Land, Rights, Laws: Issues of Native Title

Native Title Research Unit
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Contributing to the understanding of crucial issues of concern to native title

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**Abstract**

*Would the 'practical re-colonisation' of Australia by Indigenous peoples lead to practical reconciliation? John Borrows examines the Federal Government policy of practical reconciliation and argues that 'practicality' should not be the measure of all things when dealing with issues of reconciliation and colonisation. Based on the premise that equality of opportunity and outcome may give rise to a right of Indigenous peoples to participate in the re-colonisation of the continent, John Borrows demonstrates how understandings of 'practical' are subjective by asking what the practical result of Indigenous re-colonisation might be.*

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# Practical Reconciliation, Practical Re-Colonisation?

**John Borrows**

## Introduction: Practical Colonisation

The colonisation of Australia could be considered a practical matter. The redistribution of land and political power away from Indigenous peoples and towards others has produced many benefits for the majority of people in Australia. The security of non-Indigenous tenure has allowed for great financial investment and socio-economic development around

the continent. Strong non-Indigenous control of governance, largely unfettered by Indigenous concerns, has facilitated widespread peace and order throughout most of the land. By nearly all measures colonisation has been a great success. It has helped contribute to Australians enjoying one of the highest standards of living in the world. But despite all its seeming practicality, colonisation contains a fatal flaw. It does not provide as many benefits for those who have been colonised. In fact, it sometimes might be asserted that many of the colonist's most significant gains come at the expense of those who are colonised. Joseph Conrad once wrote: 'The conquest of the earth, which mostly means the taking it away from those who have a different complexion or slightly flatter noses than ourselves, is not a pretty thing when you look into it'.[1]

**Reconciliation: Practical and Otherwise**

Non-Indigenous Australians and those who are Indigenous to the continent see a problem in their midst: Indigenous peoples, by and large, are not sharing in the benefits of colonisation. Many share Conrad's concern, that the conquest of Australia is not a pretty thing when you look into it too much.[2] Therefore, despite colonisation's practicality for non-Indigenous people, there has been talk of trying to overcome its worst features through reconciliation. In the early 1990s the Hawke Labour Government implemented a formal process to achieve reconciliation between Indigenous and non-Indigenous Australians by the end of the millennium. A *Council for Aboriginal Reconciliation Act* was passed,[3] which created a body whose job it was 'to enable the nation to move forward over the coming decade with a broadly defined agenda which will meet the aspirations of Aboriginal people'.[4] The Council delivered a series of Reports over its life that dealt with specific issues concerning reconciliation.[5] In 2000 the Council delivered its final agenda to the government.[6] It suggested that Indigenous peoples should be recognised as having distinct rights because of their First Nations status. Legislation was proposed to recognise self-government and customary law, to provide for compensation, reparation and the comprehensive settlement of native title, deaths in custody and children's issues. The Council also suggested that a bill of rights be created and that constitutional recognition be extended to Indigenous peoples' rights. The agenda delivered by the Council did not meet with the approval of the Federal government and the Prime Minister.[7] They were not in favour of treating Indigenous Australians differently and declined to implement the Council's recommended distinctions in law and policy.

As a result, the Prime Minister launched an alternative agenda dealing with the need to achieve 'practical reconciliation'. Prime Minister Howard said that three objectives lie at the heart of his government's practical reconciliation process.[8] The first is a shared commitment to improved living standards as part of providing equality of opportunity for all Australians. The second is an acknowledgement of the inter-related histories of Australia, where blame or guilt is not apportioned for past wrongs. The third objective is a mutual acceptance of the importance of working together and appreciating differences in a way that does not prevent people from sharing their futures together. This agenda is premised on the idea that 'true reconciliation can never said to have occurred until Indigenous Australians enjoy the same opportunities and standards of treatment as other Australians.'[9] For the Howard government, the true measure of reconciliation should be

gauged by improvements in outcomes for Indigenous people, 'better health, better education, and a better standard of living'.[10]

It is important to be practical, to take concrete steps that meet people's needs and improve their lives. However, there is a debate over what means should be pursued to achieve this result. There are those who have expressed disagreement with Prime Minister Howard's focus on practical reconciliation. The Social Justice Commissioner William Jonas has written that practical reconciliation strips Indigenous disadvantage of its historical context and does not seek to transform the relationship between government and Indigenous peoples. He writes that the government's focus is based on 'whether one group, Indigenous people, are prepared to conform to the rest of society. If not, then the offer is closed.'[11]

There is something to be said for both sides in this debate about reconciliation; each side has a portion of the truth.

**Reconciliation, Equality and The Relevance of Indigenous Difference**

Indigenous peoples will need a measured recognition of their difference in political and legal terms if they are going to improve their lives in measurable ways. In countries where Indigenous circumstances are slowly improving Indigenous difference is being legally and politically recognised, although the pace is very slow.[12] The circumstances that created many Indigenous problems are a result of their differences and therefore dealing with this situation will also have to affirmatively address these differences. Only Indigenous peoples were colonised in Australia, there is no escaping this fact. Colonisation has created a different set of problems for them than for others in society. These differences are unlikely to go away by treating Indigenous Australians the same as non-Indigenous Australians in all circumstances. In fact, differences can be exacerbated in some instances by ignoring them and applying solutions as if they did not exist. You do not make a rich person and a poor person equal by giving them both a hundred dollars.

The recognition of difference can sometimes be necessary to achieve equality. In the Canadian case of *Law v Canada (Minister of Employment and Immigration)*[13] Justice Iacobucci of the Supreme Court of Canada observed:

> 'True equality does not necessarily result from identical treatment. Formal distinctions in treatment will be necessary in some contexts in order to accommodate the differences between individuals and thus to produce equal treatment in a substantive sense. Correspondingly, a law which applies uniformly to all may still violate a claimant's equality rights.'[14]

Just because people are subject to differential treatment does not always mean they have been denied the equal benefit and protection of the law. As Justice Iacobucci observed, the fairness of differential treatment will always be a contextualised determination that depends on the right at issue, the person's socio-economic status, and that of comparative groups.

Applying these principles to the achievement of reconciliation, one could argue that differential treatment of Indigenous and non-Indigenous peoples does not always lead to inequality. A contextualised determination of Indigenous peoples socio-economic status in Australia should take into account the fact that the comparator group (non-Indigenous Australians) did not have to suffer through the disadvantage of colonisation in this country. Once this fact is recognised steps can be taken to treat Indigenous peoples differently on this basis, and thereby overcome the disadvantage that stems from colonisation.

**Reconciliation, Equality and the Relevance of Similarity of Opportunity and Outcome for Indigenous Peoples**

At the same time, if Indigenous peoples are to achieve 'practical reconciliation', there are instances where they will have to be treated and judged in the same manner as others in society, as Prime Minister Howard suggests. Law and policy can be crafted with greater precision to identify when Indigenous similarity and difference should be relevant.[15] Indigenous peoples should not have fewer opportunities in life because of their First Nations status. They should not experience inferior outcomes because of their ancestry and socio-political community. Indigenous peoples are entitled to enjoy an equality of opportunity and outcome in their levels of health, education and standard of living. To achieve this they are going to have to take practical steps, in concert with others in society, to accomplish these goals. The results of these efforts must also be measured by the same standards that are applied to others. More Indigenous peoples will have to require of the government and secure for themselves better housing, improved educational opportunities, higher incomes and stable social lives. This is the course that others must pursue. Through their own initiative, and with the aid of the government, Indigenous peoples are going to have to start acting like others in certain circumstances and engage in practical measures to achieve these results. This is not to deny relevant Indigenous difference in the matter of colonisation, but it is to affirm the importance of societal opportunity and individualised hard work necessary to achieve these goals.

Individuals and governments must take concrete, measurable steps to eradicate the following socio-economic inequalities Indigenous peoples in Australia experience[16]:

- Gross household income for Indigenous peoples in Australia is 62% of that of non-Indigenous Australians

- The unemployment rate for Indigenous people in Australia is 4 times the national average.

- 38% of Indigenous students in Australia completed year 12, compared to 76% of non-Indigenous students.

- Indigenous people in Australia are 5.6 times more likely to live in overcrowded houses than non-Indigenous people.

- Indigenous people in Australia constitute 20% of the total prisoner population; yet make up less than 1% of the total population of Australia as a whole.

- The median age of death for Indigenous people is 24 years lower than for non-Indigenous people in Australia (life expectancy for Indigenous women is 62.8 years, and for Indigenous men is 56.3 years).

Until Indigenous peoples enjoy equal outcomes in the areas of employment rates, income, educational rates, housing circumstances, criminal justice system involvement and life expectancy, there will be no practical reconciliation in Australia.

However, in this analysis, equality can also be stretched further and an argument can be made that Indigenous peoples should enjoy the opportunity and benefits in all areas of life, not just in those outcomes listed above. If equality was to be taken this far it could be argued that Indigenous peoples have the right to participate in the ongoing colonisation of the country just like other Australians. Under such a stance it could be said that it would be unfair to deny Indigenous peoples this advantage when it has been extended to everyone else in society. Why should non-Indigenous peoples be the only group in society not to receive colonisation's benefits, it may be asked. If equality of opportunity is to be the means by which Indigenous peoples improve their lives, Indigenous peoples should also have an equal opportunity to participate with others in the colonisation of Australia. If equality of result is the outcome by which we judge the provision of opportunity, Indigenous peoples should also participate in colonisation's benefits.

Of course, if this argument were adopted it might be said that Indigenous peoples cannot colonise Australia because they are its original inhabitants. Yet this response would overlook the fact that there is an historical precedent for the Indigenous colonisation of the continent. At sometime, perhaps 40,000 years in the past, the original ancestors of Indigenous peoples spread over the territory to improve their lives and enjoy the fruits of the labour. They have been moving in their territories, and in some cases between their territories ever since, particularly in the last 200 years. It could even be said that the colonisation is an inherent right, exercised since time immemorial, if there was concern amongst Indigenous peoples about it being a delegated right. The fact that Indigenous peoples were in possession of the continent when Europeans first arrived should not prevent them from enjoying the on-going benefits of colonisation practices that are enjoyed by others who live in the same country. The fact that Indigenous peoples have voluntarily moved, been relocated or forced to seek other homes because of colonisation's impact should not prevent them from asserting a more explicit right of colonisation, if equality is the goal.

However, those who may be opposed to Indigenous colonisation may adopt a related line of argument and say that Indigenous peoples should be barred from being a colonial force precisely because they were here first. It could be said that since Indigenous peoples had already colonised Australia at one time, their resettlement of the continent in a contemporary setting cannot properly be called colonisation. Critics may ask: how can you colonise land you have already colonised? Indigenous peoples could of course ask the same

question back to non-Indigenous Australians. However, in response to this line of argument, Indigenous people may have to admit the point is technically true - they cannot, in the strict sense, colonise Australia because they have already done so. As a result, it may be more accurate for Indigenous peoples to label their position as the right to *re-colonise* Australia, and receive the equal protection and benefit of law that other colonial actors receive. As noted, Indigenous peoples could quibble about non-Indigenous peoples use of the term colonisation, since non-Indigenous Australians themselves participated in a re-colonisation of Australia.

Technical references to the precise meaning of colonisation aside, the point Indigenous peoples would be making is that they have not been permitted to re-colonise Australia in equality with others, and that this is the right that they want to practice. If Indigenous peoples were to take up this argument, they would be asserting that they should enjoy the same right to occupy land, exercise decision-making power over it and other important matters in their lives, with the full and equal protection, support and backing of the State. Colonisation should not be pursued in a way that advantages non-Indigenous peoples and disadvantages Indigenous peoples, this would be unequal. Indigenous peoples may want to argue for the right to re-colonise the Country under an equal level of protection that has been enjoyed by others in the past.

In support of this argument, Indigenous peoples could consider invoking section 10 of the *Racial Discrimination Act 1975* (Cth). They could argue that they have been discriminated against by the Australian State because they do not 'enjoy a right [of re-colonisation] that is enjoyed by persons of another race, colour, or national or ethnic origin'. As a result, Indigenous peoples could assert that all governmental acts from 1975 to the present that have extended the benefits of re-colonisation to non-Indigenous peoples and not to them are invalid because they are inconsistent with the provisions of the *Racial Discrimination Act*.[17] They could further rely on section 10 of the Act and argue that they by 'force of this section, enjoy that right [in this case to re-colonisation] to the same extent as persons of that other race, colour or national, or ethnic origin'.

If Indigenous peoples pursued re-colonisation, it would be important that their participation in this process receives the full weight of approval in law and politics. This is because in examining Australian history one can see that settlement of land is a necessary but not always sufficient condition for successful colonisation. If all Indigenous peoples did in their re-colonisation efforts was to resettle the land and exercise governance this would be insufficient to claim vested rights. Settlement has to be continually 'perfected' through justification in law and policy, and perhaps eventually morality, to be considered successful. One only has to witness the great efforts extended by the Australian State in the last 12 years to appreciate this fact. Over this period it has been considered necessary to extinguish and recognise Indigenous and non-Indigenous titles because the courts have not considered the mere physical act of the resettlement of Australia by non-Indigenous peoples to be sufficient grounds to justify this process. As a result:

- Since 1992 Indigenous peoples in Australia have had courts legally justify the extinguishment of their land rights from 1788 until 1975, the year the *Racial Discrimination Act* was passed.[18]

- In 1993 the Australian Parliament legally justified the extinguishment of Indigenous land rights from 1975 until 1994.[19]

- In 1998 the Australian Parliament legally justified the extinguishment of Indigenous land rights from 1994 until 1998.[20]

- In 2002 the cases of *Western Australia v Ward*,[21] *Wilson v Anderson*[22] and *Yorta Yorta Aboriginal Community v Victoria*[23] invented strict tests for the proof of Native title in Australian law, thereby initiating a further extinguishment of Indigenous rights because they are not considered cognisable at common law.

- Structures and policies designed to recognise Indigenous difference in Australia have been dismantled or rolled back, such as the disestablishment of ATSIC and other Indigenous representative bodies and organisations.

As these points indicate, colonisation in Australia is not only an historic process. Colonisation continues today; Indigenous peoples continue to lose their lands and have their governance undermined for the benefit of others. If non-Indigenous Australians are going to continue to re-colonise Australia, and at the same time talk about equality of opportunity and outcome, it is only fair that Indigenous peoples should be able to participate on the same footing with other Australians in the re-colonisation of the continent. Under this approach the extension of equal rights to colonisation of the continent would in one sense accord with Prime Minister Howard's view about practical reconciliation. If people could only come to a mutual acceptance of the importance of working together and appreciating differences in a way that does not prevent them from sharing their futures together, then both parties participating in the process of colonisation could achieve this end.

However, it must be asked whether people could share a future together if the re-colonisation of Australia by Indigenous peoples was protected by the State, in the way that the continuing colonisation of Australia is protected for non-Indigenous peoples. It may be said Indigenous peoples and non-Indigenous peoples could not share their futures together under this type of equality because the whole enterprise of colonisation is unfair, and always ends up dispossessing people with settled rights. It could be said that Indigenous peoples should know better than to advocate for colonisation because they have borne the brunt of its effects for over 200 years. How, it could be asked, could they advocate colonisation when they have first hand experience with its devastating effects? There are truths in this statement that must be grappled with. Colonisation does result in people being disadvantaged and there is no denying this fact.

In addressing this line of argument it is also important to note that if Indigenous peoples started claiming the right to participate with others in the colonisation of the continent, some may say this impliedly legitimates Australia's claims to the necessity, practicality or

justice of re-colonisation through the last centuries. In analysing this response one should be careful to note that while it may be true that the necessity and practice of non-Indigenous colonisation may be conceded if Indigenous peoples were to adopt this course, the justice of how colonisation has been carried out to this point would not necessarily be accepted. The answer to this question would depend on what Indigenous peoples said and did in the proclamation and implementation of their right to colonisation.

Extending the equal right to participate in the colonisation of Australia does not necessarily mean that Indigenous peoples will pursue it in the same manner that other Australians would. Equality does not mean that every person or group acts the same. In matters of equality in religion, thought, speech, assembly, for example, it is not assumed that everyone will worship, think say or gather in the same ways. The extension of equal rights still allows people to pursue those rights in a different manner. Indigenous peoples would likely pursue the re-colonisation of the continent in a somewhat different manner than non-Indigenous people, given their experience and beliefs. They could engage in practices that required the participation and full consent of non-Indigenous peoples to their re-colonisation. They could abide by principles of International law in re-colonising the continent. They could commit themselves in law, policy, morality and practice to re-colonising Australia in a way that respects the rights and interests of non-Indigenous Australians. If non-Indigenous Australians feel that this is an impossible goal, or have some discomfort in Indigenous peoples undertaking to re-colonise the Country under these principles, they may want re-examine the basis on which they undertake the same process.

**Practical Re-colonisation**

Once it is established that equality requires that Indigenous peoples have the right to engage in the re-colonisation of Australia, with the same level of protection that non-Indigenous Australians enjoy, the practical aspects of this process could then be explored.

One guide for identifying what may be practical for Indigenous peoples to pursue in their quest for re-colonisation could come from an examination of what Australian governments have done in the colonisation of Australia in the past 12 years (though for the reasons given above Indigenous peoples would probably choose otherwise). Despite its drawbacks this approach would have the advantage of diminishing fears that Indigenous peoples would pursue something different from non-Indigenous Australians. This should be more comforting to those who tend to regard similarity in treatment as equality and following the government's example could also provide a guide about what may be 'practical'. Under the assumption that an undertaking must be practical if governments have taken action in either law or policy to accomplish an objective, Indigenous peoples can take guidance from these examples to take steps to achieve 'practical re-colonisation'.

- Practical re-colonisation could permit Indigenous peoples to extinguish non-Indigenous titles prior to 1975 and this could be confirmed by federal legislation.

- Practical re-colonisation could permit Indigenous peoples to extinguish through federal legislation any non-Indigenous titles issued since 1975 where such titles are incompatible with the continued existence of Indigenous titles. For example, in cases where Indigenous peoples can show that the security of their title is necessary for their development, they should have the same rights as pastoralists, miners, lease-holders, fee-holders and others to deny activities on their land.

- Practical re-colonisation could permit legislative amendments to be passed by the federal government to make it technically difficult and financially expensive for non-Indigenous peoples to defend their titles.

- Practical re-colonisation could leave the interpretation of proof and extinguishment of non-native title in the hands of a court appointed by Indigenous peoples. Members of this court could be chosen for their expertise in Indigenous law when examining concepts of non-Indigenous law relevant to non-native title. They could also apply Indigenous law to judge non-Indigenous law.

- If more non-Indigenous people ended up dying in custody, having their children removed, losing their rights to governance, or having any other disadvantage befall them during the Indigenous re-colonisation of the continent, practicality could require that these not considered as requiring any legal remedy, legislative response, or political apology.

Some may argue that the steps described above are not 'practical' for Indigenous peoples in the re-colonisation of the continent. It may be argued that they are too divisive, expensive, unrealistic or unjust. Of course, if one asks these questions they may also ponder why these steps are considered practical when non-Indigenous people have taken similar steps in the past 12 years. Is it possible that questions of equality and practicality do not take us far enough in the debate about reconciliation in Australia? Would the practical re-colonisation of Australia by Indigenous peoples lead to practical reconciliation? Does the continued colonisation of Australia by non-Indigenous peoples lead to reconciliation? In considering these questions it should be apparent that practicality should not be the measure of all things when dealing with issues of reconciliation and colonisation. What may be practical can be subjective, and in the eye of the beholder.

Having identified this approach to the Indigenous re-colonisation of Australia, it is important to re-emphasise that this would likely not be Indigenous peoples' preferred approach. It is possible and preferable to develop other strategies for the re-colonisation of Australia that do not follow the federal government's example. What these strategies might look like depends on Indigenous peoples aspirations and what Indigenous and non-Indigenous peoples might regard as desirable and possible. It would be insightful for the future of Indigenous peoples living in re-colonised countries to explore if others have any interest in the process of Indigenous re-colonisation. This paper has attempted to initiate this conversation and invite others to take it up.

## CONCLUSION

When Joseph Conrad critiqued colonialism he was writing from his perspective as a citizen of colonial society. He could not shake the feeling that something was wrong with his culture's dispossession of others, and he tried to address this problem through his fiction. Though he himself said troubling things at times, his statement captures a strand of sentiment that has usually been detectable in colonial society. For example, in 1834 Quaker James Backhouse wrote to his friend, British Parliamentarian Thomas Buxton, 'Aborigines have had wholesale robbery of territory committed upon them by the Government, and the settlers have become the receivers of stolen property…'[24] In 1841, in the *Bonjon* case from Port Philip, Justice Willis recognised the continued existence of Indigenous authority in Australia after the assertion of British sovereignty.[25] Yet his opinion was not sustained and it soon became a hidden legal relic, buried in the dusts of jurisprudential time. Nevertheless, if one digs deep enough, one can find that voices of dissent have been raised against the dispossession of Indigenous peoples throughout Australia's colonial history.[26]

In fact, non-Indigenous voices of dissent against government policies directed towards the colonisation of Indigenous peoples have not subsided.[27] The society that has benefited from the taking of Indigenous lands and life has not been universally supportive of their government's land and power transfer. While these forces of dissent have never been strong enough to turn the tide of colonisation, they try to bring into question the 'justice' of the process. They hint of alternative legalities and/or moralities and catalogue the failures of colonisation for the countries about which they are concerned.

One of the problems insufficiently addressed in this debate is that colonialism actually works on a certain level, for a select group of people. Those who critique colonialism do not address these benefits in enough detail to be persuasive in changing how people live and respond to it. Given its brevity this paper has no doubt fallen into the same trap. Nevertheless, it is important that steps be taken to address colonialism's advantages and explore its almost invisible hold on people's views about the subject. Until this is done, the debate about the utility of the continued colonisation of certain countries is not fully engaged; people will tend to speak past one another and never fully address one another's concerns. While very few would openly defend colonialism, many more would be loathe to dismantle the benefits they receive from it. Therefore, the value of colonisation hangs like a shadow in the background of our discussions about its continuing existence. A greater exploration of some of these issues would be raised if colonisation's benefits were more thoroughly acknowledged. When we more fully understand the implications of re-colonisation, we may be in a better position to understand and eventually achieve reconciliation.

[1] Joseph Conrad 1999, *Heart of Darkness*, 2d ed., D.C.R.A. Goonetilleke, ed., Broadview Press.
[2] While colonisation may not be 'pretty', some say that we should not be 'consumed' with colonisation's worst features: "Australian history should never be a source of smug delusions or comfortable superiority. But nor should it be a basis for obsessing and consuming national guilt and shame, John Howard, "Confront Our Past, Yes, But Let's Not Be Consumed by It", *The Age*, (19 October, 1996).
[3] *Council for Aboriginal Reconciliation Act 1991* (Cth).
[4] Minister of Aboriginal Affairs, 1991, Second Reading Speech, *Parliamentary Debates* (AGPS, Canberra, 30 May, 19991) at 4498.
[5] Council for Aboriginal Reconciliation, *Walking Together: The First Steps, Report to the Federal Parliament*, AGPS, Canberra, 1991-1994; *Council for Aboriginal Reconciliation: Sharing History: Key Issues Paper Number 4*, AGPS, Canberra, 1994; *Council for Aboriginal Reconciliation, Going Forward: Social Justice and the First Australians*, AGPS, Canberra, 1995.
[6] Council for Aboriginal Reconciliation 2000, *The Australian Document Towards Reconciliation*, AGPS, Canberra; Council for Aboriginal Reconciliation 2000, *Roadmap for Reconciliation*, AGPS, Canberra; Council for Aboriginal Reconciliation 2000, *Reconciliation: Australia's Challenge*, AGPS, Canberra.
[7] For an analysis of the division of idea's concerning reconciliation see Tim Rowse 2002, *Indigenous Futures*, University of New South Wales Press, p. 2.
[8] John Howard 2000, 'Practical Reconciliation' in M. Gratton (ed.), *Reconciliation: Essays on Australian Reconciliation*, Bookman Press, pp. 89-96.
[9] Commonwealth of Australia 2002, *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report– Reconciliation: Australia's Challenge*, AGPS, Canberra, p. 2.
[10] See note 9 above.
[11] Aboriginal and Torres Strait Islander Social Justice Commissioner 2001, *Social Justice Report 2001*, Human Rights and Equal Opportunity Commission, p. 29.
[12] For a comparative analysis of Indigenous peoples rights and circumstances in Canada and the United States see Aboriginal and Torres Strait Islander Social Justice Commissioner 2004, *Native Title Report*, Human Rights and Equal Opportunity Commission, pp. 167-205.
[13] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497.
[14] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 at 25.
[15] For an extended discussion of this principle see Patrick Macklem 2001, *Indigenous Difference and the Constitution of Canada*, University of Toronto Press.
[16] The following statistics are taken from Aboriginal and Torres Strait Islander Social Justice Commissioner 2004, *Social Justice Report*, Human Rights and Equal Opportunity Commission, pp. 195-226.
[17] See *Mabo v. Queensland* (1988) 166 CLR for support.
[18] *Mabo v. Queensland* (No. 2) (1992) 175 CLR 1; 107 ALR 129.
[19] *Native Title Act 1993* (Cth).
[20] *Native Title Amendment Act 1998* (Cth). For commentary see Garth Nettheim 1999, 'The Search for Certainty and the Native Title Amendment Act 1998 (Cth)', *University of New South Wales Law Journal*, Vol. 22, No.2, pp. 564 -584; Richard Bartlett 2004, *Native Title in Australia*, 2nd ed., Butterworths, pp. 52-64.
[21] *Western Australia v Ward* (2002) 191 ALR 1. For commentary on the *Ward* case see Richard Bartlett 2004, *Native Title in Australia*, 2nd ed., Butterworths, pp. 65-73.
[22] *Wilson v Anderson* (2002) 191 ALR 313.
[23] *Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538.
[24] *British Parliamentary Papers*, 7, no. 538, 1836, p. 680.
[25] *R v Bonjon* (SC NSW Willis J, Port Phillip Gazette,18/9/1841) Papers Relative to the Aborigines, Australian Colonies, 1844 *British Parliamentary Papers*, pp. 146 ff, Irish University Press, Colonies, Australia, Vol. 8.
[26] See the work of Henry Reynolds chronicling non-Indigenous historical views about the legality and morality of colonisation, *The Law of the Land*, 3rd edition, Penguin Books, 2003.
[27] See the work of Henry Reynolds, Hal Wooten, Fred Chaney, Garth Nettheim, Lisa Strelein, etc.

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