('Calder'), in which it was confirmed that Aboriginal title existed at common law.

22 Hogg, above n 3, 28–41.
23 See Delgamuukw [1997] 3 SCR 1010.
24 Hogg further notes that the recognition of special rights peculiar to a group defined by race could infringe the idea of equality as ensured by the Charter of Rights and Freedoms and arguably be unconstitutional: Hogg, above n 3, 28–42.
25 See, eg, Van der Peet [1996] 2 SCR 507, 535, 548 (Lamer CJ).
26 Patriation was the termination of the United Kingdom's Parliament's authority over Canada, which was achieved when the Constitution Act 1982 was passed.
27 Constitution Act 1982 s 35 states:
(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, 'Aboriginal peoples of Canada' includes the Indian, Inuit and Metis peoples of Canada.
28 Constitution Act 1982 s 37 (since repealed).
29 McNeil, above n 18, 121–3.
30 See Constitutional Amendment Proclamation, RSC 1983, SI/84-102, sch cl 2. The new subsections added to s 35 are:
(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of the Act the aboriginal and treaty rights referred to in sub-section (1) are guaranteed equally to male and female persons.
31 House of Commons Special Committee on Indian Selfgovernment, Parliament of Canada, Indian Self-government in Canada: Report of the Special Committee (1983) 44 ('Penner Report').
32 First Ministers Conference, Proposed 1984 Constitutional Accord on the Rights of the Aboriginal Peoples of Canada (1984). This amendment provided in part that:
The aboriginal peoples of Canada have the right to selfgoverning institutions that will meet the needs of their communities, subject to the nature, jurisdiction and power of those institutions, and to the financing arrangements relating thereto, being identified and designed through negotiation with the government of Canada and the provincial governments.
33 See McNeil, above n 18, 126.
34 See Norman K Zlotkin, 'The 1983 and 1984 Constitutional Conferences: Only the Beginning' [1984] 3 Canadian Native Law Reporter 3, 13–14.
35 McNeil, above n 18, 124–26.
36 Ibid 126.
37 See Penner Report, above n 31, 43–4.
38 Canada, Consensus Report on the Constitution (1992). The incentive to undertake further constitutional negotiations followed the failure of the Meech Lake Accord 1987, which had been

intended to obtain Quebec's approval of the Constitutional Act

1982. This accord had failed to obtain the required approval of all provincial governments and had excluded the Aboriginal leaders in its negotiations.
39 See Patrick Macklem, 'First Nations Self-government and the Borders of the Canadian Legal Imagination' (1991) 36 McGill Law Journal 382; McNeil, above n 18, 130.
40 See McNeil, above n 18.
41 R v Sikyea [1964] SCR 642.
42 R v Sparrow [1990] 1 SCR 1075 ('Sparrow').
43 This is apart from the specific provisions like paragraph 12 of the Natural Resources Transfer Agreements: see Alberta Natural Resources Act, RSC 1930, c 3; Railway Belt and Peace River Block Act, RSC 1930, c 37; Manitoba Natural Resources Act, RSC 1930, c 29; Saskatchewan Natural Resources Act, RSC 1930, c 41.
44 The majority in Delgamuukw [1997] 3 SCR 1010 also confirmed that provincial laws could never extinguish Aboriginal rights, even where those laws are 'necessarily inconsistent' with them. Chief Justice Lamer stated that 'the only laws with sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, proprio vigore, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction': at 1120–1. It is clear that a province cannot enact legislation which directly affects Aboriginal title. Therefore the province must use laws of general application.
45 In Delgamuukw, Lamer CJ found that laws which touch the 'core of Indianness' and purport to extinguish those rights are 'beyond the legislative competence of the provinces to enact': ibid 1119.
46 See Kent McNeil, 'The Constitutional Rights of the Aboriginal Peoples of Canada' (1982) 4 Supreme Court Law Review 255, 256–7; Macklem, above n 39, 447–8; Douglas Sanders, 'The Rights of Aboriginal Peoples in Canada' (1983) 61 Canadian Bar Review 314, 329.
47 Section 25 provides:
The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including:
(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
48 See Hogg, above n 3, 28–42.
49 Métis describes people who have mixed ancestry. Initially it meant half a mixture of Indian and French. Today, the Métis represent a unique culture on the prairies.
50 On Aboriginal title and rights, see generally McNeil, above n 3; McNeil, above n 11; Kent McNeil, 'Aboriginal Title and the Supreme Court: What's Happening?' (2006) 69 Saskatchewan Law Review 281; Slattery, above n 16; M A Stephenson,

'Resource Development on Aboriginal Lands in Canada and Australia' (2002–03) 9 James Cook University Law Review 21, 23–4. See also Jack Woodward, Native Law (Carswell, 1989). Previous decisions of the Supreme Court of Canada had recognised that Aboriginal title was a freestanding right and that Aboriginal title to land is one aspect of Aboriginal rights generally: see, eg, R v Adams [1996] 3 SCR 101; R v Côté [1996] 3 SCR 139.

51 Delgamuukw [1997] 3 SCR 1010, 1082.

52 At common law such title is the equivalent of a fee simple.

53 Delgamuukw [1997] 3 SCR 1010, 1093–4 (Lamer CJ). Chief Justice Lamer confirmed that this distinction arises because Aboriginal title is based on occupation of land, whereas other Aboriginal rights are not based on occupation. Justice La Forest also considered that a distinction should be drawn between the recognition of a right to possess ancestral lands and a right to engage in an Aboriginal activity: at 1126–7.

54 According to Chief Justice Lamer's majority judgment, to be 'integral to the distinctive culture' it had to be of central significance to the culture in question and had to be one of the things that truly made that society what it was. The majority suggested that a practical way of thinking about the issue was to ask 'whether without this practice, custom, or tradition, the culture in question would be fundamentally altered other than what it is'. Thus an activity that was incidental to the culture would not satisfy the integral component of test. In relation to the distinctive culture the majority indicated that the practice must be characteristic of the culture in the sense that it was central to it. The majority also indicated that a current activity must have its roots in pre-European activities, resulting in Aboriginal rights being restricted to historical practices: Van Der Peet [1996] 2 SCR 507, 554. For a critique of this test, see John Borrows, 'Frozen Rights in Canada: Constitutional Interpretation and the Trickster' (1997–98) 22 American Indian Law Review 37.

55 See Kent McNeil and David Yarrow, 'Has the Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?' (2007) 37 Supreme Court Law Review 177.

56 Sparrow [1990] 1 SCR 1075, 1103–4, citing Calder [1973] SCR 313.

57 Sparrow [1990] 1 SCR 1075, 1119.

58 Ibid 1106:

> The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitution interpretation, principles relating to aboriginal rights, and the purposes behind the constitution provision itself. … The nature of s. 35(1) itself suggests that it be construed

> in a purposive way, When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous,

liberal interpretation of the words in the constitution provision is demanded.
59 See R v Taylor (1981) 34 OR (2nd) 360, 367 (MacKinnon ACJ) (Ontario Court of Appeal). The honour of the Crown is now regarded as a key principle in Aboriginal rights jurisprudence: see Haida Nation v British Columbia (Minister of Forests) (2002) 216 DLR (4th) 1 (British Columbia Court of Appeal); Taku River Tlingit First Nation v British Columbia [2004] 3 SCR 388.
60 Van der Peet [1996] 2 SCR 507, 527:
In order to define the scope of aboriginal rights, it will be necessary to first articulate the purposes which underpin s. 35(1), specifically the reasons underlying its recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada. Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible. … The judgment will thus, after outlining the context and background of the appeal, articulate a test for identifying aboriginal rights which reflects the purposes underlying s. 35(1), and the interest which that constitutional provision is intended to protect.
61 Ibid 535 (emphases in original).
62 Ibid 548:
In order to fulfil the purpose underlying s. 35(1) – i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions – the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that exited in North America prior to contact with the Europeans.
The aspects of the 'integral to the culture test' that are relevant here are the characterisation of the claim, the integral requirement and the time frame for proving the right. For a discussion of this, see McNeil and Yarrow, above n 55.
63 McNeil and Yarrow, above n 55, 187.
64 [1996] 2 SCR 507, 535.
65 McNeil and Yarrow, above n 55, 191.
66 [1990] 1 SCR 1075, 1092 (Dickson CJ, La Forest J).
67 Ibid 1099 (Dickson CJ, La Forest J).
68 [1996] 2 SCR 723 ('Gladstone').
69 Slattery, above n 16, 782, quoted in Sparrow [1990] 1 SCR 1075, 1093 (Dickson CJ, La Forest J).
70 Sparrow [1990] 1 SCR 1075, 1093 (Dickson CJ, La Forest J).
71 [1990] 1 SCR 1075, 1106 (Dickson CJ, La Forest J).
72 Nowegijick v The Queen [1983] 1 SCR 29, 36 (Dickson J). In R v Agawa (1988) 65 OR (2nd) 505, Blair JA stated that this principle of treaty rights interpretation should apply to the interpretation of s

35(1): at 523.
73 The Court noted that the 'contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship': Sparrow [1990] 1 SCR 1075, 1108 (Dickson CJ, La Forest J). See also Guerin v The Queen [1984] 2 SCR 335; Nowegijick v The Queen [1983] 1 SCR 29; R v Taylor (1981) 34 OR (2nd) 360.
74 Sparrow [1990] 1 SCR 1075, 1105, 1108 (Dickson CJ, La Forest J).
75 Ibid 1109 (Dickson CJ, La Forest J):
Federal legislative powers continue, including, of course, the right to legislate with respect to Indians … The powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.
See also Delgamuukw [1997] 3 SCR 1010, 1107 (Lamer CJ).
76 For a discussion of this test, see Kent McNeil, 'Envisaging Constitutional Space for Aboriginal Governments' (1992) 19 Queens Law Journal 95.
77 [1990] 1 SCR 1075, 1110 (Dickson CJ, La Forest J). A law that impairs or infringes an Aboriginal right will be subject to judicial review to determine whether the impairment was justified. Sparrow, a member of the Musqueam Nation, was charged with an offence under the Fisheries Act, RSC 1985, c F-14, as he was fishing with a drift net longer than that permitted by the Band's Indian food fishing license. He argued that he was exercising an Aboriginal right to fish, and that the restrictions on the net length were inconsistent with Constitution Act 1982 s 35(1) and invalid as such. The Canadian Supreme Court acknowledged that Parliament has the power to infringe Aboriginal rights by regulation. The infringing legislation, to be valid, must meet a two-tiered justification test: Sparrow [1990] 1 SCR 1075, 1111–19 (Dickson CJ, La Forest J). First it must be determined whether the law interferes with an activity that comes within the scope of an Aboriginal right. If such interference is established, the federal government must show:
• that a valid reason for making the law exists (for example, that the objectives were 'compelling and substantial');
• that the law upholds the honour of the Crown; and
• that other factors have been addressed, such as infringing Aboriginal right as little as possible, providing fair compensation to Aboriginal peoples affected, and consulting with the Aboriginal peoples concerned.
78 Sparrow [1990] 1 SCR 1075, 1113 (Dickson CJ, La Forest J).

79 Ibid 1114 (Dickson CJ, La Forest J).
80 Ibid 1119 (Dickson CJ, La Forest J).
81 Ibid. The Court ordered a new trial to determine whether the net length restrictions would meet the justification standard: at 1121

(Dickson CJ, La Forest J).
82 See also the application of the justification test in Gladstone [1996] 2 SCR 723; R v Adams [1996] 3 SCR 101; R v Côté [1996] 1 SCR 139; R v Nikal [1996] 1 SCR 103; R v Marshall [No 1] [1999] 3 SCR 456; R v Marshall [No 2] [1999] 3 SCR 533
83 Gladstone [1996] 2 SCR 723, 765–70 (Lamer CJ).
84 Ibid 775 (Lamer CJ). For example, a right to fish for food is internally limited because only a certain amount of fish is required to feed the people. Priority in the case of an internally limited right would allow space for non-aboriginal parties to have access to the resource. A commercial fishing right has only external limits, such as market demands and resource availability. To allow priority to an Aboriginal right with no internal limits, would enable the Aboriginal holders to absorb the entire resource with no room for non-aboriginal parties to participate in the resource. Thus, for a right without internal limits the Sparrow justification requirement did not require Aboriginal rights holders to have priority. The Court found that such a right could be satisfied by 'objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups': at 775 (Lamer CJ). See Justice McLachlin's dissent in Van der Peet [1996] 2 SCR 507, in which his Honour disagreed with this view of justification: at 664–7, See also R v Marshall [No 2] [1999] 3 SCR 533 (where it was recognised that a treaty right to fish commercially could be limited to protect non-aboriginal fishing interests); Kent McNeil, 'How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?' (1997) 8(2) Constitutional Forum 33. Infringements of treaty rights are also subject to the same justification requirements: see R v Badger [1996] 1 SCR 771, 811–16 (Cory J); R v Sundown [1999] 1 SCR 393, 413 (Cory J); R v Marshall [No 1] [1999] 3 SCR 456, 500–1 (Binnie J).
85 [1997] 3 SCR 1010, 1111 (emphasis in original), quoting Gladstone [1996] 2 SCR 723, 774 (Lamer CJ). In Sparrow, the Court suggested that the public interest is too vague a test for justification: [1990] 1 SCR 1075, 1113 (Dickson CJ, La Forest J). However, Chief Justice Lamer's judgment for the majority in Delgamuukw, in which he considered the economic development of the province as being a valid legislative objective, indicates that such a broad justification is possible.
86 Delgamuukw [1997] 3 SCR 1010, 1107.
87 However, this may not be absolutely certain, due to language in Sparrow on duty to compensate if governments extinguish or expropriate Aboriginal title: [1990] 1 SCR 1073, 1119 (Dickson CJ, La Forest J) ('whether, in a situation of expropriation, fair compensation is available'). See also, however, the alternative view recognised by Lamer CJ in Van der Peet [1996] 2 SCR 507, 538. A fortiori, the executive cannot extinguish Aboriginal rights, as the executive cannot interfere with vested rights without legislative authority: see Kent McNeil, K, 'Racial Discrimination

and the Unilateral Extinguishment of Native Title' (1996) 1(2) Australian Indigenous Law Reporter 181.
88 Ontario (A-G) v Bear Island Foundation (1989) 68 OR (2nd) 394 (Ontario Court of Appeal), affirmed by the Supreme Court on this point in Ontario (A-G) v Bear Island Foundation [1991] 2 SCR 570, 575. For commentary, see Kent McNeil, 'The High Cost of Accepting Benefits from the Crown: A Comment on the Temagami Indian Land Case' [1992] 1 Canadian Native Law Reporter 40.
89 R v Horseman [1990] 1 SCR 901. While this case dealt with treaty rights, it illustrates the possibility of modifying those rights by constitutional amendment. A treaty right to hunt commercially was taken away by the Natural Resources Transfer Agreements, which were given constitutional force by the Constitution Act 1867: see above n 43.
90 Sikyea v The Queen [1964] SCR 642; Sparrow [1990] 1 SCR 1075. This power was removed after the insertion of Constitution Act 1982 s 35.
91 Sparrow [1990] 1 SCR 1073, 1098–9.
92 See Gladstone [1996] 2 SCR 723. In this case, the regulatory schemes affecting the fishing were found not to express a clear and plain intention to eliminate the Aboriginal right. Chief Justice Lamer considered that the failure to recognise an Aboriginal fishing right, and the failure to grant special protection to it, did not constitute the clear and plain intention necessary to extinguish the right: at 754–5. The regulations never prohibited aboriginal people from obtaining licences to fish. See also Van der Peet [1996] 2 SCR 507, 587 (L'Heureux-Dube J, dissenting on other grounds).
93 In Campbell v British Columbia (A-G) Wiliamson J of the Supreme Court of British Columbia did acknowledge that the Nisga'a Nation had an inherent right to govern itself: [1999] 3 CNLR 1. In R v Pamajewon [1996] 2 SCR 821, the Canadian Supreme Court rejected a claim that an Aboriginal right of self-government authorise an aboriginal law which regulated gambling on Indian reserve lands. The Court suggested that the Aboriginal right of self-government extends only to activities that took place before European contact, and then only to those activities that were an integral part of the aboriginal society: at 833 (Lamer CJ).
94 Delgamuukw [1997] 3 SCR 1010, 1111 (Lamer CJ) (emphasis in original). In this case the Supreme Court did not comment directly on the claim for self-government, and ordered a new trial.

95 Brian Slattery, 'Making Sense of Aboriginal and Treaty Rights' (2000) 79 Canadian Bar Review 196, 215. See also Brian Slattery, 'The Metamorphosis of Aboriginal Title' (2006) 85 Canadian Bar Review 255
96 Most Australian states, except Western Australia and Tasmania,

also passed land rights legislation that allows for the granting and holding of title to Indigenous lands. In most of these land rights schemes, the tenure granted to the Indigenous landholders is generally an inalienable fee simple: see Aboriginal Land Rights (Northern Territory) Act 1976 (Cth); Aboriginal Land Rights Act 1983 (NSW); Aboriginal Lands Act 1970 (Vic); Aboriginal Land Act 1991 (Qld); Torres Strait Islander Land Act 1991 (Qld); Pitjantjatjara Land Rights Act 1981 (SA); Maralinga Tjarutja Land Rights Act 1984 (SA).

97 For a discussion of some of the differences, see Stephenson, above n 50.

98 (1992) 175 CLR 1 ('Mabo').

99 See, eg, the extensive changes in the Native Title Amendment Act 1998 (Cth).

100 To date in Canada, no Aboriginal title has been recognised by the Supreme Court, despite a number of cases dealing with Aboriginal title questions (eg, Delgamuukw [1997] 3 SCR 1010).

101 Over 22 comprehensive land claims and two self-government agreements have been entered. Comprehensive claims agreements include: James Bay and Northern Quebec Agreement 1975; Northeastern Quebec Agreement 1978; Invuvialuit Final Agreement 1984; Gwich'in Agreement 1992; Nunavut Land Claims Agreement 1993; Sahtu Denee and Metis Agreement 1994; Six Yukon Nation Final Agreements 1994; Vuntut Gwitchín First Nation Final Agreement 1995; First Nation of Nacho Nyak Dun Final Agreement 1995; Teslin Tlingit Council Final Agreement 1995; Champagne and Aishihik First Nations Final Agreement 1995; Little Salmon/Carmacks First Nation Final Agreement 1997; Selkirk First Nation Final Agreement 1997; Nisga'a Final Agreement 1999; Tsawwassen First Nation Final Agreement 2008; Maa-nulth First Nations Final Agreement 2006 (in effect as of 2011); Westbank First Nation Self-Government Agreement 2003; Sechelt Indian Band Self-Government Agreement 1986.

102 See, eg, the Western Arctic (Inuvialuit) Final Agreement 1984. Pursuant to this agreement, rights of use and occupancy – including rights to explore and develop resources – can be granted by the Inuvialuit Regional Corporation.

103 See NTA pt 2 div 3 sub-divs B–E, s 24BA. See generally Richard H Bartlett, Native Title in Australia (LexisNexis Butterworths, 2nd ed, 2004); Patricia Lane, 'A Quick Guide to ILUAs' in Bryan Keon-Cohen (ed), Native Title in the New Millennium: A Selection of Papers from the Native Title Representative Bodies Legal Conference, 16–20 April 2000: Melbourne, Victoria (Aboriginal Studies Press, 2001) 331; Lee Godden and Shaunnagh Dorset, 'The Contractual Status of Indigenous Land Use Agreements' (Land, Rights Laws: Issues of Native Title, Issue Paper Vol 2 No 1, Australian Institute of Aboriginal and Torres Strait Islander Studies, September 1999) <http://www.aiatsis.gov.au/ntru/docs/publications/issues/ip99v2n1.pdf>; Stephenson, above n 50

104 See NTA ss 24BB, 24CB, 24DB, 24BE, 24CE, 24DF, 24EB(4)–(6).
105 Eg, ILUAs could relate to the construction of a city esplanade, a gas pipeline, the creation of a national park, community living areas, access to and use of a pastoral lease and a marina development.
106 NTA s 24EA(1).
107 The question of whether to use 'people' or 'peoples' should be given consideration.
108 Justice La Forest's view in Delgamuukw was that it was unnecessary and potentially misleading to attempt to define more precisely the content of Aboriginal rights: [1997] 3 SCR 1010, 1125–6. This reiterated Justice Dickson's view in Guerin v The Queen regarding attempts to detail the characteristics of Aboriginal title: [1984] 2 SCR 335, 382.
109 Monahan, above n 3, 446.
110 See discussion accompanying nn 63–5 above.
111 See the Canadian courts' interpretations of Aboriginal title in R v Marshall; R v Bernard [2005] 2 SCR 220; R v Sappier [2006] 2 SCR 686; Tsilhqot'in Nation v British Columbia [2007] BCSC 1700.
112 (2002) 213 CLR 1. At first instance in the Federal Court, in Ward v Western Australia (1998) 159 ALR 483, Lee J drew upon the Canadian Supreme Court's view of Aboriginal title as a form of possessory title. His Honour quoted with approval from Delgaamukw:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather it confers the right to use the land for a variety of activities … Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title: Delgamuukw [1997] 3 SCR 1010, 1080 (Lamer CJ), quoted in Ward v Western Australia (1998) 159 ALR 483, 505.

On appeal, a majority of the Full Court of the Federal Court rejected Justice Lee's approach on the basis that Canada's recognition of native title occurred in circumstances very different to those in Australia: Western Australia v Ward (2000) 170 ALR 159, 178–84 (Beaumont and Von Doussa JJ). The difference between the interpretations at first instance and on appeal to the

Full Court reflects a fundamental difference in how that title is characterised: as a possessory title on the one hand, and a title limited to and restricted by traditional laws and customs. Note that in the approach taken by the Canadian Supreme Court in Delgamuukw, the underlying Crown title is sustained, such that full Aboriginal ownership is not possible, and title is alienable only to the Crown: at 1081 (Lamer CJ), 1126 (La Forest J).
113 Sparrow [1990] 1 SCR 1075, 1092.

114 See Ardith Walkem and Haile Bruce (eds), Box of Treasures or Empty Box? Twenty Years of Section 35 (Theytus Books, 2003).
115 Sparrow [1990] 1 SCR 1075, 1097–9 (Dickson CJ, La Forest J).
116 Yanner v Eaton (1999) 201 CLR 351; Mabo (1992) 175 CLR 1. Legislation that merely regulates the enjoyment of native title rights – eg, extensive legislative controls on fishing – will not extinguish native title.
117 See above n 69.
118 Members of the Yorta Yorta Community v Victoria (2002) 214 CLR 422, 444–5 (Gleeson CJ, Gummow and Hayne JJ). Although the Court found that the while the word 'traditional' in NTA s 223(1)(a) required that communities' practices have their origin in presovereignty laws and customs, they rejected the 'frozen rights' approach.
119 Ibid 443–4 (Gleeson CJ, Gummow and Hayne JJ). The Court emphasised that traditional laws and customs, and the native title rights they support, may change and adapt over time, particularly in response to the considerable pressure of European colonisation of traditional lands.
120 It is unclear whether Canadian principles of treaty interpretation, as laid down by the Supreme Court in various cases, would be applicable to modern treaty agreements in the Australian context: see Nowegiick v The Queen [1983] 1 SCR 29, 36 (where the Dickson J of the Supreme Court stated that 'treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians'); Leonard I Rotman, 'Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence' (1997) 46 University of New Brunswick Law Journal 11. Principles relating to treaty interpretation are largely dependent on the terms of agreements that have been reached between Aboriginal peoples and the government.
121 See Thorpe v Commonwealth [No 3] (1997) 144 ALR 677; Bodney v Westralia Airports Corporation Pty Ltd (2000) 109 FCR 178, 204-5 (Lehane J).
122 The honour of the Crown should also apply to Australian courts, as it is based in English law: see Brian Slattery, 'Aboriginal Rights and the Honour of the Crown' (2005) 29 Supreme Court Law Review 433, 443–5.
123 Gladstone [1996] 2 SCR 723; R v Adams [1996] 3 SCR 101; R v Côté [1996] 1 SCR 139; R v Nikal [1996] 1 SCR 103; R v Marshall [1999] 3 SCR 456; R v Marshall [No 2] [1999] 3 SCR 533.
124 See the discussion of infringement and the RDA in Barbara Ann Hocking and Margaret Stephenson, 'Why the Persistent Absence of a Foundational Principle? Indigenous Australians, Proprietary and Family Reparations' in Federico Lenzerini (ed) Reparations for Indigenous Peoples: International and Comparative Perspectives (Oxford University Press, 2008) 477.
125 Unlike the position in Canada, both state and Commonwealth governments having the potential to extinguish, impair or

regulate native title in Australia (subject to the limitations described).

126 RDA ss 9, 10 provide, in effect, that if Aboriginal people are deprived of certain rights by discriminatory laws, then those rights are not lost. The right being denied is the right not to be arbitrarily deprived of property.

127 See the interpretation of the RDA in Western Australia v Ward (2002) 213 CLR 1.

128 Durham Holdings Pty Ltd v New South Wales (2001) 205 CLR 399. See also Griffiths v Minister for Lands and Environment (NT) (2008) 235 CLR 232; Sean Brennan, 'Section 51(xxxi) and the Acquisition of Property under Commonwealth–State Arrangements: The Relevance to Native Title Extinguishment on Just Terms' (2011) 15(2) Australian Indigenous Law Review X.

129 See also the NTA validation regime for non-Indigenous property rights: NTA ss 15, 21. The RDA was 'rolled back' to enable these provisions to be enacted: see, eg, the 'mandatory grant' to the Commonwealth of five-year leases over certain lands in the Northern Territory, as part of the federal government's Intervention, and treatment of these issues in Wurridjal v Commonwealth (2009) 237 CLR 309; Griffiths v Minister for Lands, Planning and Environment (2008) 235 CLR 232.

130 Mabo (1992) 175 CLR 1; Coe v Commonwealth (1993) 118 ALR 193.

131 Constitution Act 1982 s 37.1 provides that:

(1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

(2) Each conference convened under subsection (1) shall have included in its agenda matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

Section 37 was repealed after the convening of the first Constitutional Conference in 1983. Section 37.1 was then

included by the Constitutional Amendment Proclamation 1983.

132 'Constitutional Recognition of Indigenous Australians' (Discussion Paper, Law Council of Australia, 2011) 12–13.

133 See proposals for constitutional amendments that would enable the Commonwealth government to negotiate land agreements directly with Aboriginal and Torres Strait Islander communities in Brennan, above n 128; Geoffrey Lindell, 'The Constitutional Commission and Australia's First Inhabitants: Its Views on Agreement-Making and a New Power to Legislate Revisited'

(2011) 15(2) Australian Indigenous Law Review 26.
(eoart)
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Yours LISTENING in the struggle for recognition and respect in the 180th year of the Colonization of South Australia and for achieving recognition, respect, rights, reform, reciprocity, responsibility and reparations following last year's 7th R of Reparations, by advocating the 12 L's, listen, look, learn, lore, life {legacy, loyalty, language, literacy, legitimacy}, leadership and the liberty of liberation

Lynette Alice Crocker (nee Smith)
Ngangki Burka, Senior Kaurna Woman
Kaurna Aboriginal Title holder Traditional Owner
Kowiandilla Meyunna - Kua Nepotinna (Lone Crow)
Tarndanya and Mika Womma Yerta
A/Chair of the Kaurna Yerta Aboriginal Corporation (Native Title)
Named Applicant Kaurna Native Title Claim / Apical Ancestor Group (Alice Miller)
Inaugurating Kua Nepotinna Constituent Founder - Kaurna Elders Assembly
Vice-Chair of the Kaurna Nation Cultural Heritage Association (KNCHA)
Treasurer - Journey of Healing Assoc. (S.A.) Inc
Treasurer - ANTaR SA Inc
M: 0468 349 510
25 East Avenue
Northfield SA 5085

On Kaurna Land (**http://www.kaurnaplacenames.com/**) - yet to be free !!!
Colonised in the foundation of Adelaide, South Australia - the heartland of the 1836 Letters Patent)

http://sa-change.auspics.org.au/

RE: Margaret Stephenson* INDIGENOUS LANDS AND CONSTITUTIONAL REFORM INAUSTRALIA: A CANADIAN COMPARISON

Dear Members of the Referendum Council

Please get your fellow Referendum Council member, former High Court Chief Justice Murray Gleeson to explain how the High Court has Jurisdiction to void sec 25 as a breach of the Rule of Law inherent in the Constitution as scheduled by Covering Clause 9 of the Constitution Act 1900 which was enacted under and so in accordance with the Magna Carta Voiding sec 25 by High Court legal action to uphold Magna Carta is as a legally acceptable a way, as is inserting Canadian Sec 35 style provisions into the covering clauses of the act, as a refer25, and 51 (26) to uphold the Rule of Law in Covering Clause 9 for due process for Aboriginal people by removing Sec 25 to end legal racism. The following position taken on Sec 35 refers in particular to the Council's terms of reference.

PROPOSAL FOR RECOGNITION:
Referendum Council
http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s25.html
COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 25
Provision as to races disqualified from voting
For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s61.html
COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 61
Executive power
The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Covering Clauses Amendments & NOT the current proposals for repealing Section 51 (xxvi) & annexing a Section 116A for Constitutional recognition

Kaurna Elder Lynette Crocker's Covering Cluases proposal for Kanuk Sec35 style rights
http://thestringer.com.au/mary-graham-calls-for-sovereignty-national-discussion-1595#.VELyzRaTCno

Proposal for amendments to the Australian Constitution to have a formal and legal inclusion of all Aboriginal people within the Australian Constitution.

The following proposal for amendments to the Australian Constitution may meet with the "perceived" necessity to have a formal and legal inclusion of all Aboriginal people within the Australian Constitution. It is based on the terms of the inclusion of the First Nation peoples of Canada in the 1982 new Canadian Constitution and Charter of Rights.

The advantage that this proposal raises is that it enables the recognition of Aboriginal rights in the context of enacting a Charter of Rights to secure the legal and equal recognition of formal Aboriginal rights alongside every other constitutional right set out in the constitution and Charter. It also lays the ground for the representatives of the Aboriginal people to be given a legal identity with a constitutional foundation.

On this basis Aboriginal representatives would have a position from which to call for and to negotiate the settlement of a treaty to finalize all unfinished business.

_____

PROPOSED amendment to the Commonwealth of Australia Constitution Act (1901) by the insertion in Clause 9 of Chapter IX–Charter Enacting Aboriginal Rights to provide for the insertion in the Constitution of placita 129 and 130 to institute provisions recognizing and enforcing the Rights of the Aboriginal Peoples of Australia:
Clause 9 of the Commonwealth of Australia Constitution (1901) is hereby amended to provide for the addition of Chapter IX–Charter Enacting Aboriginal Rights in Clause 9 and the Schedule is amended by the insertion of placita 129 and 130 as follows [see in red italics]:
COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT – CLAUSE 9
Constitution [see Note 1]
The Constitution of the Commonwealth shall be as follows:
The Constitution
This Constitution is divided as follows:
Chapter I–The Parliament
Part I–General
Part II–The Senate
Part III–The House of Representatives
Part IV–Both Houses of the Parliament
Part V–Powers of the Parliament
Chapter II–The Executive Government
Chapter III–The Judicature
Chapter IV–Finance and Trade
Chapter V–The States
Chapter VI–New States
Chapter VII–Miscellaneous
Chapter VIII–Alteration of the Constitution
Chapter IX–Charter Enacting Aboriginal Rights
Part I–The Rights of the Aboriginal Peoples of Australia
Part II–The Australian Charter of Rights and Freedoms
Annexure: *A Bill of Rights and Freedoms*
The Schedule
…

[Repeal Section 25] {OR HAVE THE HIGH COURT DECLARE SECTION 25 INVALID UNDER THE RULE OF LAW AS IT DID WITH THE INVESTED POWER OF THE PARLIAMENT UNDER SECTION 101 OF THE CONSTITUTION TO GRANT TO A NON-JUDICIAL 7 YEAR TERM MEMBER APPOINTED TO THE INTER-STATE COMMISSION, SUCH POWERS OF ADJUDICATION AS IT SAW FIT}

...

Chapter IX–Charter Enacting Aboriginal Rights

Part I–The Rights of the Aboriginal Peoples of Australia

129. The Rights of the Aboriginal Peoples of Australia

Recognition of existing Aboriginal, native title and proclaimed rights.

RIGHTS OF THE ABORIGINAL PEOPLES OF AUSTRALIA

(1) The existing Aboriginal, native title and proclaimed rights of the Aboriginal peoples of Australia are hereby recognized and affirmed.

Definition of "Aboriginal peoples of Australia"

(2) In this Act, "Aboriginal peoples of Australia" includes the Torres Strait Islander peoples of Australia.

Land claims agreements

(3) For greater certainty, in subsection (1) "native title and proclaimed rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal, native title and proclaimed rights are guaranteed equally to both sexes.

(4) Notwithstanding any other provision of this Act, the Aboriginal, native title and proclaimed rights referred to in subsection (1) are guaranteed equally to male and female persons.

Commitment to participation in constitutional conference.

The government of Australia and the State and territory governments are committed to the principle that, before any alteration is effected to benefit of the Royal Proclamations in respect of the Aboriginal peoples of Australia that have been issued by the Imperial Crown, and including the Letters Patent of 19 February, 1836, establishing South Australia and before any amendment is made to any Imperial Acts with effect on the Aboriginal peoples of Australia, including the "South Australian Foundation Act, 1834, to section 130 of this Act or to this section,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Australia and the Premiers of the States and First Ministers of the territories, will be convened by the Prime Minister of Australia; and

(b) the Prime Minister of Australia will invite the representatives of the Aboriginal peoples of Australia to participate in the discussions on that item.

Part II–The Australian Charter of Rights and Freedoms

130. The Australian Charter of Rights and Freedoms

Australian Bill of Rights and Freedoms

AUSTRALIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Australia is founded upon principles that recognize the supremacy of the Creator and the rule of law:

A Bill of Rights and Freedoms shall apply as annexed hereto subject to the following:

The guarantee by this Charter of certain rights and freedoms which hereby may be provided by the annexed Bill of Rights and Freedoms shall not be construed so as to abrogate or

derogate from any Aboriginal, native title and proclaimed or other rights or freedoms that pertain to the Aboriginal peoples of Australia including:
(a) any rights or freedoms of the Aboriginal peoples of Australia that have been recognized by Royal Proclamation that has been issued by the Imperial Crown in respect of the Aboriginal peoples of Australia and including the Letters Patent of 19 February, 1836; and,
(b) any rights or freedoms of the Aboriginal peoples of Australia that now exist by way of land claims, agreements or may be so acquired; and,
(c) any and all rights and freedoms of the Aboriginal peoples of Australia that have been recognized, exist or may be so acquired within the purview of this Constitution or otherwise under or by virtue of the Commonwealth of Australia Constitution Act (1901) as amended hereby.
...
http://www.abc.net.au/radionational/programs/counterpoint/

[http://www.abc.net.au/radio/program-guide/?program=Counterpoint&presenter]
Monday 4pm *Repeated: Friday 1pm*
Presented by Amanda Vanstone [GUEST: Professor Tom Flanagan, Professor Emeritus of Political Science, University of Calgary]

Recognise what? the Canadian experience

In 1982 Canada did what we are still talking about – that is they amended their constitution so Section 35 of the Constitutional act, 1982, recognises and affirms Aboriginal rights.

Monday 13 October 2014 4:40PM
[*www.abc.net.au/radionational/programs/counterpoint/inuit/5802034*]
Inuit resident of Grise Fjord. Grise Fjord is a community on Ellsmere Island, Nunavut, Canada. This is the northernmost community in Canada. ([http://www.abc.net.au/radionational/image/5802034-3x2-340x227.jpg] Yvette Cardozo/Getty)

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DOWNLOAD AUDIO:
http://mpegmedia.abc.net.au/rn/podcast/2014/10/cpt_20141013_1640.mp3

There are around 630 First Nation bands spread across Canada. Half of these are in Ontario and British Colombia and the total population is around 700, 000 people. First Nations includes Intuit and Metis people. In 1982 Canada did what we are still talking about – that is they amended their constitution so Section 35 of the Constitutional act, 1982, recognises and affirms Aboriginal rights.

Here the vote to do something similar was supposed to happen at the last federal election but has now been put off. So what might we learn from their experience? Are there any pitfalls we should avoid and how has it helped or hindered everyday life for First Nation Canadians?

Prof Megan Davis @mdavisUNSW

1. **Prof Megan Davis @mdavisUNSW** 3h3 hours ago

2. Thanks! Missed this. I'll listen to it before RT. (Not sure Canada & s 35 is a useful comparator). **@SALettersPatent** **@ILC_UNSW**

https://twitter.com/mdavisUNSW/status/523611150940790784

1. **#DenialNoMore @SALettersPatent** 3h3 hours ago

@mdavisUNSW **@ILC_UNSW** Check out Kaurna Elder Lynette Crocker's proposal4a KanukSec35 style Constitutional Recognition http://thestringer.com.au/mary-graham-calls-for-sovereignty-national-discussion-1595#.VELyzRaTCno

ANALYSIS:
WHITE AUSTRALIA POLICY COMMONWEALTH OF AUSTRALIA CONSTITUTION
Section 25 & Section 61

THE Governor-General as the Queen's representative must ensure the execution and maintenance of this Constitution, and of the laws of the Commonwealth, and this means execute and maintain S25 and S61, which is a self-executing decision.
THE Governor-General as the Queen's representative must likewise ensure the execution and maintenance of the laws of the Commonwealth. which extends to all the laws made by the law of any State allowable under S25 ensuring persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State.
First, due process under the Rule of Law is the absolute mandate of Magna Carta 1297, and has been applicable in Australia since Governor Phillip arrived figuratively on 26 January 1788.
Trial by jury of peers was defined by Blackstone in 1765 under the Rule of Law to extend in due process to every trial in which the life, limb, liberty or property of the subject is put in jeopardy by the Crown.
This was legally required for all colonists and all the Original Inhabitants in amity by the original Royal Instructions for establishing and undertaking the operation of the colony of New South Wales, as they were issued by the Admiralty for George III to Governor Phillip
It was next legally required by the Imperial enactment introducing the Rule of Law in Western Australia in 1832 in what had been until then the truncated portion of New Holland left over from the annexation of the eastern part of New Holland for New South Wales from 26 January 1788.
The legal instigation of the Rule of Law requirement for due process is the absolute mandate of Magna Carta 1297 establishing trial by jury of peers under the Rule of Law that was incipient in the South Australian Foundation Act of 15 August 1834, and as that was first implemented next by the Letters Patent for South Australia of 19 February 1836 in legally excising South Australia from New South Wales on that date, and which was next DIRECTLY required by the legal instrument of the Proclamation of South Australia by Governor Hindmarsh on 28 December 1836 that made all of us Aboriginal people in South Australia and all of us Premiginal Descendants today full Denizens with the equal rights of equivalent British subjects under Magna Carta to due process and trial by jury of peers in all matters affecting our lives, limbs, liberties or property.
Accordingly, in as far as the Rule of Law prevailed in Australia in the Australian colonies prior to 1 January 1901, the Magna Carta right in due process to trial by jury of peers was inherited by all whom the Crown

identified as its subjects under the Commonwealth Constitution as it had been so legally recognized from 28 December 1836 in South Australia until today after being instituted, no matter how falteringly, by Governor Gawler in April 1840 in South Australia.

Secondly, in any Aboriginal person having been put in jeopardy before a jury of non-Aboriginal people by the Crown on any matter affecting life, limb, liberty or property, those Aboriginal people so put in jeopardy have stood in jeopardy of their liberty if not of their life, limb, or property contrary to the Rule of Law and Magna Carta, and apart from and except for that one instance of an Aboriginal jury of peers in South Australia in the trials by Captain O'Halloran in the Coorong over the Maria massacre of 10s of sea-farers shipwrecked in the Coorong prior to then.

At all these trials otherwise since and before, the trial judges have upon no evidence tested upon prior examination, arbitrarily deprived all our Aboriginal people convicted of such charges of our Magna Carta, and after 1 January 1901 of our Australian constitutional, rights under the Rule of Law to trial by jury of our Aboriginal peers which are our birthrights by the law of our birth land

Thirdly, it has been an epoch of malevolent acts done beyond good faith and without fairly listening to our side for our Aboriginal people having been put in jeopardy of their liberty, if not life, limb or property by being arbitrarily put to trial and facing a loss of life, a prison sentence or loss of land before a jury who are not our Aboriginal peers, that has not been conducted as it ought lawfully to have been, by trials solely tried under the Rule of Law upholding the legal matter of our Aboriginal status, but which never has otherwise arisen at these trials before all those juries that unlawfully have judged them contrary to the Rule of Law and against our Magna Carta rights.

This malevolence is exemplary of the Judicatures of Australia in which it is inherent as an arbitrary denial of due process under the Rule of Law, in being simply taken for granted by the trial judge that we have possessed no such legal right.

Fourthly, these wrongs have proceeded on like malevolent judgments of fact that have been made prior to the trial before any judge has first impanelled the non-Aboriginal jury without any prior voire dire examination on the legal matter of our Aboriginal status.

Such arbitrarily pronounced malevolence likewise has repeated itself, without any accompanied prior voire dire examination, as a fait accompli at sentencing, as an ingrained malevolent practice of the seven (7) Australian Crown entities in pursuit of the enactment of Section 25 of the Commonwealth Constitution both prior to an after the federation of the Australian colonies in the Commonwealth:

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 25:

Provision as to races disqualified from voting For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted

Fifthly, the valid legal premise of this conclusion of malevolence by the Crown in the Judicatures is adherence by unlawful Crown policy and not valid legal decision to the time long honoured indubitable law summarized in the axiom: **quando aliquid mandatur, mandatur et omme per quod pervenitur ad illud [when anything is authorized, everything by which it can be achieved is also authorized]**.

Sixthly, the Imperial Parliament by the enactment of Section 25 of the Commonwealth Constitution impliedly countenanced that the full entities of the Crown in the right of the Australia States, and with legal connivance of the Commonwealth Crown, as had occurred by the unlawful bureaucratic and legal interventions of Mssrs Quick and Garran in the Commonwealth Attorney-General's Department from 1901 onward to remove all Denizen Aboriginal South Australian adult voters from the joint State and Commonwealth electoral roll maintained by the Commonwealth for South Australia, may, by the authority of parliament, enact a law by which “persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State”:

Whereupon, **quando aliquid mandatur, mandatur et omme per quod pervenitur ad illud**, such that the Crown in the executive and the Crown in the judicature also are impliedly authorized to undertake every measure by which what the parliament may do to ensure “persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State” as so determined by responsible self-government without representation for persons of Aboriginal race, and which thereby can be achieved.

Seventhly, the supposed entrenchment of this misconceived supremacy of the right of the Crown to have, hold and execute coeval executive policy as an integral component of juridical policy under the Commonwealth Constitution is sourced from the paramount force of the executive power and authority of the Crown of the **COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 61** whereby

the Queen through the representation of the Governor-General is authorized to execute and maintain the Constitution, including Section 25, and to execute and maintain the laws of the Commonwealth as they are provided for under Covering Clauses 3, 4, 5 and 6 of the Commonwealth of Australia Constitution Act 1901, if not by additional such Clause or Clauses.

Eighthly, the laws of the Commonwealth under Section 61 are not thereby confined solely to laws of the federal parliament of the Commonwealth but extend to the exercise by executive power of the federal Commonwealth and within the jurisdiction of the Executives of the Australia states of the federation, of the authority of the Queen by the Governor-General within the jurisdiction of the Federal Executive under the Rule of Law and severally amongst the jurisdictions of the Executives of all the States under the Rule of Law so as executed and maintained severally by the authority of the Queen:

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 61

Executive power The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - CLAUSE 3

Proclamation of Commonwealth [see Note 2] It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - CLAUSE 4

Commencement of Act The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - CLAUSE 5

Operation of the Constitution and laws [see Note 3] This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - CLAUSE 6

Definitions

"The Commonwealth" shall mean the Commonwealth of Australia as established under this Act

"The States " shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called ***a State*** .

"Original States " shall mean such States as are parts of the Commonwealth at its establishment.

Ninthly, the legal point in issue, against the constitutionally implied power and authority of the Crown to exercise an executive jurisdiction outside the Rule of Law that is there upon being systematically disregarded, is the paramount due process of Magna Carta 1297 under the Rule of Law binding the Crown and as that is required to be accorded subjects of the Crown, and which under the Rule of Law prohibits the Crown in all its manifestations from arbitrarily depriving subjects of their constitutional rights to trial by

jury of their peers as their birth right in due process by the law of their birth land whenever their life, limb, liberty or property as a subject is put in jeopardy by the Crown.
Moreover, **qando aliquid prohibetur fieri, prohibetur ex directo et per obliquum** [**when anything is forbidden, it is forbidden to do it directly or indirectly**] is constitutionally entrenched by the Rule of Law under Magna Carta to bind the Crown in parliament as much as in the judicature and in the executive, to prohibit the supremacy of the Crown being expressed as paramount, otherwise than by the Rule of Law. There is no jurisdiction of the judicature or power and authority of the executive that is above the law.
Tenthly, the priority of the Rule of Law in due process by trial by jury of peers arises under the Rule of Law of Magna Carta 1297.
What the Rule of Law under Magna Carta prohibits and is forbidden to the Crown in all its manifestations, is the Crown putting the life, limb, liberty or property of a subject in jeopardy without due process in a trial by jury of peers.
The Crown in the Imperial Parliament in 1900 was so strictly bounden by Magna Carta that it may not have sought indirectly to have achieved in Australia what it was forbidden by Magna Carta to do, and derogate from or abdicate the Rule of Law for its subjects.
Eleventhly, therefore there have been malevolently illegal acts of the Australian Judicatures patently done and undertaken against the Rule of Law beyond good faith, and the due process that is incumbent on the Crown, whenever the judges or justices of all their respective Australian Judicatures decided in trials of our Aboriginal people, without the Crown represented by the judge or justice in that Judicature first, or at all, fairly listening to the side of the Aboriginal person in jeopardy of their life, limb, liberty or property as they case may have been, to put that Aboriginal person outside the Rule of Law in jeopardy of their liberty, if not life, limb or property without a trial by jury of their Aboriginal peers.
Twelfthly, the Crown instead has wrongly proceeded to conduct false trials outside the Rule of Law and due process under Magna Carta, according to the axiom **quando aliquid mandatur, mandatur et omme per quod pervenitur ad illud [when anything is authorized, everything by which it can be achieved is also authorized],** and on the false premises that as the Crown, as was bound under the Rule of Law by Magna Carta, was authorized prior to the federation of Australia within the Union of the peoples of the Commonwealth, which certainly included all Aboriginal Denizens and especially of South Australia, and the six (6) other states of the Federation, by the enactment in 1900 of Section 25 of the Commonwealth Constitution, with power to pass a law in parliament to disqualify persons of any race from voting at elections for the more numerous House of the Parliament of the State**,** as countenanced by the Imperial Parliament, then everything by which this allegedly Imperial authorized policy of the Crown in pursuit of achieving that disqualification, can be achieved, is also authorized, including by arbitrarily denying any if not all Aboriginal persons of our birthright due process, simply in being Aboriginal, and being put to trial before a jury who were not our Aboriginal peers, and not take into account our Aboriginal status in lawfully determining our peers which never arose at such trials before all non-Aboriginal juries.
Finally, the sole way under the Rule of Law, allegedly prevailing in Australia for the benefit of all non-Aboriginal people and all Aboriginal people, to ensure that the civil rights of all non-Aboriginal people in Australia are universally accessed equally without fear or favour, race or creed, faith or religion and as such by all the non-Aboriginal people, is the legal protection provided by the application of Magna Carta (whose 802nd anniversary is 15 June coming) under the Rule of Law as that is ensured by due process and trial by jury of peers in all matters affecting life, limb, liberty and property of all non-Aboriginal people, but which for exactly that reason is universally denied to all of us Aboriginal people in Australia, and which the Australian government system daily now oppressively continues to occupy, despite the evident scientific fact that we having been in continuing possession of our countries across Australia for over 50,000 years according to the latest science published in the Guardian Australia likewise Thursday 9 March 2017 05.01 AEDT (https://wwwtheguardian.com/australia-news/2017/mar/09/aboriginal-dna-study-reveals-50000-year-story-of-sacred-ties-to-land?CMP=share_btn_tw).
The Australian government systems of the law, including the judiciary, policing and corrections are daily denying all of us as Aboriginal people who are being daily oppressed, our lawful access to our universal rights under the Rule of Law to due process and trial by jury of our peers guaranteed by Magna Carta in all matters affecting our lives, limbs, liberties and property because Australia is upholding and acting upon the unlawful intent and illegal purpose against us that is contrary to the Rule of Law and which nevertheless is perceived by the seven (7) Crown entities as being able to be achieved under the Australian Constitution through the entrenchment of such a power to do so by Sections 25 and 61 of the Commonwealth Constitution.
In default of the legal, judicial, policing and corrections systems taking steps to end their pursuit of this unlawful regime against our legal rights under the Rule of Law as provided by Magna Carta, we have no choice but to seek ASAP our own legal, if not a pro bono, Constitutional Law case in the High Court to have this iniquity in the Australian Constitution exposed for what it is and have it unceremoniously eradicated from it.
The constitutional provision of a seven year term for members of the INTERSTATE COMMISSION by Section 103 of the Constitution was previously determined by the High Court

of Australia, constitutionally in pursuance of the separation of powers under Section 72's establishment of the Judicature, to have limited the powers of "adjudication" that validly may be vested by the Parliament directly under Section 101 of the Constitution in the INTERSTATE COMMISSION with the effect that a fundamental part of the express terms of Section 101 of the Constitution that: "***There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder***".
The relevant provision of the Australian Constitution involved has been constitutionally VOIDED by the High Court of Australia in its ordinarily full legal effect and to any legal extent that the vesting of purported judicial powers of "adjudication" by the Parliament as so enacted is valid.
The High Court thereby disposed of the full purport of these provisions seemingly to be vested in the Commission by the Parliament, on the ground that their ordinary legal effect was in constitutional breach of the establishment of the Judicature under Section 72 itself, and including the Federal High Court of Australia as that has been mandated under the separation of powers implied by the Constitution to be exclusive of Section 101, and specifically so, owing to and solely on account of the express seven year terms for members of the INTERSTATE COMMISSION that constitutionally were provided for by the very express terms of Section 103: "***The members of the Inter-State Commission:***

(i) shall be appointed by the Governor-General in Council;

(ii) shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity;

(iii) shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office"
The High Court may with LIKE EFFECT and in pursuance of the Rule of Law as preserved by the separation of powers in the Constitution equally VOID any legal effect to the whole of Section 25 of the Commonwealth Constitution without a prior REFERENDUM on the question by the people, so that its imposition of a racist remnant of colonial powers in the Parliaments of States to obviate the Rule of Law, Magna Carta and Due Process and TRIAL BY JURY OF PEERS for the people of any race, including Aboriginal people, is terminated and trials by jury of Aboriginal peers may be mandated by the Rule of Law under Magna Carta duly and so legally in accordance with due process as implicitly within the separation of powers in the Commonwealth.

READING:
Margaret Stephenson* INDIGENOUS LANDS AND CONSTITUTIONAL REFORM INAUSTRALIA: A CANADIAN COMPARISON
REFER ADOPTION OF CANADIAN SECTION 35 ABORIGINAL TITLE SOLUTION TO CONSTITUTIONAL RECOGNITION IN AUSTRALIA

Margaret Stephenson*

INDIGENOUS LANDS AND CONSTITUTIONAL REFORM INAUSTRALIA: A CANADIAN COMPARISON
http://www.austlii.edu.au/au/journals/AUIndigLawRw/2011/22.pdf

Conclusions

Securing the recognition of Indigenous title to traditional lands in both the courts and in legislation has not been easily achieved in

Australia. The High Court's recognition of native title in Mabo occurred some 200 years after white settlement. The NTA was enacted by the Commonwealth government only as a political response to the Mabo decision. Statutory Aboriginal title was realized first in Australia in 1976 with the Aboriginal Land Rights (Northern (2011) 15(2) AILR 99Territory) Act 1976 (Cth).

Protecting these Indigenous land rights should be a priority in any constitutional amendment. Alternative means of constitutional amendments that could also achieve land justice for Indigenous Australians have been identified. These alternative means include a constitutional guarantee of 'just terms' applying to the states and territories, as well as native title or alternative settlement mechanisms.133

However, the model provided by section 35 in the Canadian Constitution Act 1982 could afford Indigenous lands in Australia additional protections against extinguishment and infringement by government action. With some modifications as suggested above, this Canadian model could be adapted to the Australian context. Section 35 has been judicially reviewed and interpreted by the Canadian Supreme Court, albeit in a Canadian context.

As discussed, similar interpretations could be anticipated in an Australian context. Section 35(1) of the Canadian Constitution Act 1982 is certainly a model that should be considered in the current debate, as one that could afford and guarantee constitutional protection for Indigenous rights to land in Australia in the future.

http://www.austlii.edu.au/au/journals/AUIndigLawRw/2011/22.pdf
Margaret Stephenson*

INDIGENOUS LANDS AND CONSTITUTIONAL REFORM INAUSTRALIA: A CANADIAN COMPARISON

I Introduction

With a sentiment currently growing in Australia that the Constitution requires updating to echo the actuality of Australia in the 21st century, it is timely to reflect on the constitutional recognition of the rights of the Aboriginal and Torres Strait Islander peoples. Recognition of Aboriginal and Torres Strait Islander peoples in Australia's Constitution

will provide the foundation for their future participation in the Australian nation. At present, no constitutional protection is afforded to the rights (including land rights) of the Aboriginal and Torres Strait Islander peoples in the Australian Constitution. The area of recognition and protection upon which I will focus in this paper is that in relation to Indigenous rights and title to land.1

Various forms of recognition and purported protection for Indigenous rights have been included in various nations' constitutions around the world.2

One constitutional model that has been judicially interpreted as affording recognition and protection of Aboriginal rights to land is that contained in Part 11 of the Canadian Constitution Act 1982.3

It is this model that I will examine, so as to determine the appropriateness of adopting a version of it in the Australian context.4

Constitutional change occurred in Canada in relation to Aboriginal peoples when a collection of provisions entitled 'Rights of the Aboriginal Peoples of Canada' was included in the Canadian Constitution in 1982. These provisions comprise a substantive section that offers protection for Aboriginal and treaty rights (section 35), and a procedural section that promises Aboriginal representation prior to Constitutional amendments (section 35.1).

Section 35 is the more significant provision. It provides:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Metis peoples of Canada.

(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.5

(4) Notwithstanding any other provision of the Act the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.6

At the time of drafting it was intended that section 35 be accompanied by an 'identification and definition' of the rights of Aboriginal peoples. Section 37 required that a constitutional conference be convened within one year of the Act coming into force, to determine the proper interpretation of the rights of Aboriginal peoples.7

While this conference was held in 1983, no clarification/elucidation of the 'identification and definition' Aboriginal and treaty rights was achieved, and these questions were left to the

courts to determine. Some minor amendments were, however, made at this conference.8 One of these required that at least two additional conferences be convened prior to April 1987, although three were actually held.9 Section 35.1 of the Constitution Act 1982 includes a commitment by government to convene a constitutional conference, which includes Aboriginal representatives, prior to any amendment being made to any part of the Constitution dealing directly with Aboriginal peoples. Section 25 was designed to protect Aboriginal, treaty and other rights by excluding the section 35 provisions in the Canadian Constitution Act 1982 from forming a part of the Charter of Rights and Freedoms.10

In this article, I will review how the Aboriginal provisions in the Canadian Constitution Act 1982 came about in their present form, how these provisions have been judicially interpreted, and the degree of protection that they offer to Aboriginal and treaty rights in Canada. I will consider whether an amendment to the Australian Constitution in terms similar to the Aboriginal provisions in the Canadian Constitution Act 1982 would provide protection to Indigenous land rights in Australia.

II Constitutional Division of Powers in Canada and Australia

To assess the effect of section 35 of the Canadian Constitution Act 1982, and to evaluate whether a similar provision could afford the requisite protection to Australian Indigenous land rights, it is necessary to have some understanding of the constitutional division of powers in both Canada and Australia.

A Canada

In Canada, exclusive jurisdiction to deal with 'Indians, and Lands reserved for the Indians' is vested in the federal government under section 91(24) of the Constitution Act 1867.11 This comprises two heads of power: one over Indians, whether they reside on reserve lands or not, and another that extends to both Indians and non-Indians where the laws relate to 'Lands reserved for the Indians'. What implications follow from the exclusive federal jurisdiction over Aboriginal title and rights? As the federal government has exclusive jurisdiction in relation to Aboriginal lands, this would mean that, prior to the constitutional entrenchment of Aboriginal rights in 1982,12 the federal Parliament would have had the exclusive power to extinguish Aboriginal title.13 Another implication of the federal government's exclusive jurisdiction in relation to Aboriginal title is that grants of

title issued by the provinces, where Aboriginal title was unextinguished, could potentially be invalid. (In British Columbia, this would involve grants made after 1871, when the colony joined the Confederation.) Given that federal jurisdiction over Aboriginal title is an exclusive jurisdiction under section 91(24) of the Constitution Act 1867, the question is: Does a province have the constitutional power to infringe or regulate Aboriginal title or Aboriginal rights? The answer should be that provincial laws are inapplicable on Aboriginal title lands. The Delgamuukw Court left the question of provincial jurisdiction to infringe or regulate Aboriginal title unclear and unresolved.14 (Note the very different position in Australia, where state and federal governments have concurrent jurisdiction over Aboriginal peoples.)

Provincial legislative powers are set out primarily in section 92 of the Canadian Constitution Act 1867. These include general jurisdiction over property and civil rights. The provinces have no head of legislative power under the Constitution that allows them to legislate for Indians or Indian lands. Section 91(24) of the Constitution Act 1867 protects a 'core' of federal jurisdiction from provincial laws of general application, through the doctrine of interjurisdictional immunity.15 This doctrine prevents the provinces from enacting legislation that affects a vital part of the subject matter within the exclusive federal jurisdiction. Thus, a province cannot enact legislation that directly affects Aboriginal title. In order for provincial laws to affect Aboriginal title, those laws must be laws of general application. It may also be possible for provincial laws of general application that affect Indians to be referentially incorporated into federal law by section 88 of the Indian Act, RSC 1951, c I-5 ('Indian Act').

16 Accordingly, provincial laws relating to Indians or lands reserved for Indians, or those that single out Indians or lands reserved (as opposed to provincial laws of general application) are ultra vires and therefore invalid. However, provincial laws of general application that affect Indian status or capacity, or lands reserved for the Indians, are valid but have to be read down so as to avoid these effects. Such laws can be referentially incorporated into federal law by section 88 of the Indian Act, provided they don't infringe treaty rights.

B Australia

In Australia, the constitutional division of powers is different. In considering Commonwealth and state powers in relation to Indigenous peoples, an understanding of the general structure of the Australian Constitution is required. The Constitution gives the Commonwealth government an enumerated list of powers, with the residue of possible legislative powers left to the states. This includes jurisdiction

over Indigenous lands (although that power is not vested solely in the Commonwealth, but remains concurrently with the states).17 The Commonwealth rarely used this power until the passage of the Native Title Act 1993 (Cth) ('NTA'). Section 109 of the Constitution provides that where there is a conflict of laws, valid federal legislation – which is to say that within the Commonwealth's sphere of responsibility as

defined by the Constitution – will take preference over state legislation. The NTA binds the Commonwealth and each of the states. Section 8 of the NTA provides that the Act 'is not intended to affect the operation of any law of a State or Territory that is capable of operating concurrently with this Act.' Therefore, state laws have to be brought in line with the federal law to avoid inconsistency with the Act.

III How and Why Did Section 35 of the Canadian Constitution Act 1982 Come About?

A Why the Need for Constitutional Reform in Canada?

The Canadian Constitution, by transferring to the Canadian Parliament responsibility for 'Indians, and Lands reserved for the Indians' in the Constitution Act 1867, recognised the unique position of Aboriginal people within Canada.18 In 1969, a White Paper on Indian Policy issued by the Trudeau Government promoted policies for the assimilation of Aboriginal people into Canadian society.19 The overwhelming response from Aboriginal Canadians was a total rejection of the assimilation policies, and a claim for special status to allow Aboriginal peoples to maintain their identity and culture.20 In the 1970s, the Aboriginal movement's increasing political momentum resulted in Aboriginal issues being included in deliberations regarding the new Canadian Constitution. Despite the history of treaties and the development of common law Aboriginal rights, it was evident that issues of justice and fairness in Aboriginal and Crown relationships had not been resolved in Canada.21

Peter Hogg has identified a number of reasons why the need for constitutional protection arose in Canada.22 These include the following (which would also be relevant in arguing for Australian constitutional protection):

- Uncertainties regarding Aboriginal rights, especially as to the definition of Aboriginal rights (although cases have resolved some of these uncertainties, many continue to remain unresolved).23
- Parliamentary sovereignty has meant that Aboriginal rights could be altered or extinguished by a competent legislative body.
- Aboriginal rights could be extinguished or changed by a constitutional amendment and Aboriginal parties were not guaranteed a right of participation in the

Constitutional amending process.24
More recently, Canadian courts have further indicated that the underlying purpose of section 35 is the reconciliation of the pre-existence of Aboriginal societies with the assertion of sovereignty of the Crown.25 In an effort to remedy past injustices and to afford protection to Aboriginal rights, such rights were included in Canada's Constitution Act 1982 when it was patriated from Britain.26 A general protection of Aboriginal rights was contained in section 35.27

B How Did Section 35 of the Canadian Constitution Act 1982 Come to be in Its Present Form?

It was intended by the drafters of section 35 that a conference be held within one year of the enactment of the Constitution Act 1982, to clarify the meaning of 'existing aboriginal and treaty rights'.28 A subsequent constitutional conference held in 1983 was designed to assist in the 'identification and definition' of the rights of Aboriginal peoples and thus provide a supplement by way of amendment to section 35. Although little advancement occurred regarding the identification of the meaning of Aboriginal rights, self-government rights were examined closely, as was their specific named inclusion in the Constitution as Aboriginal rights. A total of four constitutional conferences were held between 1983 and 1987.29 Certain constitutional amendments were approved, and two new subsections were added to section 35 in 1983.30 During this period, the Penner Report was released. It recommended that 'the right of Indian peoples to self-government be explicitly stated and entrenched in the Constitution of Canada'.31 The government responded by drafting a constitutional amendment on self-government at the 1984 conference.32 Although the federal government supported a general right of Aboriginal self-government, it proposed that this be recognised not as an inherent right, but rather that it be contingent on agreements to be negotiated with the federal and provincial governments.33
The Aboriginal delegates raised concerns that proposed financial arrangements for funding self-governing institutions were to be contained in negotiated agreements that would not be entrenched in the Constitution.34 Further conferences on Aboriginal matters were held in 1985 and 1987, but neither resolved nor clarified the constitutional rights of the Aboriginal peoples of Canada.35 Kent McNeil notes that after the discontinuation of the ministers' conferences, the recognition of Aboriginal and treaty rights in section 35 took on a new significance,36 and today many Aboriginal people

view their inherent right of self-government as an existing

Aboriginal right that is entrenched in the Constitution by section 35.37

A final round of constitutional discussions attempting to clarify the meaning of section 35 culminated in the Charlottetown Accord in 1992.38 The Accord proposed that a new section 2 be included in the Constitution Act 1867. This 'Canada clause' would have required that the Canadian Constitution 'be interpreted in a manner consistent with [certain] fundamental characteristics', including that '[t]he Aboriginal peoples of Canada, being the first people to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies and their governments constitute one of three orders of government in Canada.'

Section 2 was also to have included the following non-derogation clauses:

(3) Nothing in this section derogates from the power, rights or privileges of the Parliament or the Government of Canada, or of the legislatures or governments of the provinces, or of the legislative bodies or government of the Aboriginal peoples of Canada, including any power, rights or privileges relating to language.

(4) For greater certainty, nothing in this section abrogates or derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada.

These proposed amendments to the Canadian Constitution would have provided an acknowledgment that Aboriginal peoples governed themselves prior to European settlement and still retain the right of self-government. The Charlottetown Accord would have had a new section 35.1 inserted into the Constitution Act 1982 that did recognise the inherent right of self-government in the Canadian Constitution.39 The proposed section 35.1 stated:

(1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada.

(2) The right referred to in subsection (1) shall be interpreted in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.

The Accord would have further provided, in section 35.2, that the right of self-government includes issues related to jurisdiction, lands and resources, and economic and fiscal arrangements.

The Charlottetown Accord was rejected by the Canadian electorate in a national referendum in 1992. A full discussion of the Charlottetown Accord is beyond the scope of this article.40 However, the Accord demonstrates that Aboriginal leaders in Canada took an active role in constitutional negotiations, and that the Canadian politicians involved

in these negotiations accepted that the Aboriginal peoples' right of self-government is an inherent right that exists independently of the Canadian Constitution. No further constitutional conferences have been held in Canada regarding Aboriginal rights.

IV What Was the Position of Aboriginal Rights in Canada Prior to 1982?

As noted above, section 91(24) of the Constitution Act 1867 vests in the Canadian federal government exclusive power over 'Indians, and Lands reserved for the Indians'. This provides the Canadian federal government with the power to enact laws relating to Indians and Indian lands. For example, the Indian Act encompasses land management matters, including rules relating to the validity of wills and distribution of property on intestacy. This has not been changed by section 35 of the Constitution Act 1982. Prior to the enactment of section 35 in 1982, and by merit of its exclusive jurisdiction in relation to 'Indians' and 'Lands reserved for the Indians', the Canadian Parliament had the sole power to extinguish Aboriginal title or Aboriginal rights, whether they were established at common law, by treaty, or legislatively.41 If extinguishment took place because of legislation, that legislation had to demonstrate a 'clear and plain intention to extinguish. Provinces had no constitutional authority to extinguish Aboriginal rights.42 The provinces have no power in the Constitution over Aboriginal title or Aboriginal rights,43 and accordingly lack power to extinguish these rights.44 Because Aboriginal rights are part of the 'core of Indianness' at the heart of federal jurisdiction under section 91(24), provincial power to extinguish Aboriginal title rights has, in fact, been lacking since Confederation.45 Thus, even prior to Aboriginal rights being protected by the Constitution Act 1982, those rights could not be extinguished by provincial laws.

V What Does Section 35 of the Canadian Constitution Act 1982 Say and Do?

In Canada, section 35(1) constitutionally protects 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada' from the time that Act came into force on April 17, 1982.46 The effect of section 35 is not to define 'aboriginal and treaty rights' but to afford these rights constitutional recognition and protection from future legislative action. Two additional provisions in the Constitution Act 1982 also serve to protect the special status of Aboriginal rights in Canada. Section 35.1 requires that prior to any future constitutional amendments to the Aboriginal provisions of the Constitution Acts of 1867 and 1982, which are of direct relevance to Aboriginal peoples, a constitutional conference involving participation by representative of the Aboriginal

peoples of Canada must be held.
Of relevance is section 25 of the Constitution Act 1982, also included as part of the Canadian Charter of Rights and Freedoms. The Charter is designed to protect individuals against the actions of the governments. Section 25 guarantees that the protection given to individual rights in the Charter will not be interpreted as detracting from the protection of 'aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada'.47 Thus, this section ensures that the Constitution is interpreted in a manner that will respect Aboriginal and treaty rights, and that the equality guarantee in section 15 of the Charter will not affect Aboriginal or treaty rights.48 Section 35 is located outside the Charter, which includes sections 1–34 of the Constitution Act 1982.

VI How Has Section 35 of the Constitution Act 1982 Been Interpreted?

A 'Aboriginal Peoples of Canada'

This phrase is defined to include 'the Indian, Inuit and Metis peoples of Canada' but no further definition is provided.49

B 'Aboriginal and Treaty Rights'

Aboriginal rights and treaty rights are not defined in section 35, so it is necessary to refer to the common law interpretations. Aboriginal title is regarded as a subset of Aboriginal rights. At common law, Aboriginal title has been recognised by the Canadian courts since 1973, with the decision in Calder.50 It was only with the 1997 Supreme Court's decision in Delgamuukw that some key issues regarding Aboriginal title were resolved, and a clearer definition of Aboriginal title emerged. A detailed discussion of Aboriginal rights and title is beyond the scope of this article.

In Delgamuukw, Lamer CJ found that Aboriginal title arises from the physical fact of occupation by Aboriginal peoples prior to the Crown acquiring sovereignty.51 This title is referred to as a possessory title.52 The most significant findings of the Delgamuukw Court were, first, that Aboriginal title is a right to the land itself; second, that 'site specific' Aboriginal rights and Aboriginal title are distinct; and third, that ownership of minerals, forest products and other natural resources is part of Aboriginal title. The Delgamuukw decision appears to guarantee that Aboriginal title-holders now have a clear right to choose how their lands will be used and developed. Despite recognising that Aboriginal title is itself a form of possessory title, the Canadian Supreme Court placed certain limitations on it First, Aboriginal title was held to contain an inherent limit on its range of uses, constraining its content. Aboriginal title cannot be used for purposes that would destroy Aboriginal peoples' relationship with the land. Therefore, there will be some limits on development, which must be respected. Secondly, Aboriginal title is inalienable

except by surrender to the Crown. The Delgamuukw Court confirmed that site-specific rights to engage in particular activities and Aboriginal title are distinct.53 Site-specific Aboriginal rights are practices, customs and traditions integral to the distinctive Aboriginal culture of the group, where the use and occupation of land are not sufficient to support a claim to the land. For example, a right to hunt in a specific area of land that is not Aboriginal title, but rather a site-specific right. Site-specific rights can be established even where Aboriginal title cannot (for example, where the requisites to prove Aboriginal title cannot be established). It is therefore possible that some Aboriginal communities will possess rights protected by section 35 of the Constitution Act 1982, and yet not have title to land. To establish Aboriginal rights that are site-specific, the test to be applied is that from Van der Peet. In that case, the Canadian Supreme Court took a restrictive interpretation of Aboriginal rights and found that prior to any activity being characterised as an Aboriginal right it must be shown to be 'integral to the distinctive culture' of the Aboriginal group claiming that right.54

Is there any difference between the way that constitutionally protected Aboriginal rights have been interpreted and the

way that they should be? Concerns have been raised in the academic literature that the constitutional protection of such rights has adversely affected their definition and interpretation in the Canadian Supreme Court.55 In Sparrow, the Canadian Supreme Court provided some guidance as to how to construe section 35(1) in relation to the definition of Aboriginal rights. Chief Justice Dickson and La Forest J reviewed why section 35 was included in the Canadian Constitution, and noted that until Calder, the legal rights of Aboriginal peoples regarding their lands had largely been ignored.56 Their Honours noted that section 35(1) was included in the Constitution to remedy the fact that Aboriginal rights had been largely ignored, and that Aboriginal rights were to be respected and 'taken seriously'.57 Their Honours concluded that a generous and liberal interpretation of the words of the constitution provision was demanded.58 This approach accorded with the concept of the honour of the Crown.59 In Van der Peet, Lamar CJ approached defining Aboriginal rights by reference to their constitutional protection.60 His Honour stated:

The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. The Court must neither lose sight of the

generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.61

His Honour further treated reconciliation as a governing principle that constrains the Aboriginal rights 'recognised and affirmed' by section 35(1) to 'the crucial elements' of Aboriginal societies, thus requiring the 'specificity' of these rights. His Honour then formulated the 'integral to the distinctive culture test' for Aboriginal rights.62 McNeil and Yarrow argue that:

Because 'aboriginal rights existed and were recognized under the common law' prior to the enactment of section 35(1), the test for identifying and defining them should not depend on section 35(1) and the purposes behind it While Sparrow's purposive approach to the interpretation of the words 'recognized and affirmed' in section 35(1) makes sense because those words relate to the constitutionalization of the rights, this approach should not have been extended in Van der Peet to the definition of the rights themselves. Given that those rights were already in existence, they would have to be definable by a test that could have been applied before section 35(1) was enacted.63

The Canadian Supreme Court could simply have afforded Aboriginal rights protection from extinguishment and infringement. But as Lamar CJ emphasised in Van der Peet, 64

Aboriginal rights are rights from which only one segment of Canadian society benefits. Thus, the constitutionalisation of these rights has led to restrictions in their scope.65

C 'Existing'

Protection under section 35 is given to 'existing' Aboriginal and treaty rights, which is to say those that were in existence on 17 April 1982, when the Constitution Act 1982 came into force. In Sparrow, the Canadian Supreme Court interpreted the word 'existing' as meaning 'unextinguished'.66 According to the Court, Aboriginal rights that had been extinguished before 1982 were not revived, and did not gain the protection of section 35. In other words, section 35 protects only those Aboriginal rights and treaty rights that have not been extinguished prior to 1982. Thus, the Canadian Supreme Court established a restriction on the scope of section 35 on this basis.

(i) Regulation of Aboriginal Rights

Regulation of a right does not amount to a partial extinguishment of that right according to the Canadian Supreme Court in Sparrow. The Court found that regulation by a series of legislative controls and a system of discretionary

licensing systems which restricted the Aboriginal right to fish did not amount to extinguishment of that right, as there was no 'clear and plain intention' to extinguish.67 Similarly in R v Gladstone,
68 a regulation that allowed for Aboriginal fishing for food purposes was found not to extinguish an Aboriginal right to fish for commercial purposes.

(ii) Affirmation in a Contemporary Form of Right

The Sparrow Court said that the phrase '"existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time.' The Court held that the protected rights will be 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'.69 The Court further stated

that 'an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.'70 Thus, the Court recognised that rights can evolve to incorporate modern technology and modern commercial forms of business.

(iii) Section 35(3)

This section provides that '[f]or greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.' Because this section includes not only treaty rights that exist now but also treaty rights that 'may be so acquired', future treaty rights can gain constitutional protection. This section was included because of concerns that Aboriginal parties who negotiated land claims agreements after 1982, and who gave up constitutionally protected Aboriginal rights in exchange for new rights granted in the land claims agreements, would not have received constitutional protection for the new rights. Thus, Aboriginal and treaty rights that arise after 1982 will not be excluded from the protection afforded by section 35. The words 'for greater certainty' also suggest that rights based in treaties that do not settle 'land claims agreements' would also be protected by this section.

D 'Recognised and Affirmed'

What does it mean to say that existing Aboriginal and treaty rights are recognised and affirmed? In Sparrow, the Canadian Supreme Court considered that the phrase should be construed to give 'a generous, liberal interpretation', in accordance with the principles that govern the interpretation of Indian treaties and statutes.71 This requires that 'treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.'72 Additionally, the Sparrow Court considered that the phrase should incorporate the responsibility on the part of the government to act in a fiduciary capacity with respect to Aboriginal peoples, placing some restraint on the Crown.73 Incorporating these principles, the Canadian Supreme

Court concluded that section 35 must be interpreted as a constitutional guarantee of Aboriginal and treaty rights, and that any legislation that would abrogate those guaranteed rights would be invalid.74 However, the Court also found that those Aboriginal rights that are recognised and affirmed by section 35 of the Constitution Act 1982 are not absolute.75 The Sparrow Court found that while it is possible for legislation to infringe section 35 constitutionally protected rights, legislative infringements will be invalid if the legislation does not meet the required standard of justification.76

(i) Infringement of Aboriginal Title and Rights

Any legislative infringements or impairments of Aboriginal rights must be justified under the Sparrow test.77 The Sparrow test of justification has two parts. It requires that the government show first that the infringement is in furtherance of a legislative objective that is 'compelling and substantial',78 and second that the infringement is consistent with the special fiduciary relationship between the Crown and the Aboriginal peoples.79 The government is first required to show that a valid reason for making the law exists, for example conserving or managing the resource. A law that is merely in the 'public interest' will not serve a justified objective. Second, where a compelling and substantive objective is demonstrated, the government must show that the law is consistent with the honour of the Crown. For example, Aboriginal claims to fishing would have to have priority over the interests of other groups who do not have an Aboriginal right. Thus, justification in Sparrow involved determining the effect of the order of priorities in relation to fisheries: first, conservation; second, Indian fishing (particularly for food requirements and social and ceremonial purposes); third, non-Indian commercial fishing; and fourth, non-Indian sports fishing. Clearly, the burden of conservation measures should not fall primarily upon the Indian fishery. Additional questions, within the analysis of justification, require consideration as to

whether there has been as little infringement as possible in order to affect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented.80 The Court further added that Aboriginal peoples 'would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of [a matter affecting their rights].'81

Sparrow has been confirmed, although slightly modified, in later decisions.82 In Gladstone, the Supreme Court found that the Sparrow justification test remains good law, but that considerations in relation to priorities can differ. Where an internal limitation exists (for example, where fishing is

for food, social and ceremonial purposes), the Sparrow test

applies. If no internal limit exists (for example, where the right is to fish commercially), then the priority rules are modified accordingly.83 In the absence of an internal limit, conservation continues to have priority and after conservation goals are met, objectives that can satisfy justification include 'the pursuit of economic and regional fairness, and the recognition of historical reliance upon, and participation in, the fishery by non-aboriginal groups'.84 In Delgamuukw, Lamer CJ revisited the objectives for the justification test. stating:

> the range of legislative objectives that can justify the infringement of Aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that 'distinctive Aboriginal societies exist within, and are part of, a broader social, political and economic community' … the development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of Aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.85

Most of the activities mentioned by Lamer CJ (for example, agriculture, forestry and mining) are within provincial jurisdiction under section 92 of the Constitution Act 1867. Chief Justice Lamer also considered that both federal and provincial legislatures could infringe Aboriginal title and Aboriginal rights.86

E Extinguishment of Aboriginal Rights

Parliament's power to extinguish legislatively existed only prior to the enactment of the Constitution Act 1982, as after that date it became impossible for Parliament to extinguish constitutionally protected rights.87 However, extinguishment of Aboriginal title can occur in a limited range of circumstances. These include voluntary surrender to the Crown,88 constitutional amendment,89 or by legislation enacted by the federal Parliament prior to 1982.90 In Sparrow, a standard for the pre-1982 extinguishment of Aboriginal rights (including Aboriginal title) was established. That standard requires that a 'clear and plain intent' to extinguish

be shown.91 While the standard of ‘clear and plain intent’ does not require language that refers expressly to extinguishment of Aboriginal rights, the standard required to establish the requisite intent is high.92

F Self-government

As noted above, the ‘inherent right of self-government within Canada’ by Aboriginal peoples was agreed to by the Prime Minister, and the provincial premiers and territorial leaders, as well as by the leaders of four national Aboriginal organisations, in the Charlottetown Accord of 1992. The inherent Aboriginal right of self-government would have been an explicit, constitutionally protected right under section 35 of the Constitution Act 1982. The Canadian Supreme Court has yet to give a clear endorsement of this right.93 In Delgamuukw, Lamer CJ did recognise that Aboriginal title land is held communally, that decisions with respect to the management and development of such lands are made by that community, and that Aboriginal title includes ‘the right to choose to what uses land can be put’.94 As Slattery has argued, ‘since decisions with respect to [aboriginal] lands must be made communally, there must be some internal structure for communal decision-making’; the requirement for a ‘decisionmaking structure provides an important cornerstone for the right of aboriginal self-government’.95

VIII Should the Australian Constitution Include a Provision Similar to the Canadian Section 35 for the Protection of Australian Indigenous Lands?

A Context of Indigenous Rights in Australia and Canada

In considering whether to adopt a constitutional provision similar to section 35 of the Canadian Constitution Act 1982, it is important to review the different historical and legal contexts of Indigenous rights in Canada and Australia. In Australia, unlike in Canada, no treaties were signed with the traditional Indigenous land-owners, and initially no recognition was given to their traditional rights. Australia was settled on the basis that the Indigenous peoples had no particular rights to their lands. Today, two forms of Indigenous land tenure exist in Australia: the statutory form of land rights under state and territory legislation;96 and the common-law recognised

traditional ownership rights to land called native title., which is now governed by the Commonwealth under the NTA. No Canadian equivalent to the Australian statutory land rights schemes exists. However, the rights of Aboriginal peoples in Canada are governed by the Indian Act. Through this Act, the Canadian federal government administers and manages reserve lands the subject of treaties. No Australian equivalent to the reserve land system exists.

The concepts of Aboriginal title (Canada) and native title (Australia) share fundamental jurisprudential similarities that have diverged in certain judicial interpretations.97 In Australia, the rights of Indigenous owners to their traditional lands were first recognised in the High Court's landmark decision in Mabo v Queensland [No2], in 1992.98 The Canadian Supreme Court's 1973 decision in Calder was the first recognition that Aboriginal title existed at common law. Political reactions to each decision also differed significantly in the two jurisdictions. The Australian government's enactment of federal legislation, the NTA, was designed to provide a comprehensive regime in which native title would exist. This legislation provided for the recognition of native title and the establishment of a means for determining it, and also attempted to balance Indigenous rights with the interests of others through the introduction of the future dealings regime for native title land. This legislation is not constitutionally entrenched, and is vulnerable to amendment by the federal government.99 In Canada, the response was not to enact legislation to deal with Aboriginal land, but to establish a comprehensive claims policy for the settlement of outstanding Indigenous land claims.

Canadian comprehensive land claims are based on Aboriginal title, and rights to lands where these rights have not been the subject of treaty or dealt with through other legal means.100 Since 1973, a series of comprehensive claims has been negotiated and concluded in British Columbia, the Yukon and the North West Territories.101 Agreements generally specify the rights of the Aboriginal peoples to their land and resources. Usually, full ownership of lands by the Aboriginal peoples is recognised, often with resourcerevenue-sharing terms.102 In Australia, the NTA promotes the status of Indigenous Land Use Agreements ('ILUAs').103 ILUAs are voluntary agreements, primarily about the use of land, made between a native-title-holder or claimant and other parties. The NTA is deliberately non-prescriptive as to the content of ILUAs, so as to promote flexibility. An ILUA must generally relate to matters involving native title, although it can include any conditions that are not illegal. Agreements can range from small-scale through to large scale regional agreements about land use or management. Matters covered by an ILUA include the recognition of native title, the doing of future acts over native title lands, the manner of exercise of any native title rights in the area, the determination of compensation, and the extinguishment or surrender of native title.104 Where a formal declaration is made by the Federal Court that native title exists, an ILUA can form part of the package of agreements that record the settlement of a native title application, and demonstrate how the various rights will be exercised 'on the ground'.105

Once an ILUA is registered with the National Native Title Tribunal, it has contractual effect on the parties to it, and becomes legally binding. While registered, the agreement will also bind all native-title-holders in the area covered by the agreement, whether they are parties to the agreement or not.106 Parties to ILUAs can include not only federal and state governments, but also private parties such as companies and individuals. Additionally, although ILUAs must be registered with the National Native Title Tribunal, it is possible that the terms of an ILUA will not be publically available where a confidentiality clause has been inserted. ILUAs differ significantly from comprehensive land claims in Canada in these respects. It is necessary to be mindful of the differences governing Indigenous land title regimes in Canada and Australia when considering the inclusion of a provision equivalent to section 35 in the Australian Constitution.

In the search for appropriate constitutional protection of Aboriginal land rights in Australia, it is important to be mindful of the coverage afforded by the Canadian constitutional model through section 35, which provides that 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'. As discussed above, the Canadian section protects not only Aboriginal lands, but also other Aboriginal rights, arguably including the right of Aboriginal self-governance. In considering the resonance that a provision equivalent to section 35 might have in the Australian context, it should be remembered that the expression 'native title' in Australia includes not only title to land, but also what the Canadians describe as 'site-specific rights' relating to various Indigenous uses of land. Such a provision could further protect these existing Aboriginal rights, including those relating to traditional Indigenous self-governance, particularly in association with land management.

B What Might Constitutional Protection of Land Rights Look Like in the Australian Context?

In considering how to constitutionally protect Indigenous land rights in Australia, we should first consider what form a constitutional protection clause might look like in the Australian context. An example of an Australian equivalent to section 35 might state: 'The existing Indigenous rights and treaty rights of the Indigenous peoples of Australia are hereby recognised and affirmed.'

Secondly, we should consider what would it mean for Indigenous lands in Australia to include a mirror provision to section 35 in the Australian Constitution. What would be the

advantages and disadvantages of including such a section? What protection and advancement would such a clause offer for Indigenous rights in relation to land in Australia? How would such a clause be interpreted by Australian courts? These issues are discussed below.

(i) 'Indigenous People(s) of Australia'107

This phrase could be defined to include 'Aboriginal and Torres Strait Islander' people of Australia. It would not appear to be necessary to include a refinement to this definition.

(ii) 'Indigenous Rights (and Treaty Rights)'

The first issue to consider is whether to include constitutional protection regarding 'treaty rights', given that Australia has not made historical treaties with the Indigenous peoples. It may be prudent to include 'treaty rights' so as to encompass any treaties made in the future. ILUAs made under the NTA could be classified as modern-day treaties. If 'treaty rights' were to be given constitutional protection, then it is suggested that ILUAs be specifically excluded. As discussed above, the Crown need not be a party to an ILUA, which are often simply agreements between private parties. Additionally, many of the terms of such agreements are not subject to public scrutiny. Certainly, ILUAs made between native title parties and private individuals or companies should not be afforded constitutional backing.

A second issue to consider is that instead of simply stating 'Indigenous rights', it may, in the Australian context, be preferable to specifically include 'Indigenous statutory land rights and native title rights', so as to ensure that there is no uncertainty that the provision does apply to all Indigenous lands in Australia.

Thirdly, it would be preferable not to attempt to define Aboriginal land rights and treaty rights in an Australian constitutional provision. Native title is broadly defined in section 223(1) of the NTA to mean 'the communal, group or individual rights and interests' that 'are possessed under the traditional laws acknowledged, and the traditional customs observed' where Aboriginal people have 'a connection with the land or waters' by those laws and customs. In obtaining constitutional protection for Aboriginal rights, there is a potential risk that an over precise categorisation of the nature of Indigenous common law rights could make it difficult for new approaches to interpreting native title or Indigenous rights to emerge.108 As Monahan considers in the Canadian context, '[t]he danger is simply that these judge-made rules may be indirectly constitutionalized through the operation of section 35(1), thereby inhibiting the development of new or different modes of Aboriginal land rights which will better advance the interests of Aboriginal Canadians.'109 Certainly, there is concern that the constitutionalisation of Aboriginal rights may lead to a narrowing in the

interpretation of those rights, as Aboriginal people are the only people in society to enjoy them.110 Would this result in a narrowing of the interpretation of native title by the Courts? In Canada, remember that Aboriginal rights are site-specific rights, and are distinct from Aboriginal title to land. The term 'native title' in Australia encompasses both title to land and site-specific rights. In Canada, although the 'integral to the distinctive culture' test has restricted the interpretation of Aboriginal rights, common law Aboriginal title has continued to evolve, and since Delgamuukw in 1997 has come to encompass 'the right to the exclusive use and occupation of land'.111 In general terms, this is a more generous interpretation of Aboriginal title than we have seen in Australia. In Western Australia v Ward, the High Court of Australia failed to recognise native title as being equivalent to ownership of land, and restricted native title to rights based on the traditions and customs of the particular community.112 It is unclear whether including a clause similar to section 35 in the Australian Constitution would result in constitutionally restricted interpretations of section 223 of the NTA in relation to the concept of native title. Given the particular context in which this occurred in Canada (that of the non-recognition context), it is arguably less likely in Australia.

Fourthly, there is the issue of whether the constitutionalisation of Indigenous land rights would be considered to be a constitutionalisation of the whole process of native title under the NTA. Given that the NTA could be amended, it may need to be stated in any constitutional amendment that the native title process under the Act is not constitutionally protected.

(iii) 'Existing'

As we have seen, the Canadian Supreme Court has interpreted the word 'existing' as meaning 'unextinguished'.113 Thus, protection is given only to those rights that were in existence when the constitutional amendment came into force. An Australian amendment in these terms is likely to be similarly interpreted, and thus would not revive nor offer constitutional protection to previously extinguished Indigenous title or rights. It should also be noted that when the Canadian section 35 was originally proposed, the word 'existing' was not included.114 It was only after a last minute negotiation among governments that the word 'existing' was included. Is the inclusion of the term 'existing' necessary? Given that it was added to section 35 not to avoid the revival of extinguished rights, but on an assumption that the pre-1982 law would remain unchanged, it would seem prudent to include such a term in any Australian constitutional amendment.

a. Regulation of Aboriginal Rights

Regulation of a right does not amount to a partial extinguishment of that right according to the Canadian Supreme Court.115 This interpretation has also been followed by Australian courts.116

b Affirmation of a Contemporary Form of Right

The Sparrow Court in Canada directly borrowed Slattery's expression in finding that the protected rights will be 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'.117 In Australia, in Members of the Yorta Yorta Community v Victoria, 118 the High Court took a similar approach and found that the Aboriginal 'body of laws' may undergo evolution and development and yet still remain traditional laws and customs of the community The Court rejected the view that native title rights and interests must be frozen in time if they are to remain sufficiently 'traditional' in character.119

c. Would a Section Similar to Section 35(3) be Appropriate?

This section provides that '[f]or greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.' Any current and future treaty rights would gain constitutional protection. As discussed above, ILUAs made under the NTA could arguably be regarded as modern treaty agreements and thus gain the constitutional protection afforded by such a provision if not specifically excluded. Should consideration be given to constitutionally protecting those ILUAs made between government and the native title holders/claimants where the terms of the agreement are publically disclosed? It would seem important that a similar section should be included in any Australian constitutional protection provision, so as to protect any future treaties that are made with governments.120

(iv) 'Recognised and Affirmed'

As we have seen, the Canadian Supreme Court in Sparrow found that section 35 must be interpreted as a constitutional guarantee of Aboriginal and treaty rights. Although the extent of any fiduciary duty or trust obligation owed by the Crown to native title holders has yet to be fully determined in Australia, the non-recognition of a fiduciary duty would not necessarily lead to a substantially different interpretation.121 Arguably, even without a finding that a fiduciary duty exists in Australia, governments in Australia would remain subject to the principle of the 'honour of the Crown'.122 In general terms, it could be expected that similar interpretations would be given to an equivalent provision.

It is possible that Aboriginal rights that are recognised and affirmed by such a constitutional amendment would also not be regarded as absolute in the Australian context;

in accordance with the Sparrow Court's interpretation, it is likely that legislation could infringe constitutionally protected Indigenous rights, provided that such legislative infringement meets a required standard of justification.123 In the Australian context there may be a potential question as to whether justified infringements could be in breach of the Racial Discrimination Act 1975 (Cth) ('RDA'), if the particular infringement of Aboriginal title could not be done by government to ordinary title.124 How would justifiable infringements by government fit with the native-titleholder's right to negotiate under the NTA?

Also as we have seen with the discussion of the Sparrow justification test in the Canadian context, it is not entirely clear where the line is between extinguishment and justifiable infringement of Indigenous title to lands.

(v) Extinguishment of Aboriginal Rights

Currently, while no constitutional protection is afforded to Aboriginal land rights or native title in Australia, certain legislative restrictions do exist, both on states and the Commonwealth, in relation to the treatment of native title lands. Extinguishment of native title is subject to the Commonwealth Constitution section 51(xxxi), which requires that Commonwealth laws regarding the acquisition of property provide compensation on 'just terms'. In addition, there is a restriction on the power of extinguishment that in state laws, in that they must be consistent with valid Commonwealth laws. Section 109 of the Commonwealth Constitution would render state legislation invalid in the event of inconsistency, which would include inconsistency with the RDA.

125 Furthermore, section 11(1) of the NTA guarantees that native title cannot be extinguished contrary to the Act. Therefore, any attempt by a state or territory to extinguish or impair native title is subject to both the RDA and the NTA. Section 10 of the RDA requires equality before the law; this requires that native-title-holders be treated in the same manner as are other members of society.126 For example, native-title-holders would be entitled to be consulted and compensated for the loss of their interests.127 While limits have existed on state and territory extinguishments of Indigenous lands since the passage of the RDA, the Commonwealth government has been able to extinguish native title rights. subject only to the 'just terms' compensation requirement in section 51(xxxi). Additionally, the Commonwealth government, in formulating and implementing policies in relation to Indigenous lands, must be mindful of this 'just terms' requirement in the acquisition

of all lands. The inclusion of a constitutional guarantee of 'just terms' compensation for any extinguishment by states and territories would also afford a high level of protection required for Australian Indigenous land rights. State parliaments are currently not subject to any constitutional requirement to provide 'just terms' compensation for compulsory property acquisition.128

Clearly, constitutionally protected rights offer greater safeguards to Indigenous lands than legislatively protected ones. The inclusion of a section-35-type provision would constitutionally protect Indigenous title to lands in Australia, and certainly 'raise the bar' regarding future extinguishment of Indigenous rights. Governments would be unable to extinguish or compulsorily acquire those interests without the Indigenous landholders' consent. The Commonwealth would not be able to 'roll back' the RDA so as to allow dealings with Indigenous lands.129 After the enactment of such a provision, extinguishment of Indigenous title to land would occur in a very limited range of circumstances, such as voluntary surrender to the Crown, or after constitutional amendment.

(vi) Self-government

Aboriginal sovereignty within the Australian nation has been rejected by the High Court of Australia.130 However, it is arguable that Indigenous rights to manage the development and use of their lands as part of native title would gain constitutional protection.

C Mechanisms for Ongoing Discussion of Indigenous Rights and the Constitution

A provision similar to section 35.1 of the Canadian Constitution Act 1982, should be included in the Australian Constitution. Section 35.1 requires that a constitutional conference, involving participation by representatives of the Indigenous peoples, be held prior to any future constitutional amendments to the provisions of the Constitution which deal directly with Indigenous peoples. Further, a provision that allows for additional constitutional meetings between government and Indigenous Australians (where a constitutional amendment is made in Australia) could be included to review the progress of any such amendments.131 Such a provision could be modelled on section 37.1 of the Canadian Constitution Act 1982. This view has been endorsed by the Law Council of Australia.132

VIII Conclusions

Securing the recognition of Indigenous title to traditional lands in both the courts and in legislation has not been easily achieved in Australia. The High Court's recognition of native title in Mabo occurred some 200 years after white settlement. The NTA was enacted by the Commonwealth government only as a political response to the Mabo

decision. Statutory Aboriginal title was realized first in Australia in 1976 with the Aboriginal Land Rights (Northern

Territory) Act 1976 (Cth). Protecting these Indigenous land rights should be a priority in any constitutional amendment. Alternative means of constitutional amendments that could also achieve land justice for Indigenous Australians have been identified. These alternative means include a constitutional guarantee of 'just terms' applying to the states and territories, as well as native title or alternative settlement mechanisms.133 However, the model provided by section 35 in the Canadian Constitution Act 1982 could afford Indigenous lands in Australia additional protections against extinguishment and infringement by government action. With some modifications as suggested above, this Canadian model could be adapted to the Australian context. Section 35 has been judicially reviewed and interpreted by the Canadian Supreme Court, albeit in a Canadian context. As discussed, similar interpretations could be anticipated in an Australian context. Section 35(1) of the Canadian Constitution Act 1982 is certainly a model that should be considered in the current debate, as one that could afford and guarantee constitutional protection for Indigenous rights to land in Australia in the future.

1 The term 'Indigenous peoples' is used in this paper interchangeably with Aboriginal, Indian and, in reference to Canada, First Nations peoples.

2 See for example, the constitutions of Canada, Norway, Bolivia, Brazil, Columbia, Paraguay and Malaysia.

3 Canada Act 1982 (UK) c 11, sch B. On Aboriginal rights under the Canadian Constitution, see generally Kent McNeil, Emerging Justice?: Essays on Indigenous Rights in Canada and Australia (Native Law Centre, University of Saskatchewan, 2001); Peter W Hogg, Constitutional Law of Canada (Caswell, 5th ed, 2007); Patrick Macklem, Canadian Constitutional Law (Edmond Montgomery, 3rd ed, 2003); Patrick J Monahan, Constitutional Law (Irwin Law, 3rd ed, 2006); Bernard W Funston and Eugene Rankin Meehan, Canada's Constitutional Law in a Nutshell (Carswell, 3rd ed, 2003); John Joseph Borrows and Leonard Ian Rotman. Aboriginal Legal Issues: Cases, Materials & Commentary (LexisNexis Canada, 2007); Canada, Royal Commission on Aboriginal Peoples, Report (1996). See also Shaunnagh Dorsett and Lee Godden, A Guide to Overseas Precedents of Relevance to Native Title (Aboriginal Studies Press, 1998); Bradford W Morse (ed), Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada (Oxford University Press, 1985).

4 It is not suggested that the Canadian model would be the only means of providing protection for Indigenous property rights in the Australian Constitution; eg, consideration could be given to the role of the just terms requirement in Australian Constitution

s 51(xxxi), both as a provision that gives some protection against acquisitions by the Commonwealth and also in that it applies to all forms of property. So the legal, and ultimately political question, will be whether a just terms requirement that applies uniformly to the Commonwealth and states and whether it is a sufficient and appropriate form of protection for Indigenous property rights in Australia.

5 As inserted by Constitutional Amendment Proclamation, RSC 1983, SI/84-102, sch cl 2.

6 As inserted by Constitutional Amendment Proclamation, RSC 1983, SI/84-102, sch cl 2.

7 Constitution Act 1982 s 37 mandated the holding of First Ministers Conferences regarding s 35. The holding of a Constitutional Conference in s 37 was the basis of the amending formulae for s 35. Now see s 35.1.

8 Constitution Act 1982 ss 35(3), (4) were added. Additionally changes to section 25 Canada Act 1982 (UK) c 11, sch B pt I, s 25 ('Canadian Charter of Rights and Freedoms') (discussed below) included protection for the rights and freedoms arising from both past and future land based claims.

9 The obligation to hold additional conferences was contained in Constitution Act 1982 s 37.1. This section was repealed in 1987: see Constitution Act 1982 s 54.1.

10 Canadian Charter of Rights and Freedoms s 25 protects 'aboriginal, treaty or other rights or freedoms' of Aboriginal peoples from being altered because of the Charter's guarantee of individual and collective rights and freedoms. Section 25 has been interpreted by the Canadian Supreme Court as not affecting questions of which Aboriginal and treaty rights are protected by the Constitution see Ontario (A-G) v Bear Island Foundation [1991] 2 SCR 570.

11 For a discussion of Constitution Act 1867 s 91(24), see generally Hogg, above n 3, ch 28. See also Margaret A Stephenson, 'Canadian Provincial Legislative Powers and Aboriginal Rights Since Delgamuukw: Can a Province Infringe Aboriginal Rights or Title?' (2003) 8 International Trade and Business Law Annual 55; Kent McNeil, 'Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction' (1998) 61 Saskatchewan Law Review 431; Kent McNeil, Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right? (Robarts Centre for Canadian Studies, York University, 1998); Brian Slattery, 'The Constitutional Guarantee of Aboriginal and Treaty Rights' (1983) 8 Queens Law Journal 232; Brian Slattery, 'First Nations and the Constitution: A Question of Trust' (1992) 71 Canadian Bar Review 261

12 Constitution Act 1982 s 35.

13 This was recognised in Delgamuukw v British Columbia [1997] 3

SCR 1010, 1039–40 (Lamer CJ) ('Delgamuukw'). Extinguishment is discussed in detail below. It was also recognised by Lamer CJ in R v Van der Peet [1996] 2 SCR 507, 538 ('Van der Peet') that the enactment of Constitution Act 1982 s 35(1) prevents even Parliament from extinguishing Aboriginal rights.

14 See Stephenson, above n 11: Hamar Foster, 'Aboriginal Title and the Provincial Obligation to Respect It: Is Delgamuukw v British Columbia "Invented Law"?' (1998) 56 Advocate 221.

15 Although more recently the Canadian Supreme Court has limited this doctrine: see Canadian Western Bank v Alberta [2007] 2 SCR 3, in which Binnie and LeBel JJ held that the 'dominant tide' of constitutional interpretation does not favour interjurisdictional immunity: at 32–8. In its place, courts 'should favour, where possible, the ordinary operation of statutes enacted by both levels of government': at 33.

16 This is supported by Dick v The Queen [1985] 2 SCR 309, 330 that Indian Act s 88 applied to referentially incorporate provincial laws that affected Indianness by impairing the status or capacity of Indians (in this case in relation to Indian hunting). The legislation in question was a law of general application and thus applicable to the Indian person by referential incorporation: see Hogg, above n 3, ch 28; Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66 Canadian Bar Review 725, 774–82.

17 In contrast to the position in Canada, the Australian federal government acquired jurisdiction to make laws in relation to Aboriginal affairs by referendum in 1967. Australian Constitution s 51(xxvi) now extends Commonwealth legislative competence to encompass '[t]he people of any race for whom it is deemed necessary to make special laws.' Prior to the 1967 referendum, the states had exclusive power to make laws concerning Indigenous peoples within their respective jurisdictions, while the Commonwealth was expressly excluded from doing so.

18 See Kent McNeil, 'The Decolonisation of Canada: Moving Toward Recognition of Aboriginal Governments' (1994) 7 Western Legal History 113, 118–21. See also Bruce Ryder, 'The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations' (1991) 36 McGill Law Journal 308, 314–20.

19 Statement of the Government of Canada on Indian Policy (1969)

20 The Alberta Indian Association's 'Citizens-Plus' brief was presented to Prime Minister Trudeau and the Canadian government in 1970. This 'Red Paper' became the official position of the National Indian Brotherhood.

21 See, eg, the 1973 Canadian Supreme Court decision in Calder v British Columbia (A-G) [1973] SCR 313 ('Calder'), in which it was confirmed that Aboriginal title existed at common law.

22 Hogg, above n 3, 28–41.

23 See Delgamuukw [1997] 3 SCR 1010.

24 Hogg further notes that the recognition of special rights peculiar to a group defined by race could infringe the idea of equality as

ensured by the Charter of Rights and Freedoms and arguably be unconstitutional: Hogg, above n 3, 28–42.
25 See, eg, Van der Peet [1996] 2 SCR 507, 535, 548 (Lamer CJ).
26 Patriation was the termination of the United Kingdom's Parliament's authority over Canada, which was achieved when the Constitution Act 1982 was passed.
27 Constitution Act 1982 s 35 states:
(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, 'Aboriginal peoples of Canada' includes the Indian, Inuit and Metis peoples of Canada.
28 Constitution Act 1982 s 37 (since repealed).
29 McNeil, above n 18, 121–3.
30 See Constitutional Amendment Proclamation, RSC 1983, SI/84-102, sch cl 2. The new subsections added to s 35 are:
(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of the Act the aboriginal and treaty rights referred to in sub-section (1) are guaranteed equally to male and female persons.
31 House of Commons Special Committee on Indian Selfgovernment, Parliament of Canada, Indian Self-government in Canada: Report of the Special Committee (1983) 44 ('Penner Report').
32 First Ministers Conference, Proposed 1984 Constitutional Accord on the Rights of the Aboriginal Peoples of Canada (1984). This amendment provided in part that:
The aboriginal peoples of Canada have the right to selfgoverning institutions that will meet the needs of their communities, subject to the nature, jurisdiction and power of those institutions, and to the financing arrangements relating thereto, being identified and designed through negotiation with the government of Canada and the provincial governments.
33 See McNeil, above n 18, 126.
34 See Norman K Zlotkin, 'The 1983 and 1984 Constitutional Conferences: Only the Beginning' [1984] 3 Canadian Native Law Reporter 3, 13–14.
35 McNeil, above n 18, 124–26.
36 Ibid 126.
37 See Penner Report, above n 31, 43–4.
38 Canada, Consensus Report on the Constitution (1992). The incentive to undertake further constitutional negotiations followed the failure of the Meech Lake Accord 1987, which had been

intended to obtain Quebec's approval of the Constitutional Act 1982. This accord had failed to obtain the required approval of all provincial governments and had excluded the Aboriginal leaders in its negotiations.
39 See Patrick Macklem, 'First Nations Self-government and the

Borders of the Canadian Legal Imagination' (1991) 36 McGill Law Journal 382; McNeil, above n 18, 130.
40 See McNeil, above n 18.
41 R v Sikyea [1964] SCR 642.
42 R v Sparrow [1990] 1 SCR 1075 ('Sparrow').
43 This is apart from the specific provisions like paragraph 12 of the Natural Resources Transfer Agreements: see Alberta Natural Resources Act, RSC 1930, c 3; Railway Belt and Peace River Block Act, RSC 1930, c 37; Manitoba Natural Resources Act, RSC 1930, c 29; Saskatchewan Natural Resources Act, RSC 1930, c 41.
44 The majority in Delgamuukw [1997] 3 SCR 1010 also confirmed that provincial laws could never extinguish Aboriginal rights, even where those laws are 'necessarily inconsistent' with them. Chief Justice Lamer stated that 'the only laws with sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, proprio vigore, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction': at 1120–1. It is clear that a province cannot enact legislation which directly affects Aboriginal title. Therefore the province must use laws of general application.
45 In Delgamuukw, Lamer CJ found that laws which touch the 'core of Indianness' and purport to extinguish those rights are 'beyond the legislative competence of the provinces to enact': ibid 1119.
46 See Kent McNeil, 'The Constitutional Rights of the Aboriginal Peoples of Canada' (1982) 4 Supreme Court Law Review 255, 256–7; Macklem, above n 39, 447–8; Douglas Sanders, 'The Rights of Aboriginal Peoples in Canada' (1983) 61 Canadian Bar Review 314, 329.
47 Section 25 provides:
The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including:
(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
48 See Hogg, above n 3, 28–42.
49 Métis describes people who have mixed ancestry. Initially it meant half a mixture of Indian and French. Today, the Métis represent a unique culture on the prairies.
50 On Aboriginal title and rights, see generally McNeil, above n 3; McNeil, above n 11; Kent McNeil, 'Aboriginal Title and the Supreme Court: What's Happening?' (2006) 69 Saskatchewan Law Review 281; Slattery, above n 16; M A Stephenson, 'Resource Development on Aboriginal Lands in Canada and Australia' (2002–03) 9 James Cook University Law Review 21, 23–4. See also Jack Woodward, Native Law (Carswell, 1989).
Previous decisions of the Supreme Court of Canada had

recognised that Aboriginal title was a freestanding right and that Aboriginal title to land is one aspect of Aboriginal rights generally: see, eg, R v Adams [1996] 3 SCR 101; R v Côté [1996] 3 SCR 139.
51 Delgamuukw [1997] 3 SCR 1010, 1082.
52 At common law such title is the equivalent of a fee simple.
53 Delgamuukw [1997] 3 SCR 1010, 1093–4 (Lamer CJ). Chief Justice Lamer confirmed that this distinction arises because Aboriginal title is based on occupation of land, whereas other Aboriginal rights are not based on occupation. Justice La Forest also considered that a distinction should be drawn between the recognition of a right to possess ancestral lands and a right to engage in an Aboriginal activity: at 1126–7.
54 According to Chief Justice Lamer's majority judgment, to be 'integral to the distinctive culture' it had to be of central significance to the culture in question and had to be one of the things that truly made that society what it was. The majority suggested that a practical way of thinking about the issue was to ask 'whether without this practice, custom, or tradition, the culture in question would be fundamentally altered other than what it is'. Thus an activity that was incidental to the culture would not satisfy the integral component of test. In relation to the distinctive culture the majority indicated that the practice must be characteristic of the culture in the sense that it was central to it. The majority also indicated that a current activity must have its roots in pre-European activities, resulting in Aboriginal rights being restricted to historical practices: Van Der Peet [1996] 2 SCR 507, 554. For a critique of this test, see John Borrows, 'Frozen Rights in Canada: Constitutional Interpretation and the Trickster' (1997–98) 22 American Indian Law Review 37.
55 See Kent McNeil and David Yarrow, 'Has the Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?' (2007) 37 Supreme Court Law Review 177.
56 Sparrow [1990] 1 SCR 1075, 1103–4, citing Calder [1973] SCR 313.
57 Sparrow [1990] 1 SCR 1075, 1119.
58 Ibid 1106:

> The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitution interpretation, principles relating to aboriginal rights, and the purposes behind the constitution provision itself. … The nature of s. 35(1) itself suggests that it be construed in a purposive way, When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitution provision is demanded.

59 See R v Taylor (1981) 34 OR (2nd) 360, 367 (MacKinnon ACJ) (Ontario Court of Appeal). The honour of the Crown is now

regarded as a key principle in Aboriginal rights jurisprudence: see Haida Nation v British Columbia (Minister of Forests) (2002) 216 DLR (4th) 1 (British Columbia Court of Appeal); Taku River Tlingit First Nation v British Columbia [2004] 3 SCR 388.

60 Van der Peet [1996] 2 SCR 507, 527:

> In order to define the scope of aboriginal rights, it will be necessary to first articulate the purposes which underpin s. 35(1), specifically the reasons underlying its recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada. Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible. … The judgment will thus, after outlining the context and background of the appeal, articulate a test for identifying aboriginal rights which reflects the purposes underlying s. 35(1), and the interest which that constitutional provision is intended to protect.

61 Ibid 535 (emphases in original).

62 Ibid 548:

> In order to fulfil the purpose underlying s. 35(1) – i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions – the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that exited in North America prior to contact with the Europeans.

The aspects of the 'integral to the culture test' that are relevant here are the characterisation of the claim, the integral requirement and the time frame for proving the right. For a discussion of this, see McNeil and Yarrow, above n 55.

63 McNeil and Yarrow, above n 55, 187.

64 [1996] 2 SCR 507, 535.

65 McNeil and Yarrow, above n 55, 191.

66 [1990] 1 SCR 1075, 1092 (Dickson CJ, La Forest J).

67 Ibid 1099 (Dickson CJ, La Forest J).

68 [1996] 2 SCR 723 ('Gladstone').

69 Slattery, above n 16, 782, quoted in Sparrow [1990] 1 SCR 1075, 1093 (Dickson CJ, La Forest J).

70 Sparrow [1990] 1 SCR 1075, 1093 (Dickson CJ, La Forest J).

71 [1990] 1 SCR 1075, 1106 (Dickson CJ, La Forest J).

72 Nowegijick v The Queen [1983] 1 SCR 29, 36 (Dickson J). In R v Agawa (1988) 65 OR (2nd) 505, Blair JA stated that this principle of treaty rights interpretation should apply to the interpretation of s 35(1): at 523.

73 The Court noted that the 'contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship': Sparrow [1990] 1 SCR 1075, 1108 (Dickson

CJ, La Forest J). See also Guerin v The Queen [1984] 2 SCR 335; Nowegijick v The Queen [1983] 1 SCR 29; R v Taylor (1981) 34 OR (2nd) 360.

74 Sparrow [1990] 1 SCR 1075, 1105, 1108 (Dickson CJ, La Forest J).

75 Ibid 1109 (Dickson CJ, La Forest J):

> Federal legislative powers continue, including, of course, the right to legislate with respect to Indians … The powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.

See also Delgamuukw [1997] 3 SCR 1010, 1107 (Lamer CJ).

76 For a discussion of this test, see Kent McNeil, 'Envisaging Constitutional Space for Aboriginal Governments' (1992) 19 Queens Law Journal 95.

77 [1990] 1 SCR 1075, 1110 (Dickson CJ, La Forest J). A law that impairs or infringes an Aboriginal right will be subject to judicial review to determine whether the impairment was justified. Sparrow, a member of the Musqueam Nation, was charged with an offence under the Fisheries Act, RSC 1985, c F-14, as he was fishing with a drift net longer than that permitted by the Band's Indian food fishing license. He argued that he was exercising an Aboriginal right to fish, and that the restrictions on the net length were inconsistent with Constitution Act 1982 s 35(1) and invalid as such. The Canadian Supreme Court acknowledged that Parliament has the power to infringe Aboriginal rights by regulation. The infringing legislation, to be valid, must meet a two-tiered justification test: Sparrow [1990] 1 SCR 1075, 1111–19 (Dickson CJ, La Forest J). First it must be determined whether the law interferes with an activity that comes within the scope of an Aboriginal right. If such interference is established, the federal government must show:

- that a valid reason for making the law exists (for example, that the objectives were 'compelling and substantial');
- that the law upholds the honour of the Crown; and
- that other factors have been addressed, such as infringing Aboriginal right as little as possible, providing fair compensation to Aboriginal peoples affected, and consulting with the Aboriginal peoples concerned.

78 Sparrow [1990] 1 SCR 1075, 1113 (Dickson CJ, La Forest J).

79 Ibid 1114 (Dickson CJ, La Forest J).

80 Ibid 1119 (Dickson CJ, La Forest J).

81 Ibid. The Court ordered a new trial to determine whether the net length restrictions would meet the justification standard: at 1121 (Dickson CJ, La Forest J).

82 See also the application of the justification test in Gladstone [1996] 2 SCR 723; R v Adams [1996] 3 SCR 101; R v Côté [1996] 1 SCR 139; R v Nikal [1996] 1 SCR 103; R v Marshall [No 1] [1999] 3

SCR 456; R v Marshall [No 2] [1999] 3 SCR 533
83 Gladstone [1996] 2 SCR 723, 765–70 (Lamer CJ).
84 Ibid 775 (Lamer CJ). For example, a right to fish for food is internally limited because only a certain amount of fish is required to feed the people. Priority in the case of an internally limited right would allow space for non-aboriginal parties to have access to the resource. A commercial fishing right has only external limits, such as market demands and resource availability. To allow priority to an Aboriginal right with no internal limits, would enable the Aboriginal holders to absorb the entire resource with no room for non-aboriginal parties to participate in the resource. Thus, for a right without internal limits the Sparrow justification requirement did not require Aboriginal rights holders to have priority. The Court found that such a right could be satisfied by 'objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups': at 775 (Lamer CJ). See Justice McLachlin's dissent in Van der Peet [1996] 2 SCR 507, in which his Honour disagreed with this view of justification: at 664–7, See also R v Marshall [No 2] [1999] 3 SCR 533 (where it was recognised that a treaty right to fish commercially could be limited to protect non-aboriginal fishing interests); Kent McNeil, 'How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?' (1997) 8(2) Constitutional Forum 33. Infringements of treaty rights are also subject to the same justification requirements: see R v Badger [1996] 1 SCR 771, 811–16 (Cory J); R v Sundown [1999] 1 SCR 393, 413 (Cory J); R v Marshall [No 1] [1999] 3 SCR 456, 500–1 (Binnie J).
85 [1997] 3 SCR 1010, 1111 (emphasis in original), quoting Gladstone [1996] 2 SCR 723, 774 (Lamer CJ). In Sparrow, the Court suggested that the public interest is too vague a test for justification: [1990] 1 SCR 1075, 1113 (Dickson CJ, La Forest J). However, Chief Justice Lamer's judgment for the majority in Delgamuukw, in which he considered the economic development of the province as being a valid legislative objective, indicates that such a broad justification is possible.
86 Delgamuukw [1997] 3 SCR 1010, 1107.
87 However, this may not be absolutely certain, due to language in Sparrow on duty to compensate if governments extinguish or expropriate Aboriginal title: [1990] 1 SCR 1073, 1119 (Dickson CJ, La Forest J) ('whether, in a situation of expropriation, fair compensation is available'). See also, however, the alternative view recognised by Lamer CJ in Van der Peet [1996] 2 SCR 507, 538. A fortiori, the executive cannot extinguish Aboriginal rights, as the executive cannot interfere with vested rights without legislative authority: see Kent McNeil, K, 'Racial Discrimination and the Unilateral Extinguishment of Native Title' (1996) 1(2) Australian Indigenous Law Reporter 181.
88 Ontario (A-G) v Bear Island Foundation (1989) 68 OR (2nd) 394 (Ontario Court of Appeal), affirmed by the Supreme Court on

this point in Ontario (A-G) v Bear Island Foundation [1991] 2 SCR 570, 575. For commentary, see Kent McNeil, 'The High Cost of Accepting Benefits from the Crown: A Comment on the Temagami Indian Land Case' [1992] 1 Canadian Native Law Reporter 40.

89 R v Horseman [1990] 1 SCR 901. While this case dealt with treaty rights, it illustrates the possibility of modifying those rights by constitutional amendment. A treaty right to hunt commercially was taken away by the Natural Resources Transfer Agreements, which were given constitutional force by the Constitution Act 1867: see above n 43.

90 Sikyea v The Queen [1964] SCR 642; Sparrow [1990] 1 SCR 1075. This power was removed after the insertion of Constitution Act 1982 s 35.

91 Sparrow [1990] 1 SCR 1073, 1098–9.

92 See Gladstone [1996] 2 SCR 723. In this case, the regulatory schemes affecting the fishing were found not to express a clear and plain intention to eliminate the Aboriginal right. Chief Justice Lamer considered that the failure to recognise an Aboriginal fishing right, and the failure to grant special protection to it, did not constitute the clear and plain intention necessary to extinguish the right: at 754–5. The regulations never prohibited aboriginal people from obtaining licences to fish. See also Van der Peet [1996] 2 SCR 507, 587 (L'Heureux-Dube J, dissenting on other grounds).

93 In Campbell v British Columbia (A-G) Wiliamson J of the Supreme Court of British Columbia did acknowledge that the Nisga'a Nation had an inherent right to govern itself: [1999] 3 CNLR 1. In R v Pamajewon [1996] 2 SCR 821, the Canadian Supreme Court rejected a claim that an Aboriginal right of self-government authorise an aboriginal law which regulated gambling on Indian reserve lands. The Court suggested that the Aboriginal right of self-government extends only to activities that took place before European contact, and then only to those activities that were an integral part of the aboriginal society: at 833 (Lamer CJ).

94 Delgamuukw [1997] 3 SCR 1010, 1111 (Lamer CJ) (emphasis in original). In this case the Supreme Court did not comment directly on the claim for self-government, and ordered a new trial.

95 Brian Slattery, 'Making Sense of Aboriginal and Treaty Rights' (2000) 79 Canadian Bar Review 196, 215. See also Brian Slattery, 'The Metamorphosis of Aboriginal Title' (2006) 85 Canadian Bar Review 255

96 Most Australian states, except Western Australia and Tasmania, also passed land rights legislation that allows for the granting and holding of title to Indigenous lands. In most of these land rights schemes, the tenure granted to the Indigenous landholders is generally an inalienable fee simple: see Aboriginal Land Rights

(Northern Territory) Act 1976 (Cth); Aboriginal Land Rights Act 1983 (NSW); Aboriginal Lands Act 1970 (Vic); Aboriginal Land Act 1991 (Qld); Torres Strait Islander Land Act 1991 (Qld); Pitjantjatjara Land Rights Act 1981 (SA); Maralinga Tjarutja Land Rights Act 1984 (SA).

97 For a discussion of some of the differences, see Stephenson, above n 50.

98 (1992) 175 CLR 1 ('Mabo').

99 See, eg, the extensive changes in the Native Title Amendment Act 1998 (Cth).

100 To date in Canada, no Aboriginal title has been recognised by the Supreme Court, despite a number of cases dealing with Aboriginal title questions (eg, Delgamuukw [1997] 3 SCR 1010).

101 Over 22 comprehensive land claims and two self-government agreements have been entered. Comprehensive claims agreements include: James Bay and Northern Quebec Agreement 1975; Northeastern Quebec Agreement 1978; Invuvialuit Final Agreement 1984; Gwich'in Agreement 1992; Nunavut Land Claims Agreement 1993; Sahtu Denee and Metis Agreement 1994; Six Yukon Nation Final Agreements 1994; Vuntut Gwitchín First Nation Final Agreement 1995; First Nation of Nacho Nyak Dun Final Agreement 1995; Teslin Tlingit Council Final Agreement 1995; Champagne and Aishihik First Nations Final Agreement 1995; Little Salmon/Carmacks First Nation Final Agreement 1997; Selkirk First Nation Final Agreement 1997; Nisga'a Final Agreement 1999; Tsawwassen First Nation Final Agreement 2008; Maa-nulth First Nations Final Agreement 2006 (in effect as of 2011); Westbank First Nation Self-Government Agreement 2003; Sechelt Indian Band Self-Government Agreement 1986.

102 See, eg, the Western Arctic (Inuvialuit) Final Agreement 1984. Pursuant to this agreement, rights of use and occupancy – including rights to explore and develop resources – can be granted by the Inuvialuit Regional Corporation.

103 See NTA pt 2 div 3 sub-divs B–E, s 24BA. See generally Richard H Bartlett, Native Title in Australia (LexisNexis Butterworths, 2nd ed, 2004); Patricia Lane, 'A Quick Guide to ILUAs' in Bryan Keon-Cohen (ed), Native Title in the New Millennium: A Selection of Papers from the Native Title Representative Bodies Legal Conference, 16–20 April 2000: Melbourne, Victoria (Aboriginal Studies Press, 2001) 331; Lee Godden and Shaunnagh Dorset, 'The Contractual Status of Indigenous Land Use Agreements' (Land, Rights Laws: Issues of Native Title, Issue Paper Vol 2 No 1, Australian Institute of Aboriginal and Torres Strait Islander Studies, September 1999) <http://www.aiatsis.gov.au/ntru/docs/publications/issues/ip99v2n1.pdf>; Stephenson, above n 50

104 See NTA ss 24BB, 24CB, 24DB, 24BE, 24CE, 24DF, 24EB(4)–(6).

105 Eg, ILUAs could relate to the construction of a city esplanade, a gas pipeline, the creation of a national park, community living areas, access to and use of a pastoral lease and a marina

development.
106 NTA s 24EA(1).
107 The question of whether to use ‘people’ or ‘peoples’ should be given consideration.
108 Justice La Forest’s view in Delgamuukw was that it was unnecessary and potentially misleading to attempt to define more precisely the content of Aboriginal rights: [1997] 3 SCR 1010, 1125–6. This reiterated Justice Dickson’s view in Guerin v The Queen regarding attempts to detail the characteristics of Aboriginal title: [1984] 2 SCR 335, 382.
109 Monahan, above n 3, 446.
110 See discussion accompanying nn 63–5 above.
111 See the Canadian courts’ interpretations of Aboriginal title in R v Marshall; R v Bernard [2005] 2 SCR 220; R v Sappier [2006] 2 SCR 686; Tsilhqot’in Nation v British Columbia [2007] BCSC 1700.
112 (2002) 213 CLR 1. At first instance in the Federal Court, in Ward v Western Australia (1998) 159 ALR 483, Lee J drew upon the Canadian Supreme Court’s view of Aboriginal title as a form of possessory title. His Honour quoted with approval from Delgaamukw:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather it confers the right to use the land for a variety of activities … Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s aboriginal title: Delgamuukw [1997] 3 SCR 1010, 1080 (Lamer CJ), quoted in Ward v Western Australia (1998) 159 ALR 483, 505.

On appeal, a majority of the Full Court of the Federal Court rejected Justice Lee’s approach on the basis that Canada’s recognition of native title occurred in circumstances very different to those in Australia: Western Australia v Ward (2000) 170 ALR 159, 178–84 (Beaumont and Von Doussa JJ). The difference between the interpretations at first instance and on appeal to the

Full Court reflects a fundamental difference in how that title is characterised: as a possessory title on the one hand, and a title limited to and restricted by traditional laws and customs. Note that in the approach taken by the Canadian Supreme Court in Delgamuukw, the underlying Crown title is sustained, such that full Aboriginal ownership is not possible, and title is alienable only to the Crown: at 1081 (Lamer CJ), 1126 (La Forest J).
113 Sparrow [1990] 1 SCR 1075, 1092.
114 See Ardith Walkem and Haile Bruce (eds), Box of Treasures or Empty Box? Twenty Years of Section 35 (Theytus Books, 2003).
115 Sparrow [1990] 1 SCR 1075, 1097–9 (Dickson CJ, La Forest J).
116 Yanner v Eaton (1999) 201 CLR 351; Mabo (1992) 175 CLR 1.

Legislation that merely regulates the enjoyment of native title rights – eg, extensive legislative controls on fishing – will not extinguish native title.

117 See above n 69.

118 Members of the Yorta Yorta Community v Victoria (2002) 214 CLR 422, 444–5 (Gleeson CJ, Gummow and Hayne JJ). Although the Court found that the while the word 'traditional' in NTA s 223(1)(a) required that communities' practices have their origin in presovereignty laws and customs, they rejected the 'frozen rights' approach.

119 Ibid 443–4 (Gleeson CJ, Gummow and Hayne JJ). The Court emphasised that traditional laws and customs, and the native title rights they support, may change and adapt over time, particularly in response to the considerable pressure of European colonisation of traditional lands.

120 It is unclear whether Canadian principles of treaty interpretation, as laid down by the Supreme Court in various cases, would be applicable to modern treaty agreements in the Australian context: see Nowegiick v The Queen [1983] 1 SCR 29, 36 (where the Dickson J of the Supreme Court stated that 'treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians'); Leonard I Rotman, 'Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence' (1997) 46 University of New Brunswick Law Journal 11. Principles relating to treaty interpretation are largely dependent on the terms of agreements that have been reached between Aboriginal peoples and the government.

121 See Thorpe v Commonwealth [No 3] (1997) 144 ALR 677; Bodney v Westralia Airports Corporation Pty Ltd (2000) 109 FCR 178, 204-5 (Lehane J).

122 The honour of the Crown should also apply to Australian courts, as it is based in English law: see Brian Slattery, 'Aboriginal Rights and the Honour of the Crown' (2005) 29 Supreme Court Law Review 433, 443–5.

123 Gladstone [1996] 2 SCR 723; R v Adams [1996] 3 SCR 101; R v Côté [1996] 1 SCR 139; R v Nikal [1996] 1 SCR 103; R v Marshall [1999] 3 SCR 456; R v Marshall [No 2] [1999] 3 SCR 533.

124 See the discussion of infringement and the RDA in Barbara Ann Hocking and Margaret Stephenson, 'Why the Persistent Absence of a Foundational Principle? Indigenous Australians, Proprietary and Family Reparations' in Federico Lenzerini (ed) Reparations for Indigenous Peoples: International and Comparative Perspectives (Oxford University Press, 2008) 477.

125 Unlike the position in Canada, both state and Commonwealth governments having the potential to extinguish, impair or regulate native title in Australia (subject to the limitations described).

126 RDA ss 9, 10 provide, in effect, that if Aboriginal people are deprived of certain rights by discriminatory laws, then those

rights are not lost. The right being denied is the right not to be arbitrarily deprived of property.
127 See the interpretation of the RDA in Western Australia v Ward (2002) 213 CLR 1.
128 Durham Holdings Pty Ltd v New South Wales (2001) 205 CLR 399. See also Griffiths v Minister for Lands and Environment (NT) (2008) 235 CLR 232; Sean Brennan, 'Section 51(xxxi) and the Acquisition of Property under Commonwealth–State Arrangements: The Relevance to Native Title Extinguishment on Just Terms' (2011) 15(2) Australian Indigenous Law Review X.
129 See also the NTA validation regime for non-Indigenous property rights: NTA ss 15, 21. The RDA was 'rolled back' to enable these provisions to be enacted: see, eg, the 'mandatory grant' to the Commonwealth of five-year leases over certain lands in the Northern Territory, as part of the federal government's Intervention, and treatment of these issues in Wurridjal v Commonwealth (2009) 237 CLR 309; Griffiths v Minister for Lands, Planning and Environment (2008) 235 CLR 232.
130 Mabo (1992) 175 CLR 1; Coe v Commonwealth (1993) 118 ALR 193.
131 Constitution Act 1982 s 37.1 provides that:
(1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.
(2) Each conference convened under subsection (1) shall have included in its agenda matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.
Section 37 was repealed after the convening of the first Constitutional Conference in 1983. Section 37.1 was then

included by the Constitutional Amendment Proclamation 1983.
132 'Constitutional Recognition of Indigenous Australians' (Discussion Paper, Law Council of Australia, 2011) 12–13.
133 See proposals for constitutional amendments that would enable the Commonwealth government to negotiate land agreements directly with Aboriginal and Torres Strait Islander communities in Brennan, above n 128; Geoffrey Lindell, 'The Constitutional Commission and Australia's First Inhabitants: Its Views on Agreement-Making and a New Power to Legislate Revisited' (2011) 15(2) Australian Indigenous Law Review 26.
(eoart)

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Yours LISTENING in the struggle for recognition and respect in the 180th year of the Colonization of South Australia and for achieving recognition, respect, rights, reform, reciprocity, responsibility and reparations following last year's 7th R of Reparations, by advocating the 12 L's, listen, look, learn, lore, life {legacy, loyalty, language, literacy, legitimacy}, leadership and the liberty of liberation

Lynette Alice Crocker (nee Smith)
Ngangki Burka, Senior Kaurna Woman
Kaurna Aboriginal Title holder Traditional Owner
Kowiandilla Meyunna - Kua Nepotinna (Lone Crow)
Tarndanya and Mika Womma Yerta
A/Chair of the Kaurna Yerta Aboriginal Corporation (Native Title)
Named Applicant Kaurna Native Title Claim / Apical Ancestor Group (Alice Miller)
Inaugurating Kua Nepotinna Constituent Founder - Kaurna Elders Assembly
Vice-Chair of the Kaurna Nation Cultural Heritage Association (KNCHA)
Treasurer - Journey of Healing Assoc. (S.A.) Inc
Treasurer - ANTaR SA Inc
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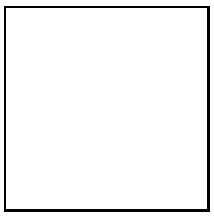

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