

# The Indigenous right of self-determination and 'the state' in the Northern Territory

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## ***Abstract***

The topic of this thesis is the prolonged denial and eventual recognition of the rights of the Indigenous peoples of Australia following the British assertion of sovereignty. The analysis considers the manner in which the denial and subsequent recognition of Indigenous rights has affected the system of government of the dominant society (the Commonwealth of Australia) in terms of the establishment and evolution of the constitutional framework and associated processes of institutional change in the principles, structures and procedures of the system of government. The primary jurisdiction in which this topic is explored is the Northern Territory of Australia; the primary contexts are the recognition of Indigenous land rights (defined broadly to include associated natural and cultural heritage and resource rights) and the Indigenous right to self government within 'the state' (the internationally constituted and recognised polity of the Commonwealth of Australia).

The thesis draws on analogous developments in Canada and New Zealand to demonstrate that, while significant progress has been made in the recognition of Indigenous rights since the 1960s, many forms of recognition remain conceptually and procedurally limited. In particular, associated regimes have almost invariably been devised and implemented within a fundamentally monocultural context in which Indigenous rights remain subject to unilateral abrogation or extinguishment by Commonwealth governments. In addition, the legal basis of and requirements for recognition of Indigenous rights according to Commonwealth law result in extremely variable levels of recognition in different areas and contexts, and principles and procedures for the mutual recognition and co-existence of Indigenous and Commonwealth law and systems of government are only partially apparent in the Federal and Northern Territory systems of government. In addition to extending and deepening the recognition of Indigenous rights throughout all relevant institutions of the system of government, to address these deficiencies the thesis argues that constitutional recognition and protection of Indigenous rights and the negotiation of treaties are essential if the Indigenous right of self-determination is to be respected and accommodated by the dominant society.

## **Declaration**

*This is to certify that:*

- i. the thesis comprises only my original work towards the PhD,*
- ii. due acknowledgment has been made in the text to all other material used,*
- iii. the thesis is less than 100,000 words in length, exclusive of tables, bibliographies and appendices.*

Signed: \_\_\_\_\_

Daniel Edgar

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## ***Chapter 1***

### ***Introduction and methodology***

#### **Introduction**

How has the initial denial and subsequent recognition of Aboriginal civil rights, law and institutions in the Northern Territory been accomplished within the system of government of the Commonwealth of Australia? The analysis of this question is conducted within the context of an increasing level of recognition of the prior and concurrent sovereignty of Indigenous peoples and the associated Indigenous right of self-determination<sup>1</sup> within constitutional, legal, political and administrative discourses and institutions in Australia, other countries (Canada and New Zealand in particular) and at the international level, and the formidable conceptual, ideological and practical barriers that have constrained complete acceptance of that right by many nation-states. As this thesis demonstrates, the direct and indirect impacts of the increasing level of recognition of Indigenous rights since the 1960s on the institutions of ‘the state’ established following the British assertion of sovereignty in Australia have been substantial, resulting in alterations to many of the basic principles, structures and procedures of the systems of government and land tenure that had developed prior to the recognition of Indigenous rights by governments and courts of the Commonwealth of Australia.

Although the term ‘the state’ is elusive and can be conceptualised and defined in many ways (Vincent, 1987), the term is used in this thesis simply to refer to the polity and system of government of an internationally recognised nation-state (in this instance the constitutional source, allocation and exercise of legislative, executive and judicial powers in the Commonwealth of Australia). In Australia ‘the state’ must also be distinguished from ‘the States’, the latter term referring to the autonomous regional polities incorporated within the Commonwealth of Australia upon federation in 1901

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<sup>1</sup> As stated and defined by the Declaration on the Rights of Indigenous Peoples, adopted by a resolution of the General Assembly of the United Nations in 2007. Although Australia voted against the resolution, the Declaration is a comprehensive and concise set of principles and rights providing an excellent reference point for analysis of relations between nation-states and Indigenous peoples.

(having previously existed as separate self-governing colonies of the British Empire). Each State has a separate Constitution and distinct system of representative and responsible government within the federal structure and division of powers provided for by the Commonwealth Constitution (contained in s. 9 of the *Commonwealth of Australia Constitution Act 1900 (Imp)*, a statute of the British Parliament).<sup>2</sup> The basic institutions and powers of the system of government of the Northern Territory of Australia (NT) are similar to those of the States in many respects, but there are also important differences.

### **The conceptual basis and methodology of the thesis**

For the purposes of this thesis the ‘system of government’ of the Commonwealth of Australia (RCAGA, 1976; 11) includes the constitutional framework (the fundamental laws and institutions established or provided for by the Commonwealth Constitution for the allocation and exercise of public powers and duties), the political system (in particular the structure and political dynamics of the Parliament and the respective roles of the Parliament and the Executive within each polity) and the system of public administration (also referred to as the ‘machinery of government’: RCAGA, 1976; 3). The basis, evolution and combined operation of these distinct but interdependent elements of the system of government of the NT and Federal polities of the Commonwealth of Australia, “the institutional orderings of their respective constitutional and administrative systems” prior to and following federation (Finn, 1987; 164), are examined in the primary context of factors and regimes associated with the denial and recognition of Indigenous rights in order to identify the nature and roles of specific developments and components of the system of government, as well as the interactions amongst inter-connected arrangements.

Analysis of the system of public administration may be conducted at the level of the departments of the public service or a specific department or agency, in terms of “the whole configuration of the public sector”, or may “focus on ‘the state’ in its most general sense and its interaction with society”. (Halligan & Wettenhall, 1990; 18) The analysis in this thesis combines these perspectives within the context of relations between

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<sup>2</sup> The term Federal Government is used to refer to the national government of the Commonwealth of Australia; although the term ‘Commonwealth Government’ is also frequently used in the literature, as the topic of this thesis is the prior and concurrent sovereignty of the Indigenous peoples of Australia the term ‘Commonwealth’ governments (institutions, courts etc.) is generally used to refer to all of the polities and institutions established pursuant to the Commonwealth Constitution.

Indigenous institutions and the institutions of the Commonwealth of Australia. The thesis examines the entire system of government not in the sense of consideration of every law, administrative unit and public official, but of all components throughout the system of government that, in their individual and combined operation, have been or are of particular significance to the denial and recognition of Indigenous civil, political and proprietary rights. The intention is to integrate elements of the various fields of analysis for a certain purpose – to gain a long-term “whole-of-government” perspective (DCM, 2001) on major factors of and changes within the institutional environment leading to and resulting from the denial and subsequently the recognition of Indigenous rights in the NT, with most emphasis on regimes governing land and wildlife ownership and management.

This is not to suggest that one analytical construct is inherently more accurate or pertinent than another, rather that the various intellectual fields from which concepts and methods are derived are often confined to a limited subset of many inter-related aspects of the same phenomena, which can to some extent be integrated by an exercise in ‘theoretical pluralism’. (Saunders, 1983; 57) As Ives and Messerli (1989, 9) state, a particular set of circumstances can be “likened to a kaleidoscope, which will change its pattern depending upon the way in which it is tilted, or upon the angle of view.” The thesis therefore draws on concepts and methodologies from theoretical and empirical studies in the fields of constitutional law, jurisprudence, political theory, public administration, public policy, institutional economics, the creation, allocation and exercise of property rights (in particular those pertaining to land and natural resources) and the status of Indigenous rights in the British colonies and, from 1901, the Commonwealth of Australia. Institutions can be defined as:

the humanly devised constraints that structure political, social and economic interaction. They consist of both informal constraints... and formal rules... Throughout history, institutions have been devised by human beings to create order and reduce uncertainty in exchange... Effective institutions raise the benefits of cooperative solutions or the costs of defection... (North, 1991; 97-98)

Davis and North (1971, 6-8) make a further distinction between the ‘institutional environment’, “the set of fundamental political, social and legal ground rules that

establishes the basis for production, exchange and distribution” of the relevant system, and ‘institutional arrangements’, the variety of formal and informal arrangements between organisations and individuals “that govern the ways in which these units can cooperate and/ or compete” in specific situations (with emphasis on institutions affecting major economic sectors for the purposes of their study – a detailed examination of processes of institutional change associated with the development and growth of the U.S. economy). (See also North, 1990: Smyth, 1998: Alston *et al* (eds), 1996)

The term institutional arrangements is used interchangeably with ‘regime’ in this thesis to refer to a particular cluster or alignment of relevant (‘active’ or operative) components of the institutional environment in specific contexts, such as Federal and NT legislation and policy, common law principles, administrative agencies and other arrangements dealing with or affecting a particular topic or matter. This is similar to the definition of regimes of Krasner (quoted in Gill & Law, 1988; 37); “implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area”. Formulated in the context of the study of international relations, the definition is also pertinent for regimes within nations-states.

Institutional change is the result of interactions between the constraints and opportunities provided by the existing (‘inherited’) institutional environment, and the activities of those participating in or affected by the various regimes which together comprise that environment. Although the inertia of existing institutions is often considerable there are usually many potential sources of pressure for institutional inertia or change, and prospects for and consequences of institutional change (which may be intended or ‘spontaneous’) depend on the results of the interaction of all such forces and components. (O’Faircheallaigh, 1999: Ekins, 1986: Wright & Hayward, 2000) Underlying factors such as the capacity of relevant individuals and groups to influence or participate in a regime may also instigate or amplify pressure for stasis or change, as may exogenous factors (such as technological change, environmental conditions or events in other jurisdictions). Sometimes manifestations of institutional change within the constitutional, legal, political or administrative components of a regime occur independently, however factors leading to changes in one sphere may also manifest in others. Although the evolution of institutions is an open-ended process of ‘consecutive

change' (Veblen, 1919, quoted in Hodgson (ed), 2003; xiv), the analysis of changes in the institutional environment and specific regimes in the NT is carried out both at specific points since the British assertion of sovereignty and over discrete periods of time.

Institutional arrangements form the 'selection environment' of the participants in each regime (Loasby, 2000; 590), the options available amongst the range of rules and measures of a specific regime by which each participant within the institutional environment may pursue their objectives (another major aspect the capacity of each participant resulting from the combination of resources, legal rights and organisation). Where alternatives exist, the selective use of particular arrangements (for instance the various types of incorporation that may be used to carry out commercial activities, or different land use strategies) can, to some extent at least, be an effective surrogate for formal authority or legal rights. In this manner participants outside the formal locus of authority and decision-making (referred to as 'secondary groups' by Davis & North, 1971) can influence or even determine how a regime functions and changes over time.

Just as Loasby (2000) notes that 'the market' consists of many markets with very different features and Hutchinson (quoted by Allars, 1997; 53-55) argues that 'the state' exists as "a site and a structure for the creation and exercise of power" consisting in effect of a "constellation of governments" rather than a monolithic institution, in a study of institutional arrangements underpinning 'co-management' regimes providing for community-based natural resource management Leach, Mearns and Scoones (1999, 225-30) note that in each situation examined in the study there are "diverse institutions operating at multiple-scale levels from macro to micro" within each community, and emphasise the significance of each to the outcomes achieved by specific regimes. The macro scale of this thesis precludes detailed analysis of the dynamics of different regimes within specific communities and groups (though reference is made to studies in different localities that provide detailed analysis of local dynamics affecting the operation of specific regimes); rather the emphasis is on the extent to which different regimes of the Commonwealth of Australia have incorporated recognition of Indigenous law and systems of government within their structures and procedures, and the source and strength of the legal carapaces protecting Indigenous domains.

The terms joint management and co-management are used interchangeably to refer to regimes in which the respective authority and participation of Indigenous and Commonwealth institutions are recognised and exercised on mutually agreed terms.<sup>3</sup> In this sense the degree to which such arrangements are based on consultation with, or extend to requiring the prior, free and informed consent of, relevant Indigenous representatives and groups is pivotal to determining whether a regime provides for genuine co-management – while the details and results of each arrangement must be assessed separately to ascertain whether arrangements have been devised and implemented by mutual agreement, arrangements based on consultation rather than consent remain primarily within a monocultural paradigm. The term ‘bicultural mechanisms’ is used to refer to formal arrangements between Indigenous and Commonwealth institutions to provide for mutual recognition of authority pertaining to and the co-management of specific functions. Co-management may be devised and implemented by way of the establishment of distinct bicultural structures and procedural arrangements (such as boards of management of numerous national parks in the NT, in some ways basically similar to a joint venture arrangement) or by project-specific cooperation between discrete Indigenous and Commonwealth institutions (more analogous to an ‘arm’s length’ transaction or strategic alliance amongst autonomous entities). There are of course many aspects involved in assessing the effectiveness of bicultural mechanisms and other arrangements for co-management; although the authority of Indigenous institutions, their capacity and the opportunity to participate in decision-making underpin categorisation as a bicultural (as opposed to essentially monocultural) management regime, how these and other factors interact and evolve can only be assessed in each instance. (McHugh, 2004: Leach *et al*, 1999)

Indigenous peoples existed in an institutional vacuum in the British colonies of Australia for many years (“some hybrid of outlaw, foreign enemy and protected race seemed to be the white attitude” to the legal status of Indigenous people during British colonisation: Neal, 1991; 151), and were only included in the Commonwealth

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<sup>3</sup> Although the term ‘co-management’ is most often used in international literature, the term joint management has commonly been used in the NT since the 1980s to refer to the co-management of national parks.

Constitution in order to maintain or facilitate their non-status in the dominant polity, by excluding Indigenous people from the census count, excluding relations with Indigenous people(s) from the jurisdiction of the Federal Parliament (other than in territories), and explicitly authorising the States to adopt measures discriminating against persons on racial grounds. Although in many jurisdictions some of the restrictions on civil rights were gradually reduced during the first half of the 1900s, it was not until a constitutional amendment in 1967 that constitutional recognition was extended to the formal citizenship rights of Indigenous people (as individuals) for the first time (see chapter 5).

Elaborate legal and administrative arrangements were devised to implement the policy of dispossession and oppression, including the appointment of ‘protectors’ and superintendents to manage government reserves and institutions and implement restrictions on travel and freedom of association introduced to segregate Indigenous people from British settler communities. As government policy shifted from segregation to assimilation, integration and, eventually, limited recognition of specific sets of (collective) Indigenous rights, restrictions on civil rights were removed and the systems of reserves and institutions were dismantled and new regimes were established to provide a basis for the recognition and exercise of Indigenous rights. These regimes have been shaped by, and in many instances resulted in substantial modifications to, the extant systems of public administration and land tenure in each jurisdiction (in particular the ownership and management of ‘Crown’ lands – for instance, in the NT the ownership and management of Aboriginal reserves was transferred to Aboriginal people soon after the commencement of the Land Rights Act).

A study by Libecap (1978), derived from and building upon a methodology developed by Davis and North (1971), provides a useful technique for identifying and evaluating the nature and rate of change in a legal regime pertaining to a particular topic or resource, Libecap’s case study involving the introduction, implementation and elaboration of a set of property rights regulating gold and silver production in Nevada during 1858-1895. The regime established to determine claim boundaries and define and enforce the rights of miners was initially formed and administered by members of the mining camp. This local regime for mineral production was replaced by elaborate government regulations soon after the size and value of the deposits became apparent.

Libecap devised several methods to examine, quantify and explain the introduction and elaboration of the property rights component of the mineral production regime by way of legislative amendments and judicial interpretations. The analysis of the evolution of the regime takes into account the total number of changes to the applicable mining law since its introduction as well as an estimate of the relative weight of those changes, measured by the “annual-increase-in-precision” in the detail of the regime and the “cumulative specificities” of annual changes over time. (Libecap, 1978; 44-48) The regime was frequently amended in the early years of operation, followed by a succession of periods of relatively stable operation punctuated by occasional changes to the structure and implementation of the property rights system until a long-term equilibrium was reached. Libecap (1978, 38) surmised of the evolution of the regime: “when the legal rights structure is highly defined and enforced, further increases in the precision of the law will occur at a slower rate... [A] progression [of short-run equilibrium levels] occurred until a stable long-run equilibrium of support was obtained where uncertainty was minimal”.

Although the extensive scope of this thesis makes the application of Libecap’s methodology to detailed examination of each regime of major significance impractical, a very basic estimate of the progress made towards equilibrium in different regimes providing for the recognition, protection and exercise of Indigenous rights can be made in terms of identifying the timing and nature of significant changes within specific regimes and the extent to which institutional changes recognising and accommodating specific sets of rights have been incorporated into the land tenure system and the structures and activities of all relevant Commonwealth institutions. This may provide some insight into how close each regime is to reaching a substantial degree of long-term equilibrium (at least in terms of achieving a set of mutually agreed basic principles and mechanisms to govern relations between Indigenous and Commonwealth institutions for the co-management of functions of mutual interest), and also perhaps the manner in which those regimes might further evolve (by comparing these elements with the principles of the Declaration on the Rights of Indigenous Peoples and the Kalkaringi Statement, as well as the basis and evolution of analogous regimes in other jurisdictions in different stages of implementation).

As the analysis in this thesis is of ongoing processes of institutional change rather than a discrete historical period, it is of course not possible to conclude that particular regimes are ‘stable’ or mature (or simply stagnant – an absence of change could be due to either)<sup>4</sup> other than during certain periods. Nonetheless, the degree to which regimes recognising specific Indigenous rights encompassed by the right to self-determination (e.g. pertaining to a specific resource, category of land tenure or activities of a government agency) have evolved and become integral parts of land and natural resource management regimes may imply that the basic structures and procedures of some regimes are closer to a relatively long-term equilibrium than others, in terms of their degree of precision, the extent to which principles and mechanisms are subject to mutually agreed co-management arrangements in each instance and the extent to which co-management has been incorporated into all relevant levels of Commonwealth institutions.

In order to conduct a detailed analysis of developments throughout the system of government over time the primary jurisdiction and case study examined in the thesis is the Northern Territory. The analysis of institutional change over time associated with the gradual shift from denial to recognition of Indigenous rights includes those changes apparent in (or otherwise affecting) the Commonwealth Constitution, Parliament(s), legislation and public policy, land administration and patterns of land tenure, developments and patterns in the overall design, structure and operation of the system of public administration as well as within specific regimes and agencies, and the emergence of Indigenous institutions recognised by the governments and courts of the Commonwealth. The NT provides an informative case study for analysis as, due to both constitutional and demographic factors, the recognition of Indigenous rights has been a high profile political topic for many years, and many regimes established to provide for the recognition and exercise of specific sets of rights have been operative since the 1970s and are integrated throughout the system(s) of government to a much greater extent than in other jurisdictions of the Commonwealth of Australia.

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<sup>4</sup> As North (1990, 1991) points out, institutions may be deliberately inefficient or uncertain. This point is made in the context of economic efficiency, but may be equally pertinent to administrative efficiency or uncertainty as to legal and proprietary rights underpinning specific regimes.

A variety of processes of institutional change that have occurred across the system of government are examined, including the basis, provisions and principles of the constitutional framework and the establishment and development of key institutions of the system of government, the establishment and evolution of regimes central to land and natural resource management, and the proliferation since the 1960s of Indigenous institutions incorporated in a variety of legal forms to secure recognition from governments and courts of the Commonwealth of Australia for specific purposes. The analysis of the features of governance in the NT examines the legal and administrative structures, procedures and principles pertaining to land and natural resource ownership and management in most detail. These regimes comprise a complicated set of arrangements resulting from the concurrent rights and responsibilities of the NT and Federal Governments and Aboriginal peoples pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the Land Rights Act) and *Self-Government (Northern Territory) Act 1978* (Cth) (the Self-Government Act). Both statutes were enacted by the Federal Parliament pursuant to s. 122 of the Commonwealth Constitution.<sup>5</sup> The Land Rights Act commenced operation on 26 January 1977 and provides a regime for the management of land restored to Aboriginal ownership, and a procedure by which traditional Aboriginal owners can claim certain types of land. The Self-Government Act commenced operation on 1 July 1978, establishing the NT as a “body politic under the Crown” (i.e. a separate polity exercising legislative, executive and judicial powers and functions within the Commonwealth of Australia) and providing the primary basis of the ‘constitutional’ powers, functions and institutions of the NT Government.

The Land Rights Act provides the basis for the ownership and management of most Aboriginal land in the Northern Territory, and for the processing by an Aboriginal Land Commissioner of land claims lodged by traditional Aboriginal owners. Some areas in the NT have also been restored to Aboriginal ownership and management pursuant to

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<sup>5</sup> Brennan CJ (in *Kruger v Commonwealth* (1997) 190 CLR 1 at 31) states of the plenary power conferred by s. 122: “The power ‘to make laws for the government’ of a Territory can be divided into two broad categories, namely, a power to make laws defining the form of institutions of a government for a Territory of the Commonwealth and a power to enact the domestic laws of the Territory other than laws with respect to the form and institutions of its government.”

other regimes, including since 1994 the *Native Title Act* 1993 (Cth). While specific aspects of the operation of the Native Title Act in the NT are considered in chapters 6 to 8, the broader operation of the regime is not examined in detail in this thesis. The Land Rights Act also provides for the application of laws of the Northern Territory Government to Aboriginal land, generally as well as for certain purposes - the protection of sacred sites, wildlife conservation, entry to certain coastal waters adjacent to Aboriginal land and entry onto Aboriginal land (these regimes are referred to as 'reciprocal legislation' or complementary legislation), on the proviso that such laws are capable of operating concurrently with the Land Rights Act.

The Land Rights Act places what amounts to major constitutional limitations on the powers of the NT Government to deal with Aboriginal land held pursuant to the Act and land subject to claim (particularly prior to the commencement of the Native Title Act, but also compared to the restrictions that Act places on the land management and decision-making powers of the State and Federal Governments), requiring the informed consent of traditional Aboriginal owners for all major land use and resource management decisions. Thus in addition to providing the primary basis for and definition of the rights and responsibilities of the NT and Federal Governments and Aboriginal peoples in relation to the ownership and management of Aboriginal land, the Land Rights Act has a crucial role in determining their respective rights and responsibilities in relation to access to and the management of other natural resources and the operation of land use planning and environmental protection regimes of the NT Government.

The thesis examines how the enactment and operation of the Land Rights Act has affected the structure and operation of the land and natural resource ownership and management regimes of the NT Government and concurrent regimes of the Federal Government. The attempt to capture and convey a sense of the main parameters and patterns within which specific developments have occurred requires an at times somewhat cursory summary of developments in the evolution of constitutional, legislative and administrative arrangements and political conditions (the 'institutional environment') in place prior to, during and since the conferral of self-government. A 'whole-of-government' level of analysis is utilised in order to provide an overview of, and to identify and assess the consequences of underlying patterns and major

developments affecting, the evolution of specific land and natural resource management regimes established pursuant to the Self-Government Act and Land Rights Act rather than as an attempt to 'cover the field' in detail. By placing specific developments and processes of institutional change within a broader context it is possible to identify and make a preliminary evaluation of the nature and significance of prevailing factors and patterns, and the progress that has been made towards recognising and accommodating specific sets of rights within each regime.

The research is based on analysis of primary and secondary sources and formal and informal interviews with practitioners active in land and natural resource management in the NT (including employees of the NT Government, Aboriginal organisations, companies and non-government organisations), and generally states the law as of 2003 (to permit a preliminary assessment of events since the first change of government in the NT in 2001). In some cases developments since 2003 of particular relevance are also considered. Approximately three years have been spent in the NT since 1998 conducting research in various capacities, most recently for three months in 2006.

### **The structure of the thesis**

Although the primary objective is to examine those elements of the system of government pertaining to land ownership and management, the complicated nature of the regimes that have developed since the British assertion of sovereignty requires an examination of the basis and evolution of constitutional, political and administrative developments more generally. This is the task undertaken in chapters 2 to 4, which provide an overview of the genesis and basis of the system of government in the NT, and pivotal features of the constitutional, political and administrative spheres since the conferral of self-government. The Commonwealth Constitution provides the principal source of authority and basis for the institutions of the Federal Government; the NT Government is also ultimately subject to the Commonwealth Constitution but primarily derives its authority from and functions pursuant to the Self-Government Act (as well as the Land Rights Act for many land and natural resource regimes).

Chapters 2 and 3 examine the conceptual basis and evolution of the core components of the system of government established by the Commonwealth Constitution, a combination of concepts and institutions adapted from the basis and

system of government established by the Constitution of the United States of America (the U.S. - a federally structured republic) and the Westminster system of Britain (a constitutional monarchy with a unitary structure). The system of government of each polity of the federally structured Commonwealth of Australia (including that of the NT) is principally derived from the institutions of representative democracy and responsible government underpinning the Westminster system. The system of government has therefore been described by Thompson (1980, 1994, 2001) as a 'Washminster' mutation, the system of government of each polity based on the organisational structures and procedures, legal principles and constitutional and political 'conventions' of the Westminster system of government (parliamentary democracy) within and subject to a federal constitution conceptually and structurally derived from the written constitution and federal system of the U.S. (with the Federal Government based in Washington). Thus the system of government of the Commonwealth of Australia is primarily derived from "aspects of British parliamentary government as well as aspects of the American federal Presidential model... Not only had Australia taken bits from here and there but we had combined and developed them into a unique form of government, different from either parent." (Thompson, 1994; 97) The system of government established in Canada by the *British North America Act 1867* (Imp) has a very similar hybrid form, consisting of a union of regional polities that have retained autonomous systems of government (also derived from the Westminster system) within a federal constitutional framework, providing the principal prototype for the Commonwealth system of government.

Finn (1987, 160) concludes of the systems of government that evolved in the British colonies of Queensland, New South Wales and Victoria during the 1800s: "The imperfect image is the recurrent metaphor of the colonial stories. Between countries, between and within colonies, the process of mirroring can be seen at work, be it of institutions, of practices, or of ideas. But distortions, great and slight, present themselves with some regularity." (Finn, 1987; 160) For instance, in addition to the very different parliamentary structures: "The instruments of administrative government had obvious British antecedents but they were arrayed, were balanced, differently." (Finn, 1987; 161) During the 'settling in' period of self-government (see chapter 4) the roles of the individual minister and local authorities diminished in the Australian colonies (at the

same time as their roles strengthened in Britain), and many statutory authorities were established to conduct a wide range of activities (as statutory boards were being brought within the departmental system in Britain) including participation in many economic sectors as local forms of ‘state socialism’ emerged to consolidate and accelerate agricultural and industrial development. (Eggleston, 1932) A substantial portion of the public administration has continued to remain outside the departmental structure (approximately sixty per cent of the employees of the Federal Government in the 1970s: RCAGA, 1976; 11).

As the British system of government has been of major significance to the introduction and consolidation of the systems of government of all of the polities of the Commonwealth of Australia directly and indirectly, the evolution of the Westminster system is considered in some detail in chapter 2, particularly developments during the 1800s (relying on, among others, Habermas, Marcham and Birch). As with the British Government, the governments of the constituent elements of the Commonwealth of Australia (the Federal Government, those of the States and, more recently, the self-governing Territories) have a parliamentary rather than presidential Executive; the Cabinet is drawn from the members of Parliament, with an essentially symbolic Head of State in the normal course of events – i.e. acting as directed by the Head of Government (the Prime Minister, Premier or Chief Minister) and Ministers. There is therefore a partial (functional) rather than strict separation of legislative and executive powers, the Cabinet providing a focal point for operational management within the system of government; the “efficient secret” according to Bagehot, a potential basis for arbitrary government according to Montesquieu. As with the Westminster system, the Commonwealth system(s) of government is based on a decidedly ‘liberal’ constitutional and political culture, emphasising formal legal equality, constitutionally guaranteed property rights and freedom to trade rather than more extensive protection of substantive human rights and freedoms (though the latter have increasingly been provided for since the emergence of the ‘welfare state’ and, in Australia, increasing emphasis on the sovereignty of the people). Despite a gradual shift in the centre of gravity, the simultaneous existence of the descending sovereignty of ‘the Crown’ and ascending sovereignty of ‘the people’ remains, as does the susceptibility of the system of government within each polity to

varying degrees of 'Executive state' and 'tyranny of the majority' also apparent in the Westminster system.

Chapter 4 examines the establishment and consolidation of the system and machinery of government in the NT since the British assertion of sovereignty. The Federal Government assumed responsibility for administration of the Northern Territory at the beginning of 1911 pursuant to an agreement with the South Australian Government (which had administered the NT from 1863), and retained jurisdiction over almost all aspects of governance until the commencement of the Self-Government Act in 1978. While there are many similarities in powers, functions, and institutions, the NT Government has a different constitutional basis and locus of authority from that of the States. Established on 1 July 1978 as a "body politic under the Crown by the name of the Northern Territory of Australia", the NT Government differs from State Governments as its authority (and limits on that authority) stems from Federal legislation (primarily the Self-Government Act) rather than a State Constitution and the associated provisions of the Commonwealth Constitution pertaining to the federal division of functions and powers. The Self-Government Act and regulations implemented a "substantial grant of local autonomy", with the conferral of legislative and executive (and in 1979 judicial) authority and the concomitant institutional framework that comprise "an extensive and comprehensive, but not complete, form of self-government." (Nicholson, 1985; 705: see also Lumb, 1978; Hanks *et al*, 2004) The Self-Government Act and regulations define the "form of institutions" of the NT Government and the associated locus and extent of legislative and executive authority and from the perspective of the NT Government is an 'organic' document (a law that cannot be changed by the usual legislative process), and is thus a "kind of Constitution". (Lane, 1994; 114)

Since the conferral of self-government commentators have observed that constitutionally, politically and administratively the Northern Territory is "something different". (Jaensch, 1979; Heatley, 1991) The Self-Government Act transferred responsibility for most 'State-type' functions, however there are still important differences between the nature and extent of the NT Government's constitutional authority and those of the State Governments, with significant implications for land ownership and management in particular. The Federal Government retained jurisdiction

over certain State-type functions, most notably for the purposes of this thesis the Land Rights Act, the management of two national parks, and ‘prescribed substances’ (including uranium) under the *Atomic Energy Act 1953* (Cth).

It took several decades for political party systems to emerge in the self-governing colonies, and several more before a predominantly two party system, basically comprising a centre-left ‘labour’ party (the Australian Labor Party - Labor) and a coalition of two centre-right ‘conservative’ political parties based primarily on rural and business constituencies (the Liberal Party and National Party – the Coalition); in the NT the two conservative parties are formally merged as the Country Liberal Party (CLP). (Loveday *et al* (eds), 1977; Brugger & Jaensch, 1985; Maddox, 2000) A prominent early member stated: “the CLP sees its philosophy and policy as blending those of the two major anti-Labor national parties and adapting that blend to fit Territory conditions.” (Lewis, 1981; 43-44) Heatley (in Jaensch & Loveday (eds), 1981; 25) surmised of the early performance of the NT Government:

It is difficult to give the government even an approximate ideological label, given its eminently pragmatic approach. If a common strand emerges, then perhaps the distinguishing feature was the ‘Territorialism’ of the government (and particularly its leader), characterised by an overbearing and flamboyant commitment to Territory development.

There are many other factors that distinguish the Northern Territory – the “newest and smallest” government (Warhurst, 1990; 1) in Australia (at least until the conferral of self-government on the Australian Capital Territory) - from the States, notably the small population, the high proportion of Aboriginal residents, and the retention of power by the CLP from the conferral of self-government until the election in 2001. The electoral dominance of the CLP during the establishment and consolidation of the institutions of the NT polity is a major feature of the political and administrative landscapes of the NT.

The recognition of Indigenous rights by successive Federal and Territory Governments since the 1960s has been manifested in different ways. Although the policies of each of the ‘major’ political parties in these jurisdictions have changed significantly over time, overall (and subject to many exceptions) the policies of the Labor party(s) since the 1970s have tended to provide a higher level of recognition of

Indigenous rights than those of the conservative political parties (the Federal Coalition, and in the NT the CLP), as well as a more significant role in policy development and implementation in areas of government of particular significance to Indigenous people. This trend is apparent in many aspects of intergovernmental relations between the NT and Federal Governments, and also the underlying tenor of relations with Aboriginal institutions (and the membership of the Legislative Assembly – most if not all Aboriginal Members of the Assembly have been members of Labor, and electorates with a large proportion of Aboriginal residents often elect Labor candidates). (Jaensch & Wade-Marshall, 1994: Altman & Dillon, 1988)

The regimes providing for the ownership and management of land and natural resources in the NT contain elements of conflict, co-existence and cooperation between Indigenous and Commonwealth institutions, with each element usually apparent to some degree in their operation. The central protagonists have usually been the NT Government and the Northern and Central Land Councils (statutory authorities established by the Land Rights Act to manage Aboriginal land and protect and promote the rights and interests of traditional Aboriginal owners), with the Federal Government sometimes actively involved as either protagonist, mediator or final arbiter of disputed jurisdiction (the latter role also performed by the High Court in some instances). The degree of conflict has usually been most intense in regimes at the core of ownership and control over land and resources, apparent in the allocation by the NT Government of substantial resources to legal, political and administrative campaigns against the provisions of the Land Rights Act during the tenure of the CLP (the CLP had a substantial majority in the Legislative Assembly from 1978 until 2001).

The jurisdictional campaign of successive CLP Governments to reduce or eliminate the scope of restrictions in the Land Rights Act on the NT Government's control over land and resource management was conducted by way of contesting individual land claims lodged with the Aboriginal Land Commissioner, regular criticism of the Land Rights Act as enacted by the Federal Government (including a demand that the Act be 'patriated' to the jurisdiction of the NT Government), and in the structure and operation of regimes established by the NT Government to manage different categories of land and natural resources at the core of the contested terrains. The latter regimes include

those defining the basis of land ownership and management in areas potentially subject to claim under the Land Rights Act (primarily “unalienated Crown land”), including regimes providing for the declaration and management of areas as ‘towns’ or parks and reserves, the administration of other ‘Crown’ land including pastoral leases and marine areas and wildlife management.

Although relations between the NT Government and Aboriginal peoples were often hostile during the time the CLP was in power, this did not prevent the development of cooperative arrangements in specific situations. As Foster (1997) argues (see chapter 6), one reason for this was probably to support the efforts of the NT Government to persuade the Federal Government to transfer complete jurisdiction over all aspects of land and natural resource management. There are therefore significant zones of legal recognition of Indigenous rights and administrative cooperation based on local agreements within otherwise contested spheres of land tenure where a limited geographic and administrative truce exists (e.g. several jointly managed national parks), and although the contest for jurisdiction has been at times dominant if not decisive in the manner in which a specific regime has evolved and been implemented it is also at times substantially if not almost entirely absent as an operative factor. Other instances of cooperation consist of regimes that are peripheral to the contested terrains of jurisdiction or are otherwise not constrained by the perception of a ‘zero sum’ basis, and where cooperation is essential to achieve an objective of both parties (i.e. the NT Government and Aboriginal peoples), e.g. protection of endangered species, weed control, and the Brucellosis and Tuberculosis Eradication Campaign.

The election of the Labor Government in 2001 resulted in a substantial reduction in the level and intensity of dispute over several contested areas of governance: amongst the first actions of the Labor Government were the repeal of controversial “mandatory sentencing” laws (the implementation of which had a very disproportionate impact on Aboriginal people), and an apology to the “Stolen Generations”. The reduction in the overall range and intensity of dispute is also apparent in the subsequent proliferation of cooperative arrangements in several areas of land ownership and management (in terms of geographic, legal and administrative domains) that had previously been the subject of fierce and apparently irrevocable disagreement, including many parks and reserves of the

NT, and the processing of many outstanding applications for community living areas on pastoral leases that had been administratively frozen for several years. Consequently, after a long period of predominantly intense and wide-ranging dispute accompanied by cooperation in limited or peripheral areas, the political, legal and administrative zones of cooperation between Aboriginal and non-Aboriginal institutions have been subject to major changes since 2001. While many areas of contention remain, the overall balance of relations has shifted substantially from a prevailing climate of hostility and conflict between the NT Government and Aboriginal peoples to one of cooperation punctuated by more limited and clearly defined disputes.

Chapter 5 provides the conceptual and analytical frameworks used to describe and critically assess progress made in the recognition of Aboriginal rights in the NT in the subsequent chapters, based primarily on the identification of distinct phases in relations between Aboriginal and non-Aboriginal Australians in the NT, the sets of principles and rights contained in the Declaration on the Rights of Indigenous Peoples and the primary analytical categories of land rights and self-government. Key sub-sets of Indigenous rights examined include: “the right to autonomy or self-government in matters relating to their internal or local affairs” (Article 4), and to maintain their own political, legal, economic social and cultural institutions as well as to participate in those of the nation-state that affect their rights and interests (Articles 5, 19, 20, 34); a requirement that nation-states consult and cooperate with Indigenous peoples in good faith in order to obtain their free, prior and informed consent to legislative or administrative measures affecting their rights or interests (Articles 18, 19); and, “the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”, including to exercise control over land and resource use within their territories (Articles 26, 32).

In addition to the principles of the Declaration, the concepts and definitions of the right of self-determination of Daes, Dodson and Tully (among others), the provisions of the Kalkaringi Statement (a set of principles and objectives endorsed by delegates at two Aboriginal constitutional conventions in the NT in 1998) and consideration of a selection of analogous developments in other jurisdictions (in particular in Canada and New Zealand due to their relatively similar constitutional and cultural heritages and

conditions) provide the basis for a preliminary evaluation of the extent to which Indigenous rights have been recognised by and integrated within the system of government of the NT. Although detailed comparative analysis is beyond the scope of this thesis, analogous developments in Canada are of major significance for two reasons: Canada has a very similar system of government, and as a basis for comparison in terms of the basis of, and institutional changes accompanying major shifts in, relations between Indigenous peoples and ‘the state’ during and following European colonisation (in particular the negotiation of treaties and, since the 1980s, constitutional recognition of Indigenous rights, which provide a more elaborate, appropriate and secure basis for principles and mechanisms for co-existence, mutual recognition and co-management).

Chapters 6 to 10 examine the manner in which the recognition and accommodation of Indigenous rights to land and self-government has been incorporated within the basic principles, structures and processes of the system(s) of government of the Commonwealth of Australia. Chapter 6 reviews the basis of the recognition of Indigenous land rights in the U.S., Canada and New Zealand, and examines the introduction and operation of the Land Rights Act and other land rights regimes in the NT in more detail. Chapter 7 examines several specific aspects of the operation of the main land rights regimes in the NT including the significance of different types of land tenure for the recognition of land rights, patterns of land ownership and management within specific government agencies, and cultural heritage protection. Chapter 8 examines key features of the main wildlife management regimes. Chapter 9 examines the legal and organisational basis of different forms of Aboriginal self-government in the NT, i.e. the emergence of Aboriginal institutions recognised by the governments and courts of the Commonwealth of Australia (as manifestations of the right to an effective and autonomous level of Indigenous self-government, recognised as “domestic dependent nations” in the U.S. and in Canada as a “third order” of government of the federal system).

Chapter 10 argues that the incremental gains that have occurred in the level of recognition of Indigenous rights in Australia is best conceptualised as gradual progress in a transition towards unequivocal recognition of the Indigenous right of self-determination as distinct peoples or nations within ‘the state’, with enduring limitations on that right

largely the result of opposition to Indigenous self-determination in the dominant ideologies, legal and political cultures and by influential interest groups, as well as practical obstacles, rather than an indication that the associated processes of institutional change have been largely completed. Compared to the nature and extent of institutional change that has occurred in Canada and New Zealand, the recognition of many aspects of the Indigenous right of self-determination by governments and courts of the Commonwealth of Australia remain extremely limited. Consequently, chapter 10 draws on analogous developments in Canada and New Zealand to examine the importance, and also the limitations, of constitutional recognition and protection of Indigenous rights and the negotiation and implementation of treaties between Indigenous and non-Indigenous peoples, and argues that regionally negotiated agreements (treaties) guaranteed by constitutional protection provides the most appropriate long-term objective and basis for recognising and facilitating the Indigenous right of self-determination.

## ***Chapter 2***

### ***The basis of the system of government***

#### **Introduction**

There has been considerable albeit very selective adoption and adaptation of the concepts and institutions of the Westminster system of government in Australia, including the symbols, protocols, structures and functions of the Westminster Parliament, the Head of State and Cabinet, as well as the associated structures and principles of public administration. These concepts and institutions have been modified to function within each polity of the Commonwealth of Australia in accordance with local conditions and the federal and institutional allocation of powers and functions provided for by the Commonwealth and State Constitutions. Due to the strong influence of the Westminster system the evolution of that system of government is considered in some detail in this chapter, as is the influence of the Canadian and U.S. Constitutions as prototypes for the federal structure of the Commonwealth Constitution. Each of these distinct systems of government (and also those that had been established in the self-governing British colonies in Australia) made a significant contribution to the basis and content of the Constitution and system of government of the Commonwealth of Australia, contributing conceptual and institutional building blocks that have been modified and combined to provide the basis for a new system of government (see Diagram 1).

#### **The evolution of the Westminster system of government**

The sequence of developments following the acceptance of the Magna Carta by King John in 1215 that eroded and eventually ended the absolute sovereignty and powers of the British Monarchy resulted in a constitutional monarchy subject to ‘parliamentary sovereignty’ as the basis for the system of government. By 1500: “Two centuries of varied activity had made Parliament one of the great central institutions of government, alongside the monarchy, its supporting administrative agencies, and the central court system.” (Marcham, 1960; 59) Nonetheless, prior to 1688 the Parliament had existed as an essentially consultative forum of the aristocracy, merchants, and other landowners,

albeit increasingly influential. By founding the concept of parliamentary sovereignty and establishing the supremacy of the Parliament in the event of conflict with the Monarch in 1688, the ‘Glorious Revolution’ established the Parliament as “the guardian of the people’s rights and the principal check over the crown” (O’Brien, 1991b; 271) rather than securing the sovereignty of the people as such:

The Bill of Rights of 1689 and the Act of Settlement of 1701 declared the monarchy to be based on a contract between the crown, the parliament and the people, though the people had no say in the matter. Over the centuries the royal prerogatives were largely conceded by a grudging crown to a ‘sovereign parliament’ at Westminster. (O’Brien, 1991a; 7)

By these acts the powers of government were redistributed between the Parliament and the Monarch rather than constitutionally limited, dispersed or devolved to the people directly. In addition, the ‘representative’ chamber of the Parliament, the House of Commons, had a very limited franchise until the mid-1800s, composed of and elected by “men of property and letters”. (Habermas, 1962: Birch, 1964) The crucial status and function of an independent judiciary (including operational autonomy and security of tenure) in establishing the ‘rule of law’, increasingly emphasised during the 1600s and confirmed by the *Act of Settlement* 1700 (Eng), was established well before substantive measures were taken to recognise the ‘constitutional’ authority and role of the people in the system of government, primarily to emphasise the supremacy of the Parliament over the Monarch in the event of dispute and as a guarantee for citizens against arbitrary deprivation of liberty or property (subject to the absolute sovereignty of the ‘Crown in Parliament’).

From the 1600s there were an increasing number of assertions in the common law and constitutional and sociological discourses that public powers are essentially fiduciary in nature, to be exercised with the consent and for the benefit of the people. In accordance with the *Bill of Rights* 1688 (Eng), *Crown and Parliament Recognition Act* 1688 (Eng) and Act of Settlement: “The King was compelled to govern through Parliament and to accept the independence of his judges ... The judges conceded the supremacy of statute over common law but turned their attention to securing the individual from official interference.” (Joseph, 1993; 175) Although absolute sovereignty remained with the

Crown (and after 1688 the Parliament), in the performance of some public services and duties the courts “could still bring public officials into a trust relationship with the public”. (Finn, 1995; 11)

The consolidation of the political functions and institutions of the public sphere and foundation of the ‘administrative state’ in the 1700s was reinforced by the concurrent elaboration of concepts and mechanisms of private law (property, contract, and commerce) and the emergence of civil society. Nonetheless, disparities in the constituencies of Members of Parliament meant that the endorsement of the Monarch remained of significance to ministerial tenure for many years:

Through the rest of the 18<sup>th</sup> century, England continued its progress from a monarchical system wielding direct governmental authority, to a system of parliamentary democracy. The evolution was a slow one. Throughout most of the century, the monarchs retained a personal involvement in government in the sense that ministers were in office by royal choice and owed their position to that link with the Crown, rather than with each other or their political party. (Parkinson, 1994; 112)

The combination of the consolidation of limited government, the rule of law and private property rights, significant technological advances including in key sectors such as communications, transport and printing, and the increased importance of professional expertise for administration provided “guarantees of calculability” by the administrative state based on rational administration underpinned by an independent judiciary. (Habermas, 1962; 81-82; Weber, 1949, 1968) Although ‘the people’ remained entirely outside the system of government during the 1700s, in the context of the times important conceptual and substantive advances were made in the democratisation of the system of government. While previously the dominant constitutional discourses purported to rationalise the absolute sovereignty and powers of the Monarch sustained and exercised by Divine Right, during the 1700s there was much more emphasis on individual liberty, the consent of the governed and natural law as the basis of the legitimacy of the state and the exercise of sovereign powers; opponents and analysts “asked whether the law was to depend upon the arbitrary will of the princes or whether the latter’s commands were to be legitimate only if based on law.” (Habermas, 1962; 52-53)

With the major changes in transport and communication, the increased accessibility and therefore influence of intellectual discourse maintained the inexorable shift of power from the Monarchy to the Parliament. These developments were further influenced by the widespread and profound conflicts between Monarchs, Parliaments and ‘the people’ throughout Europe towards the end of the 1700s, though internal dissent and conflict was offset to some extent by frequent European and imperial wars that reinforced national identity and solidarity. The imperative of establishing an effective system of government with some degree of popular legitimacy and support was given much greater urgency by the success of the American war of independence and subsequent introduction of a system of government explicitly based on the sovereignty and consent of the people, philosophically and politically rationalised by reference to concepts and principles refined by the discourses of the ‘Age of Enlightenment’ during the preceding century. (Kramnick (ed), 1987: Paine, 1792: Torrey (ed), 1960: Williams, 1990)

[By] transferring sovereignty directly from the King of England to the people of America as individuals without an intermediary, the Americans departed completely from what was to become an entirely different European constitutional path. In Europe, the struggle was centred on the King and parliament... Whichever method was chosen [as the basis and form of the state, republic or constitutional monarchy], sovereignty remained centralised, distant and above the people. (Webb, 1991; 291, 293)

The objective of establishing the sovereignty and consent of the people as founding principles and ongoing requirements of the system of government were reinforced by the manner in which the U.S. Constitution was drafted: “The constitutional convention, a peculiarly American invention, served two purposes. First, it was a means of obtaining the consent of the governed; and second, it thereby both affirmed and demonstrated the sovereignty of the people by their defining the scope, the legality and the powers of government.” (Webb, 1991; 282) The U.S. Constitution could therefore be construed as the result of a rebellion or civil war between the American colonies of the British Empire and Britain (and with its success a war of independence), and a social revolution, “bringing forth a form of government and a perception of the ‘governed’

unique in the previous annals of government”. (Webb, 1991; 278: see also e.g. Wills, 1978: De Tocqueville, 1835, 1855)

The transition to a constitutional state in Britain, in terms of the establishment of a form of limited government underpinned by a separation of powers and the rule of law, had therefore made substantial progress by the late 18<sup>th</sup> century though remained extremely limited in terms of establishing a democratic system of government.<sup>6</sup> Even when ‘the people’ were recognised (or at least invoked) as the basis of the authority and legitimacy of the state, European Governments generally remained extremely reluctant to establish absolute and paramount rather than limited and contingent civil rights for all members of each polity. In this respect at least three basic sets of civil rights can be considered, those concerning rational-critical debate (essentially ‘political’ rights associated with the right to participate in public decision-making processes, including freedom of discussion, communication and association), civil or social rights (including the right to life and liberty, formal equality before the law and a base level of substantive equality), and private property rights (including a guarantee against the arbitrary deprivation of property and ‘freedom of contract’). (Marshall, 1965: Habermas, 1962: Plamenatz, 1963: Bengelsdorf *et al* (eds), 2006: Behrendt, 2003)

Key concepts of and competing forces in the process of transformation from essentially descending and autocratic to ascending and democratic forms of sovereignty and systems of government therefore include establishing the principles and practices of open government based on constitutional recognition and protection of popular sovereignty and civil rights, and progress towards a degree of substantive as well as formal equality amongst citizens. These principles underpinned and provided the basic objectives of the transition from secretive and technocratic decision-making by aristocratic, political, bureaucratic and economic elites, features derived from the absolute sovereignty of the Monarchy (and subsequently Parliament) that were “set in the basic order of centralisation and hierarchy... [apparent] in the early emergence of the modern state”. (Torgerson & Paehlke, 2005; 3) The distinct sociological, political and

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<sup>6</sup> To the extent that “a constitutional system is one where the wielders of state power or authority are subject to limitations so that in the exercise of their authority ... they are subject to principles and rules which govern the manner in which that power is exercised.” (Lumb, 1983; 3-4)

constitutional aspects of discourses on the state that philosophically rationalised or advocated various degrees and forms of descending sovereignty to establish and maintain legal and civil order continued to bear most resemblance to the basis and functioning of the state in Britain in the early 1800s.<sup>7</sup>

While the importance of the consent of a reasoning and rational public to the legitimacy of government had been gaining support from the second half of the 1700s as ‘public opinion’ became the basis of the ‘social contract’ or consent of the governed (e.g. as argued by Locke in 1690 and Rousseau and Bentham in the 1700s, further developed by De Tocqueville, Mill and Bagehot in the 1800s), a very restricted franchise continued in Britain for many years. (See also Plamenatz, 1963: Phillips & Jackson, 1973: Carney, 1994) Centralisation and descending sovereignty continued to be reinforced in the very limited representative system of government of Britain by the continued emphasis on parliamentary sovereignty and the perceived requirement for strict hierarchy within the administrative state: the authority of the state was conceptualised as and manifested in the unitary and absolute sovereignty of the ‘Crown in Parliament’, “the King, the Lords and the Commons acting together as the supreme governing body”. (Sartori, 1962, 854-55)

Key developments in the evolution of the system of representative and responsible government and the emergence of the ‘liberal state’ during the 1800s include a gradual shift in the primary basis of the appointment and accountability of Ministers from the Monarch to Parliament, the opening of the proceedings of the Parliament to the public, and the gradual removal of restrictions on the franchise and extension of the right to formal (legal and political) equality. Over time ‘constitutional’ precedents and conventions developed to define the manner in which the powers of Parliament would be exercised, which together with a combination of statutory and common law procedures and remedies (notably those of *habeas corpus*, trespass and the right to trial by jury) provided a limited set of legal guarantees of civil rights against arbitrary government and oppression. A further important caveat for present purposes, discussed in more detail in

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<sup>7</sup> Including such theorists as Hobbes and Filmer in the 1600s, and from the 1800s the legal positivism of Austin, Dicey and Kelsen emphasising the necessity of a strict hierarchical legal order. The early arguments were rejected by the founders of the U.S. Constitution, themselves citing theorists such as Locke, Blackstone, Montesquieu and Rousseau emphasising various aspects and degrees of natural law and ascending sovereignty based on the consent, rights and reserve powers of ‘the people’ and the separation of the powers of the state.

chapter 5, is that the civil rights that were recognised in Britain were not extended to non-European subjects of British colonies (other than the recognition of certain concurrent rights by treaties where imperial exigencies required, e.g. in New Zealand and some parts of Canada and Africa, more often abrogated than honoured as the weight of numbers and/or military technology shifted in favour of the colonists). In this sense, Tully (1995, 96) notes of the language of modern constitutionalism: “While masquerading as universal it is imperial in three respects: in serving to justify European imperialism, imperial rule of former colonies over Indigenous peoples, and cultural imperialism over the diverse citizens of contemporary societies.”

The continued predominance during the early 1800s of descending and absolute parliamentary sovereignty (underpinned by a high level of secrecy and a very restricted franchise) and contingent civil rights was not construed as inimical to the public interest in the dominant discourses of the Westminster system; “On the contrary, only property owners were in a position to form a public that could legislatively protect the foundations of the existing property order; only they had private interests – each his own – which automatically converged into the common interest in the preservation of a civil society as a common sphere.” (Habermas, 1962; 87) Although the civil rights protected at common law became a significant element of the constitutional culture (as the “birthright and inheritance” of all British citizens: Blackstone, 1765), the absolute sovereignty and powers of the Parliament exacerbated the risk and possible severity of a “tyranny of the majority” inherent to the Westminster system. (Mill, 1865: De Tocqueville, 1855) As Parkinson (1994, 100-101) argues of the decision of Chief Justice Coke in *Dr Bonham’s Case*<sup>8</sup> that a law of Parliament could be adjudged void by the court in certain circumstances:

It may indeed have been a statement which gained far more importance for its utility in later political controversies than for the significance which it merited in its original context... Yet Coke had raised a concern which still reverberates through to the present time. What constraints are there upon the tyranny of the majority? If Parliament has an absolute power to make laws, what protection do citizens have from the violation of fundamental human rights?

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<sup>8</sup> (1610) 77 ER 638.

It was an issue which was to exercise the minds of 17<sup>th</sup> and 18<sup>th</sup> century thinkers, and which led to the enactment of a Bill of Rights as a constraint upon legislative authority in the American Constitution.

The emphasis of the British system of government on parliamentary sovereignty remained based on the assumed rather than demonstrated consent of the people for many years, the incremental parliamentary and electoral reforms of the 1800s gradually reducing the gap between the constitutional fiction and philosophical aspiration of legitimacy by popular consent and the extant system of government. Under pressure from international developments (and the profound consequences and implications of the American and French revolutions in particular), the proliferation of increasingly influential discourses advocating a more democratic system of government, and a more informed, enfranchised, and organised population, the ‘administrative state’ of the 18<sup>th</sup> century became subject to a series of democratic forms of ‘legitimation’ in the 19<sup>th</sup> century, together with the industrial revolution producing the ‘liberal state’.

In Britain, Bentham and others connected the emerging concepts of public opinion and the legitimacy of the exercise of public functions and powers soon after the American and French revolutions, identifying the totality of the public as the ultimate deliberative forum and source of authority of the state. From this time discourse increasingly acknowledged that only public debate inside and outside the parliament could transform governance based on autocracy and domination into rule by representation, reason and consent; as with the concessions made by the Monarch to the Parliament over the preceding centuries, the ruling classes of Britain were forced to make incremental changes to Parliament and the electoral system throughout the 1800s to pre-empt more radical change. In this way subjects gradually became citizens by participation in rational-critical public debate and elections, and the exercise of authority by the state increasingly subject to principles such as individual liberty, the formal equality of all citizens before the law, and legislation by public agreement.

### **The consolidation of the Westminster system of government**

Amongst many other developments during the 1800s, the opening of the proceedings of Westminster Parliament to public discourse, the consolidation of the roles

of the Cabinet and political parties, the incremental extension of the principle of 'representation by taxation' to 'government by appropriation' (including more extensive and consistent parliamentary review of the budget cycle of individual departments and the government as a whole), and the introduction of significant electoral reforms in 1832<sup>9</sup> and 1867<sup>10</sup> provided institutional space within the system of government for the theoretical roles of the consent of the governed and public opinion in a representative democracy to take effect. Consequently, with the elaboration and refinement of the Westminster system at the height of the liberal era and the further erosion of strict social stratification "the political public sphere could attain its full development in the bourgeois constitutional state" of Britain, the government and the law deriving their legitimacy from an increasingly representative source and subject to rational-critical public discourse and debate. (Habermas, 1962; 76) Although the extent to which democratic systems of government were established in European countries and colonies varied considerably, over the following years the notion of state legitimacy stemming from the consent of the governed generally continued to shift from a conceptual (and fictitious) preliminary social compact ceding sovereignty to a supreme governing council within the state (descending sovereignty) to an ascending (and ongoing) delegation of authority subject to the sovereignty, civil rights and 'reserve powers' of the people.

Two pillars of the system of representative and responsible government, collective and individual ministerial responsibility, were established by the 1830s. The traditional responsibilities of the Cabinet include maintaining the confidence of a majority in the Lower House, operational management of the administration and maintaining unanimity amongst Cabinet members in the implementation of decisions made and in their responsibility to the Parliament and the people. In terms of the collective responsibility of the Cabinet:

For the convention to be established, three developments were necessary. These were: first, the effective unity of the cabinet; second, effective control of the cabinet by the Prime

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<sup>9</sup> Policy platforms were adopted by political parties, and a major parliamentary select committee inquiry into the condition of native people in British colonies conducted, around the same time.

<sup>10</sup> Each of these electoral reforms was of major significance though for different reasons: "The 1832 Act was more important in terms of the principles involved [reducing the enormous disparity amongst constituencies] but it did not make so much difference to the size of the electorate". (Birch, 1964; 66)

Minister; and third, the understanding that if the cabinet were defeated in Parliament on a major issue or a vote of confidence, the Prime Minister would have no choice but to resign or ask for a dissolution. (Birch, 1964; 133)

Birch further identifies these conditions as emerging primarily from around 1780, though not combined and affirmed as a distinct convention until the 1830s.<sup>11</sup> The concept of individual ministerial responsibility emerged much earlier with the introduction of the system of parliamentary government in 1688 (though as noted above still usually primarily based on the support of the Monarch rather than a majority of the Members of Parliament for many years). The concept of the individual responsibility of Ministers to the Parliament for administration within their respective portfolios was also widely accepted as a convention by the second half of the 1800s, and made more feasible in terms of responsibility for operational management (rather than simply culpability for proven instances of political or administrative incompetence or malpractice) by public service reforms consolidated during that time (discussed below). The traditional conventions of collective and individual ministerial responsibility are further complicated in Australia by the federal division and sharing of many powers and functions, and the potential role of the Upper House of bicameral Parliaments as an independent agent (discussed in chapter 3).

The pressure for further reforms in Britain increased rather than dissipated as the institutions of representative and responsible government were being established, with significant improvements in parliamentary procedures and the system of public administration continuing throughout the mid-1800s, such as the effectiveness of select committees and the reconvening of permanent parliamentary committees after a long hiatus. The increasing influence of ‘radical’ discourses was initially apparent in the early 1800s in the form of utilitarianism,<sup>12</sup> subsequently supplemented by discourses based on class analysis as changes in society and the system of government made utilitarianism

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<sup>11</sup> “In these middle decades of the century, the collective responsibility of the cabinet to Parliament became a cardinal feature of British politics. Lord John Russell, who had questioned the meaning of the principle in 1839, accepted its implications without hesitation in 1852 and 1866, in each case resigning immediately his government was defeated in Parliament.” (Birch, 1964; 135: see also Marcham, 1960)

<sup>12</sup> Usually emphasising aspects such as individual liberty, property rights and formal legal equality, the roles of public discourse and opinion as practical elements of the rights of assent to and participation in government, and that government should be conducted to achieve the greatest good for the greatest number.

appear much more 'moderate'. The emergence and identification of increasingly distinct 'middle' and 'lower' classes within society as a result of the ongoing industrial revolution, and associated conflicts of interest between employers and workers, occurred during the 1820s and 1830s in particular: "the publication of John Wade's *History of the Middle and Working Classes* [in 1833] ... was something of a milestone in the development of class consciousness". (Birch, 1964; 84)

With the extension of trade union activities to involvement in the political sphere and increasing influence of 'radical' discourses linking previously segregated analysis of legal and political structures and functions and the associated modes of production, class structures and distribution of wealth and income by 'the state' and 'the market' over the following decades (most notably by Marx and Engels), the significant extension of the franchise effected by the *Reform Act 1867* (Eng) increased the democratic legitimacy of the Parliament and significantly altered the major features and dynamics of the dominant constitutional and political cultures. During the following decades the parliamentary consequences of this electoral reform entrenched the role of the majority political party in the House of Commons as the basis upon which the Government is formed, and the convention that the responsibility of Cabinet is to the Parliament rather than the Monarch. Nonetheless, with the transformation of the role and nature of party politics following 1867: "while the doctrine of collective responsibility [to Parliament] remains unchanged, its practical importance has been greatly reduced"; subsequently, "it is not so much a form of [continuous] Parliamentary control of the executive as a form of [periodic] voters' control, exercised through Parliamentary elections". (Birch, 1964; 137)

Thereafter the Monarch was required to exercise all functions and powers at the direction of the Prime Minister, and the Cabinet was responsible for operational management of the public administration and the exercise of prerogative powers, the Monarch retaining only "the right to be consulted, the right to encourage, and the right to warn". (Bagehot, 1867) The role of the House of Lords was incrementally reduced, particularly following the passage of the Reform Act in 1832, though the constitutional convention of the supremacy of the House of Commons remained a contested matter until the passage of the *Parliament Act 1911* (Eng). (Limon *et al*, 1997; Russell, 2001) The effect of these developments was reinforced by the introduction of extensive financial

and public service reforms during the mid-1800s that further improved the ability of the Parliament to review the activities of the Executive, and therefore the accountability of both to the electorate. The traditional powers of the Parliament to impose taxes and subsequently to authorise the funding of the government by appropriation (on the basis of budget estimates for each major set of functions) were gradually extended by the introduction of mechanisms to provide for the audit and review of public accounts throughout the budget cycle and the system of public administration, reinforced by the establishment of a Select Committee of Public Accounts and the subsequent passage of the *Exchequer and Audit Departments Act 1866* (Eng) establishing the office and functions of the Comptroller and Auditor-General:

As from 1832 a system grew up under which departmental accounts covering the expenditure of voted moneys ('appropriation accounts') were audited and compared with the estimates by the Commissioners for Auditing the Public Accounts, who reported the result to the House of Commons. The basic elements of the 'classical' budgetary system were already in existence before the establishment of the Public Accounts Committee in 1861 and the office of Comptroller and Auditor General in 1866. The Exchequer and Audit Departments Act of the latter year was, nevertheless, the greatest achievement of the classical budget movement. The Comptroller and Auditor General was an independent officer combining the old duties of the Comptroller General of the Exchequer with those of the Commissioners for Auditing, and his audit was to be 'on behalf of the House of Commons'. Many details of his audit, however, continued to be associated with the Treasury, and the British state audit was less exclusively the instrument of Parliament than has sometimes been supposed. (Normanton, 1966; 20)

Consequently: "the Treasury as well as Parliament gained greatly in power and influence as the result of the budgetary system of 1866, which translated vague prerogatives into effective authority". (Normanton, 1966; 21) Concurrent public service reforms elaborated and codified the structure and operating procedures of departments, including the requirement that an annual report be forwarded to the Parliament, to ensure that all Government expenditure was "properly authorised, recorded and audited". (English & Guthrie, 2000; 99) Other key developments in public administration during the mid-1800s included the introduction of a merit-based system of recruitment, the

consolidation of departments as the core of the public administration, and an hierarchical structure of administration incorporating all employees of the public sector through the permanent head of each department to the Minister, who was in turn responsible to Parliament for the conduct of the department and other public sector activities and policies within the Minister's designated portfolio (an administrative manifestation of descending sovereignty). (Schaffer, 1957: Duffield, 1991: RCAGA, 1976: Willson, 1955) The introduction of systematic procedures for review and the independent auditing role of the Comptroller and Auditor General were pivotal to the verification by the Parliament of the integrity and effectiveness of the Cabinet, individual agencies and the system of public administration as a whole:

The budget cycle was not only a device which kept the executive as a whole in its place [by "upholding the financial supremacy of the legislature"], but also one which harnessed the ministries in the service of the heads of the executive who framed and initiated the budgets. The fact that these documents were given due form of law by the parliaments gave them much greater weight than if they had merely been direct instructions to the ministries. And the whole cunningly contrived system depended for its effectiveness upon the surveillance provided by state audit. (Normanton, 1966; 20-21)

The conceptual and structural basis of the system of public administration also distinguished legislation and parliamentary review of the Executive from the development of policy and policy implementation by the Executive (referred to in the thesis as 'operational management'), involving a partial separation of legislative and executive functions and a further subdivision of the latter to provide for administration by a politically neutral public service (subject to a significant degree of secrecy as a consequence of the privileges and immunities provided by the 'shield of the Crown' covering Executive functions and activities, reinforced by Cabinet solidarity and the formal political neutrality of the public service). Consequently, in Britain (and also in Canada and the self-governing colonies in Australia) during the 1800s "the 'ministerial department' emerged as the organisational manifestation of the constitutional principle of ministerial responsibility", the permanent head of the department "furnishing principal advice to the minister, managing the department for the minister, and providing the

formal channel of communication between minister and departmental officers generally”. (Halligan & Wettenhall, 1990; 20-21)

By the 1880s therefore the various elements underpinning the key features of the constitutional monarchy in Britain - parliamentary sovereignty, representative and responsible government and the system of public administration – were in place, a system of government that provided a basis and reference point for derivatives and permutations in self-governing colonies throughout the British Empire. The conventions of collective and individual ministerial responsibility in particular were entrenched by the 1880s in terms of many aspects of their orthodox modern form, content and effect as a more or less cohesive and codified set of precedents and practices, the cumulative effect of the extensive changes to the central principles, structures, and processes of the system of government and the features and dynamics of the political culture within the Parliament (including the consolidation of the functions of political parties in particular) as the franchise was extended.

The emergence of a predominantly two party political system following the passage of the second Reform Act in 1867 was facilitated by the pluralist or “first past the post” electoral system and single-member constituencies, whereby the person (party) with the most votes in each electorate wins a seat in the House of Commons. Palmer (1995, 168) notes that a method of analysis in public choice theory of the predominantly bipartisan Westminster system of government is based on the premise that:

the Westminster model of single-party majority parliamentary government can be analogized to a franchise bidding scheme for regulating a natural monopoly in the commercial context... [According to this analogy the system of government] involves the holding of a competition (an election) between competing organizations (parties) for the virtually unconstrained right to exercise a monopoly power (by government, over legitimate coercion).

The monopoly of the Government (the majority party of the Lower House) over operational management of the administration is subject to review by the Upper House and the right of the Monarch to be consulted, to advise and to warn, though in the Westminster system the powers of the House of Lords as a ‘house of review’ are extremely limited compared to those of the Upper House in the bicameral Parliaments of

the Commonwealth of Australia (see chapter 3). The concepts and conventions of individual and collective ministerial responsibility to Parliament (specifically the House of Commons) provide a (usually) constant line of political responsibility for, and control over the operational management of, the administration between elections.

As the franchise was extended and the social functions of government expanded, the liberal state became the ‘welfare state’, with surges in growth in the size and functions of the public administration during and following the First and Second World Wars. Consequently, major inroads were made into reducing the extent of “legal equality and factual inequality” that had persisted in the political and economic systems of the liberal state. (Habermas, 1998; 65) With the establishment of the welfare state in Western democracies the “highly productive capitalist economies were socially domesticated for the first time, and were thus brought more or less in line with the normative self-understanding of democratic constitutional states”. (Habermas, 1962; 48) The extensive reforms to the electoral and education systems during the 19<sup>th</sup> century provided a solid basis for the transition towards universal suffrage and the establishment of the welfare state to reduce the disparity between formal and substantive equality in the existence and exercise of individual rights, liberty and opportunity (though as noted above civil rights were generally only extended to Europeans in colonies of the British Empire, including Australia).

As the welfare state was being established, further reforms were made to the procedures and mechanisms of the Parliament to improve its efficacy in dealing with increasingly complex policy issues and public administration. For instance, the House of Commons established four permanent parliamentary committees pursuant to Standing Orders in 1907, consolidating their role and effect in the system of government. The roles of the committees were variously “to advise; to inquire; to administer; to legislate; to negotiate; and to scrutinize and control” (Wheare, quoted in Barnhart, 1999; 41), the primary objective being to provide “a means to secure greater surveillance of the executive by Parliament”. (Select Committee on Procedure, quoted in Radice, 1999; 167) However, a recommendation of the Haldane Committee inquiry into the machinery of government in 1918 that a comprehensive system of parliamentary committees be established was not implemented; instead, incremental additions were made until a

revision of the Standing Orders and committee system in 1947 established a multiplicity of parliamentary committees rather than a coherent and comprehensive system designed to encompass all major aspects of government. As discussed in chapter 3, following earlier tentative steps towards a more coherent and comprehensive committee system, and similar developments in Australia, New Zealand and Canada, a committee system was established in the House of Commons in 1979 to provide for comprehensive and consistent coverage of the public sector.

The establishment of the office of the Comptroller and Auditor-General in 1866 was a precursor of and prototype for other parliamentary commissioners, independent statutory officers responsible for assisting the Parliament in maintaining the accountability of the Executive. As with the formal linkage of the roles of the Comptroller and Auditor-General and the Public Accounts Committee,<sup>13</sup> other parliamentary commissioners have been established to further improve the integrity and effectiveness of the Parliament and the system of public administration. A Select Committee on the Parliamentary Commissioner for Administration was established in 1967 (and subsequently merged with the Public Service Committee to become the Select Committee on Public Administration) to receive and review reports of the Parliamentary Commissioner, and the Select Committee on Standards and Privileges was empowered to review reports of the Commissioner for Standards in 1995. Similar independent parliamentary office(r)s, referred to in the thesis as ‘independent parliamentary agencies’ (after Kennedy *et al*, 1992), have been established by the Parliaments of the Commonwealth of Australia (see chapter 3).

### **Constitutional development in Australia**

The constitutions and systems of government of Canada and the U.S. provided prototypes for the federal system and the structure and content of the written constitution, the consolidation of the institutions of representative and responsible government in Britain providing an increasingly coherent and elaborate prototype for the systems of government of the self-governing colonies and from its inception in 1901 the

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<sup>13</sup> Notwithstanding the close functional and operative nexus with the Public Accounts Committee since the inception of the office, the Comptroller and Auditor General has only formally been an officer of the House of Commons and the Head of the National Audit Office since 1983. (Hogwood *et al*, 2000; 209)

Commonwealth of Australia.<sup>14</sup> The drafting of the Commonwealth Constitution was heavily influenced by the prevailing intellectual discourses and system of constitutional monarchy and representative democracy of Britain. The relative stability, coherence and affluence of the Westminster system by this time, the cordial relations between Britain and the Australian colonies and the dominance of the principle tenets of liberal philosophy provided a very different social climate to the at times violent conflicts between Crowns, Parliaments and people and associated revolutionary discourses of the late 18<sup>th</sup> century on the drafting of the U.S. Constitution. The British officials, convicts and free settlers in Australia, and subsequently the dominant political and economic classes of the self-governing colonies:

bore with them a strong conception of what the rule of law meant, the uses to which it could be put, and its importance in British political life... Like their seventeenth century forebears, they summoned up the ancient constitution, their birthright and inheritance, rather than adopting the revolutionary road and philosophical schemes of the French or American revolutions. (Neal, 1991; 76: see also McMinn, 1979: Melbourne, 1963)

Consequently, the Commonwealth Constitution does not share the emphasis of the U.S. Constitution on the implementation of the more radical ideas of the 'Age of Enlightenment' such as popular sovereignty, an absolute rather than contingent constitutional guarantee of civil as well as economic and property rights and freedoms, and a strict separation of powers rather than the absolute and indivisible sovereignty of the Crown and fusion of legislative and executive powers and institutions. As in Canada, the Commonwealth Constitution provided for a constitutional monarchy with a federally structured system of representative and responsible government (with the system of government of each polity of the Federation derived principally from the Westminster system), and adapted from the U.S. Constitution the endorsement of the system of government by the people (including the convening of constitutional conventions and

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<sup>14</sup> As discussed in chapter 4, representative and responsible government was established during the 1850s in New South Wales, Victoria, South Australia, Tasmania and Queensland, and in Western Australia in 1889 – the extant constitutions and systems of government of the self-governing colonies were recognised and incorporated within the Commonwealth Constitution pursuant to Chapter VI.

also submission of the final document to referendum), constitutional recognition of the role and formal independence of the High Court, and a partial separation (or division) of powers within the Federal Parliament (this had also been a feature of the Upper House of several of the Parliaments of the self-governing colonies). The composition of the Upper House of the Federal Parliament is also derived from that of the U.S. Senate (based on a set level of representation from each State).

As noted above, at the time the Australian colony was established in 1788 parliamentary sovereignty (including representation by taxation, the exclusive power of Parliament to impose taxes) and the necessity of an independent judiciary and the rule of law were well established as integral elements of the system of government in Britain. By the time representative and responsible government was introduced to the larger colonies in the mid-1850s the role of the Cabinet (drawn from the majority political party in the Parliament) as the functional centre of Government, the system of public administration, and associated conventions of individual and collective ministerial responsibility to Parliament, were apparent though still undergoing development and elaboration. Although as in the U.S. a series of constitutional conventions were held to draft the Commonwealth Constitution they consisted of members and appointees of the existing Parliaments of the colonies and were limited to devising a system of government that essentially maintained the status quo between citizens and the state (as well as amongst 'citizens' and those without citizenship), strongly influenced by the relative affluence of the Australian colonies, the continued constitutional and cultural ties with Britain, and the international dominance of the British Empire.

The sovereignty of the Crown as a conceptual and symbolic construct, as well as the formal locus of power in the system of government, remained therefore a core aspect of the basis and system(s) of government of the Commonwealth of Australia. These differences from the U.S. Constitution, which emphasised the sovereignty of the people, strong constitutional protection of civil liberties and a strict separation of legislative and executive powers, were not considered a disadvantage by the drafters of the Commonwealth Constitution as according to the liberal democratic theory prevailing in Britain at the time, "the interest of the owners of private property could converge with that of the freedom of the individual in general." (Habermas, 1962: 56) Thus although

many aspects of the federal structure of the U.S. Constitution were adapted and the final document approved by a majority of voting 'citizens', there was no formal transfer of sovereignty to the people; the Constitution was essentially devised to maintain the status quo between the Monarch, Parliament and the people within a new polity:

The Constitution was not written as a people's Constitution, but by drafters who, according to Manning Clark, 'wanted a Constitution that would make capitalist society hum'. Designed to take care of 'essentially mundane chores', the Constitution does not expressly embody the fundamental rights or the aspirations of the Australian people, nor any spirit of reconciliation with Australia's indigenous inhabitants. It has a chapter on Finance and Trade but nothing but a few scattered provisions on the topic of human rights. (Williams, 1995; 288-89)

Consequently, in addition to a set of limited constitutional rights (all of which apply to the Federal Government but not State Governments), including trial by jury in relation to indictable offences (s. 80), freedom of religion (s. 116) and freedom from the arbitrary deprivation of property (s. 51(xxxi)), the rights that were explicitly recognised included the requirement that interstate trade, commerce and intercourse "shall be absolutely free" (s. 92). The Constitution even provided for the implementation and enforcement of the latter provision by a specific constitutional commission (though the commission never became a prominent constitutional mechanism): "There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance ... of the provisions of this constitution relating to trade and commerce, and of all laws made thereunder" (s. 101). Apart from providing for the formal separation of judicial power (including constitutional guarantees of security of tenure for the judiciary and the role of the High Court as interpreter and enforcer of the provisions and principles of the Constitution), and the limited set of individual rights to which the powers of the Federal Government are subject, the drafters of the Commonwealth Constitution had "a nineteenth-century confidence that civilised men, or at least those of British descent, would never repudiate the civil liberties won by their forefathers" (La Nauze, 1972; 232), and were "prepared to put their faith in parliament, relying upon it to respect and protect their rights and to ensure that their common law rights were not taken away." (Doyle, 1994; 144)

The adoption of the Commonwealth Constitution therefore effected a partial transfer of the sovereignty of ‘the Crown’ to ‘the people’ and corresponding shift from descending to ascending sovereignty (albeit constantly ‘intermediated’ within the polity by interactions demonstrating varying degrees of domination and subjugation or consent and equality, as argued by Foucault (1978, 1980)). An important aspect of this shift was the establishment of constitutional limitations on parliamentary sovereignty, resulting in parliamentary ‘supremacy’ within constitutionally defined allocations of authority (amongst the Federal and State polities) and ‘manner and form’ requirements, rather than the unfettered ‘parliamentary sovereignty’ of Britain (the latter subject only to public opinion rather than constitutional constraints). Notwithstanding the recognition of some civil rights, the initial endorsement of the Constitution establishing the Commonwealth of Australia by a majority of voting ‘citizens’ within each self-governing colony,<sup>15</sup> the provision requiring approval of constitutional amendments by referendum (discussed below), and the early adoption of universal suffrage in elections compared to Britain: “There remain significant conceptual and practical difficulties with the basis upon which the Australian people are said to underpin the sovereignty of the Constitution.” (Williams, 1995; 286)

The potential for inconsistency between parliamentary supremacy and civil rights is apparent in the implementation of the White Australia Policy (incorporated in s. 25 of the Constitution, which permits discrimination based on race), and the complete lack of constitutional recognition of the civil rights of Indigenous peoples until 1967 (see chapter 5). The absence of an explicit constitutional guarantee of many civil rights and freedoms, and the exclusive focus on the formal equality of individuals and property rights as the basis of the limited civil rights that are recognised, increases the risk and possible severity of a ‘tyranny of the majority’ adversely affecting the rights and interests of marginalised groups, most notably for present purposes the longstanding oppression of (and still limited recognition of and protection for) the individual and collective rights of Australia’s Indigenous peoples. (Behrendt, 2003) Although the rule of law “provided a

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<sup>15</sup> As Williams (1995, 287) notes: “while the Constitution was supported by a majority of the people who actually voted, large sections of the community were excluded from voting and many people who were entitled to vote did not do so”. (See also Cass & Rubenstein, 1995)

measure of protection against [the arbitrary exercise of] power from the top” for British ‘settlers’ prior to the conferral of self-government:

for the Aborigines, its authority stood behind their forceful dispossession, its protections proved largely illusory, its courts were closed to Aboriginal testimony, and its principles denied the existence of their own laws...

While the whites carried on their own battles within the rule of law framework, it was put to one side in their dealings with the blacks. (Neal, 1991; 78, 80)

These core policies of the self-governing colonies of Australia at the time of Federation continued to exercise considerable influence over the development of the dominant constitutional and political cultures for many years:

Australian colonial governments, with ministries drawn from their respective parliaments, were responsible only to their own legislatures. This, and not democracy, was the meaning of ‘responsible government’ in Australia. As the party system developed, government and opposition differed increasingly along ideological lines best expressed as the clash between parties representing the interests of conservative rural property owners and urban industrialists and businessmen and of only slightly less conservative working men. (Webb, 1991; 288)

Nonetheless, following the establishment of forms of government based on the Westminster system to the extent local conditions and the federal structure and provisions of the Constitution permitted, there was considerable experimentation and innovation compared to the inertia of the established society, system of government and dominant constitutional and political cultures in Britain, which has tended to result in slow and incremental evolution in the usual course of events. There was therefore in some important respects accelerated evolution within the ‘democratic laboratory’ of the Australian self-governing colonies and subsequently the polities of the Commonwealth of Australia, including the establishment of an elected Upper House in the Federal Parliament rather than the hereditary and appointed membership of the House of Lords and the appointed membership (or very restricted franchise) of most of the Upper Houses

(Legislative Councils) of the self-governing colonies,<sup>16</sup> the proliferation of statutory authorities as instruments of public administration (examined in chapter 4), and “short [maximum terms for] Parliaments, payments for Members of Parliament, the secret ballot, universal manhood suffrage and, later, votes for women.” (Thompson, 1994; 97)

Notwithstanding the fundamental differences in the constitutional basis of the system of government, the influence of the institutions and conventions of the Westminster system on the Parliament and system of public administration of each polity remains strong: “while federalism reflects the existence of multiple and autonomous agencies of government, parliamentary government integrates all the agencies of each government into a single hierarchy with the executive at its apex.” (Sharman, 1991; 25) Of course, not only the concepts and institutions but also the people comprising the British system of government and society were imported to Australia, including a strong class consciousness and awareness of the benefits of organisation and collective action for the subsequent development of powerful trade unions in mining, manufacturing, maritime and construction industries and the public service in particular.

Although there have been occasional name changes and schisms or alliances within and amongst the ‘major’ political parties, and since the 1970s independents and ‘third parties’ have attained increasing prominence in many Upper Houses following the introduction of electoral reforms based on proportional representation, as in Britain the political landscapes of all polities of the Commonwealth of Australia have been dominated by an essentially bipartisan system (as noted in chapter 1, currently comprising Labor and the Coalition – the major exception is in the NT, where the Coalition arrangement was fused and formalised in the 1970s as the CLP). (Heatley, 1990; Maddox, 2000) Thus the ‘constitutional’ prominence of the political party in ‘Government’ and the political party forming the ‘Official Opposition’ continues to be an important factor in, if not the primary foundation of, the political culture throughout the Commonwealth of Australia. (Jaensch & Wade-Marshall, 1994; 27-32)

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<sup>16</sup> While early attempts to establish a political ‘bunyip aristocracy’ in the Upper Houses of the self-governing colonies were unsuccessful, the practice of appointing rather than electing members to the Upper House persisted in some State Parliaments for many years. (McMinn, 1979; Thompson, 1994; Stone, 2002)

## Features of the federal systems of government in Canada and Australia

As noted above, Canada has also adapted and combined many of the structures and principles of the British and U.S. systems of government, and can therefore be considered the principal prototype of the Commonwealth system of government. A brief comparison of similarities and differences between the two federal systems provides further insights into the distinctive features of the Commonwealth Constitution.<sup>17</sup> There are many common, similar and different elements in each ‘Washminster’ system of government. (Brady, 1947; Albinski, 1973; Bakvis & Chandler (eds), 1987; Hodgins *et al* (eds), 1989; Galligan *et al* (eds), 1991; Griffiths (ed), 2005) Common and similar features include: a written federal Constitution contained within a statute of the Imperial Parliament of Britain,<sup>18</sup> providing for a formal division of powers between the Federal and regional levels of government (‘Provinces’ in Canada, ‘States’ in Australia) subject to judicial interpretation and enforcement;<sup>19</sup> the Head of State (the British Monarch), with a formal representative in each polity of each Federation having an essentially symbolic constitutional role in the usual course of events; bicameral Federal Parliaments; a system of representative and responsible government within each polity (including self-governing territories); the development and during the 1980s in particular proliferation of ‘executive federalism’ as the main device of intergovernmental relations (Galligan *et al* (eds), 1991); and, constitutional change has usually occurred by intergovernmental negotiation and major shifts in the prevailing political or judicial interpretation of

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<sup>17</sup> Federal systems differ from unitary systems (which may also contain some form of regional government) in that: “The two levels [of government] are interdependent: neither can abolish, and each relies on the other in making and implementing policy. Sovereignty ... is divided on a territorial basis”. (Gillespie, 1994; 60)

<sup>18</sup> Both Constitutions are founded in “the form of law by an Act of the Imperial Parliament ..., the Supreme Sovereign Legislature of the British Empire”. (Quick & Garran, 1901; 285) The original Constitution of Canada was contained in the *British North America Act 1867* (Imp).

<sup>19</sup> In addition to having a unitary system of government, the British ‘Constitution’ consists of an amalgamation of historical agreements between the Crown and the Parliament, constitutional and political ‘conventions’, legislation and a significant though contingent set of statutory and common law rights and remedies: “the United Kingdom has a difficult and *sui generis* constitution, deriving from a tortuous sedimentation of the common law, acts and conventional usage, partly legal and partly extra-legal”. (Sartori, 1962; 853: see also: Wade & Bradley, 1985; De Smith & Brazier, 1986) The system of government in New Zealand is very similar to that of Britain, though New Zealand has a unicameral Parliament and the Treaty of Waitangi has attained quasi-constitutional status. (Joseph, 1993; McHugh, 2004)

constitutional provisions and principles rather than in accordance with the (very different) formal constitutional procedures for amendment (discussed below).

Major differences include: the negotiation of treaties with Indigenous peoples in many parts of Canada during the period of European colonisation, in contrast to the repudiation of prior and concurrent Indigenous sovereignty during the colonisation of Australia (see chapters 5, 6 and 10); in Canada s. 91(24) of the Constitution stipulates that the Federal Parliament has exclusive jurisdiction in relation to “Indians, and Lands reserved for the Indians” and s. 35 (introduced in 1982 and reinforced by another amendment in 1984) guarantees “aboriginal and treaty rights”, whereas in Australia s. 51(xxvi) of the Constitution specifically prohibited the Federal Parliament from exercising jurisdiction over Indigenous Affairs (and s. 127 excluded Indigenous persons from being counted in the census) until 1967 (following the amendment the Federal Parliament has concurrent jurisdiction); in Canada the Members of the Upper House of the Federal Parliament are appointed rather than elected directly; ‘provincialism’ has had a much stronger influence in Canada;<sup>20</sup> and, the Provincial Parliaments of Canada are unicameral (other than in Queensland the Parliaments of the States are bicameral – the Parliaments of the self-governing territories in both Canada and Australia are also unicameral). Also, in Australia there are “more frequent elections, compulsory voting, and stronger and more integrated extra-parliamentary party organizations” within and across all polities of the Federation. (Elkins, in Hodgins *et al* (eds), 1989; 408)

The procedures for constitutional reform in Australia exemplify the ongoing tension between the sovereignty of the Crown and the people: although a majority of ‘the people’ (as well as a majority of the States) must give final approval to amendments to the Commonwealth Constitution in a referendum (s. 128), the procedure for instigating and devising the proposed nature and extent of constitutional reform (and also final approval of amendments in the case of amendments to State Constitutions) is controlled by ‘the Crown’ (the Federal Parliament). However, although the Commonwealth of Australia therefore has a rigid as opposed to flexible constitution (Phillips & Jackson,

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<sup>20</sup> There are ten Provinces and three territories in Canada; in Australia there are six States and three mainland territories, with seven external territories (six comprising an island or group of islands and the Australian Antarctic Territory – the Commonwealth of Australia’s sovereignty over the latter is not recognised by many nation-states). (Hanks *et al*, 2004; Griffiths (ed), 2005)

1973),<sup>21</sup> there are many ways in which significant constitutional change can occur other than by such formal amendment. As Galligan (1997, 7) notes, most adaptations have occurred by way of “changing political practice and reinterpretation by the High Court”.

Originally no amendment procedure was stipulated by the Canadian Constitution; by convention, amendments prior to 1982 were made in accordance with a request to the British Parliament either by the Federal Parliament alone or, in cases directly affecting the federal system and the role of the Provinces, with the concurrence of a significant proportion of the Provincial Governments. (Russell, 1989) The ‘patriation’ of the Canadian Constitution in 1982 (adopting the *Constitution Act*, 1982, albeit still contained within British legislation, the *Canada Act* 1982 (UK)) introduced an amendment procedure that no longer requires the involvement of the British Parliament and consists of several different procedural methods depending on the nature of the amendment (generally requiring the approval of the Federal Parliament and seven of the ten Provincial Parliaments together containing at least 50% of the population) as well as a Charter of Rights and Freedoms. (Cameron, 2005: McNeil, 2001)

Many constitutional ‘amendments’ in both Canada and Australia have occurred as a result of intergovernmental political negotiations, by a shift in or elaboration of judicial interpretation of the Constitution, or by a unilateral re-interpretation of constitutional powers by the Federal Government. Amongst the many fundamental changes that have resulted from judicial decisions in Australia is the increasing acceptance of ‘the people’ as the ultimate source and repository of sovereignty during the 1990s (with a subsequent reinforcement of common law civil rights, albeit within the constraints of the Constitution: Doyle, 1995),<sup>22</sup> and the recognition of certain Indigenous rights to the extent constitutional and common law requirements and principles permitted (i.e. in

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<sup>21</sup> As the substantive provisions of the Commonwealth Constitution cannot be changed in the same manner as ordinary laws.

<sup>22</sup> In particular in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. Thus the Commonwealth of Australia was referred to by some as a “crowned republic” in the 1990s (Winterton (ed), 1994) following judicial recognition that the people “sustain the authority and the legitimacy of our system of government” (Finn, 1995: 1); note however the cautionary comments of Kirby P (as he then was) on the conceptual and practical importance of parliamentary sovereignty and the inherent limitations of judicially defined rights and freedoms in *Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372. (See also Williams, 1999: Kirk, 2001: Stone, 2001, 2005: Saunders, 2002: Foley, 2003: Meagher, 2004)

accordance with the principles determining the acquisition of foreign territories by the British Crown, the application of British law in such colonies, and the common law doctrine of native title, discussed in chapter 6).

Notwithstanding the criticisms of the Commonwealth Constitution made in this thesis, Galligan's (1997, 7) contention that overall and in comparison with many other countries "Australia has not needed major change by referendum to function reasonably well or to adapt its Constitution to changing conditions" is not disputed. Nonetheless, chapter 3 argues that this is at least in part the case because many of the provisions of the Constitution are either extremely vague, or have no relevance at all, to key components and operational principles ('conventions') of 'responsible government' in particular. Consequently, there are some aspects of constitutional amendment that are arguably essential, and many that could be useful. An essential aspect is modernisation of existing provisions to provide more correlation between the terms and provisions of the Constitution, the structure and functioning of the system of government, and Australia's status as an independent nation-state. This can be done without altering the existing basis and substance of the system of government; as noted in chapter 3, some provisions of the Constitution are either completely obsolete or archaic.

There are however two further sets of changes in particular that would be useful (and could also be considered essential to democratic and international legitimacy) of particular relevance for the purposes of the thesis: constitutional recognition of the rights and interests of Indigenous people in some form to ensure that certain minimal conditions are beyond the power of the 'government of the day' to alter unilaterally (see chapter 10); and, explicit acknowledgement of 'the people' as the basis and sole source of authority and legitimacy underpinning the Constitution (the Constitution is currently in force by the authority of the Imperial Parliament of Britain), reinforced by a Charter of Rights and Freedoms or Bill of Rights. (Williams, 2001, 2006: Greig, 2003)

## **Conclusion**

The result of the selective adoption and adaptation of elements of several very different systems of government by the founders of the Commonwealth of Australia is perhaps best described as a federally structured constitutional monarchy (or 'crowned republic') with a system of parliamentary democracy (representative and responsible

government) in each polity of the Federation. Although the absolute sovereignty of the Crown and the associated prevalence of descending sovereignty and strict hierarchical structures in the Westminster system have been modified considerably in Australia, the sovereignty of the people over the system of government remains equivocal in some respects. Other significant variations from and adaptations to the Westminster system include those associated with the adoption of the Commonwealth Constitution (such as the division of powers and functions amongst the Federal and State Parliaments, and the role of the High Court as constitutional interpreter and adjudicator), the powers and functions of the representatives of the Head of State in each polity, and the structure and composition of the Federal and State Parliaments. The development of key institutions of the systems of government of the Commonwealth of Australia (in particular those of the Federal and NT Governments) are examined further in chapters 3 and 4: chapter 3 examines the roles of Parliament and the Executive and key features of the dominant political cultures and dynamics in each polity, chapter 4 examines the establishment and evolution of governance and public administration in the NT since the British assertion of sovereignty.

## ***Chapter 3***

### ***Key features of the system of government***

#### **Introduction**

The evolution of the Westminster system of government as the principle basis for the systems of government established within each polity of the Commonwealth of Australia, and the influence of the Canadian and U.S. Constitutions on the structure and content of the constitutional framework and federal system, provide useful reference points for more detailed analysis. Chapters 3 and 4 examine the development of key political and administrative institutions within each polity of the Commonwealth of Australia (with most emphasis on the Federal and NT systems of governments), including the respective roles of the Parliament and the Executive, and major features of the political cultures and systems of public administration that have developed within the evolving constitutional frameworks of each jurisdiction. Chapter 3 also argues that the systems of government have retained (subject to significant variation geographically and temporally) the inherent susceptibility of the Westminster system to substantial Executive control over all parliamentary as well as executive powers and functions.

#### **The Parliament: Basis, procedures and functions**

The roles of each House of Parliament, and procedural safeguards and mechanisms designed to maintain the 'rule of law' within them, have made distinctive contributions to the operation and accountability of the Federal and State Governments, as has the absence of an Upper House in the unicameral Parliaments of the NT and Queensland. Although a detailed analysis of the Federal Parliament is beyond the scope of the thesis, several aspects are of particular significance to governance in the NT. The Federal Parliament has been very influential in Australia in the development of mechanisms designed to strengthen the effectiveness of Parliament, and also to provide for the otherwise nebulous influence of 'public opinion' to be exerted directly by the introduction of some procedures facilitating participatory democracy between elections (e.g. in addition to the traditional measures of access to local Members and the right to

formally petition Members of Parliament, the role of parliamentary committees has been strengthened since the 1970s). The direct responsibility of the Federal Government for public administration in the NT between 1911 and 1978, and the retention of several State-type functions and paramount constitutional jurisdiction following the conferral of self-government, have also had major impacts on the establishment and consolidation of the system of government in the NT.

### ***The Legislative Assembly of the Northern Territory***

The small membership and unicameral structure of the Legislative Assembly has made replication of the procedures and safeguards designed to maintain the efficacy of and uphold the ‘rule of law’ within the Westminster Parliament, and enhance the effectiveness of Parliament more generally, particularly difficult. Nonetheless, the direct and indirect influence of the procedures and practices of the House of Commons is apparent in many aspects of the Legislative Assembly of the NT (and Queensland) and the Lower Houses of the Parliaments of the other polities of the Commonwealth of Australia. For example, the ‘Committee of the whole House’, consisting of all Members of the Assembly, considers bills and enacts legislation in accordance with the requirements of Standing Orders, and some of the symbolic paraphernalia and rituals (e.g. the mace and despatch box) have also been adopted. In many ways therefore Charles Dickens’ impression of the opening of the Legislative Assembly of Nova Scotia in 1841 might be similar to that of a visitor to the Legislative Assembly in that the “the forms observed on the commencement of the new session of Parliament in England were so closely copied, and so gravely presented on a small scale, that it was like looking at Westminster through the wrong end of a telescope”. (Quoted in Adamson, 1989; 139)

There has however been selective adoption of, and extensive variations to, some of the key safeguards established within the Westminster Parliament, such as the strictly non-partisan status of the Speaker (not replicated in the Federal or NT Parliaments), and the method of selection of the members and Chairperson of each parliamentary committee (parliamentary committees in Australian Parliaments tend to be dominated by the governing political party). Fitzgerald (1989, 138) notes that modifications to the distinct roles of the Attorney-General:

exemplify the local distortions which have been introduced into the Westminster system of Government. They are probably both causes and consequences of those distortions...

Traditionally, the Attorney-General is not only a member of the Executive but the Chief Law Officer of the Crown... [As] chief law officer, the Attorney-General has extensive powers and discretions which are intended to be exercised in the public interest ... The Attorney-General also has primary responsibility for legal advice in relation to matters of public administration and government. The proper performance of such functions is dependent upon independence and impartiality and freedom from party political influences, which is threatened if the Attorney-General is subject to Cabinet control and Parliament is effectively dominated by the Executive. (See also: EARC, 1993d: McCarthy, 2004)

In accordance with the concept of parliamentary supremacy (as opposed to parliamentary sovereignty in Britain - see chapter 2) and the unicameral structure of the Parliament of the NT, the Legislative Assembly provides the focal point for the accountability and review of the NT Government including: procedures to be followed in the introduction and passage of bills to provide the opportunity for scrutiny and debate of new legislation and amendments to existing legislation - “the procedures for the translation of a Bill into an Act involve a specific stage for the discussion of the details of the Bill by the Committee of the Whole House” (Jaensch & Wade-Marshall, 1994; 193); providing the opportunity for Members of the Assembly to put questions to Ministers regarding all aspects of their respective portfolios; the tabling of annual reports of departments and other public sector agencies, and (often though certainly not always) other formal inquiries, audits and reviews of the public sector as they are completed; and, the operation of parliamentary committees, including permanent committees established to maintain rules for the proceedings of the Legislative Assembly and to review specific areas of government, and committees formed on an *ad hoc* basis to inquire into a certain topic or perform a specific function.

In addition to providing the members of the political component of the Executive (the Cabinet), the Legislative Assembly has an expressive function (giving expression to the objectives and values of the people), and the function of informing the public of matters of state. (Loveday, 1981) Jaensch and Wade-Marshall (1994, 244) quote a description by Pettifer of the respective functions of Parliament and the Executive:

“Parliament is not a governing or policy *making* body. That is the responsibility of the Executive Government. The role of the Houses is to monitor the Executive, that is, the Ministry and its supporting Administration.” These distinct constitutional roles of the Parliament and the Executive are discussed further below in terms of operational management and review and accountability. The Legislative Assembly of the NT, with 25 Members, is the smallest Parliament in Australia (other than that of the Australian Capital Territory: Halligan & Wettenhall (eds), 2000). The Legislative Assembly of Tasmania also has 25 members (the next smallest is that of South Australia with 47 members), however both of these Parliaments also have an Upper House. Nonetheless, although a similar range of functions to those of State Governments are conducted, the public administration of the NT is less than half the size of the next smallest administration (also that of Tasmania), and approximately one twenty-fifth the size of the Federal public service. (Warhurst, 1990)

During the early years of self-government in particular parliamentary scrutiny of legislation and policy was extremely limited. Between September 1977 and May 1980 more than 400 bills were passed by the Legislative Assembly:

Sheer quantity in itself does not signify much and there were certainly many bills of minor importance. However, at the same time, a significant proportion of the legislation was qualitatively different. Given the particular constitutional and political context the frequent introduction of major pieces of legislation was to be expected...

The scrutiny of this legislation was often inadequate, not only because much of it was rushed through, but also because of the small membership of the Assembly, the omnibus responsibilities of ministers and their opposition counterparts, the relative inexperience and lack of expertise by members of the Legislative Assembly (MLAs), the limited time for debate, the use of parliamentary devices (notably the suspension of standing orders to facilitate passage of urgent bills) to curtail consideration, and the inadequacy of research and support services. (Heatley, 1981d; 16)

The dominance of one political party (the CLP) from the formative years of the NT polity until the first change of government in 2001 facilitated the establishment of significant spheres of essentially arbitrary (unaccountable) government or ‘Executive

state' within the otherwise constitutional state in several important respects, in the sense that a constitutional state has an authoritative and clearly defined set of principles of 'limited government' applying to the structure, functions and powers of all institutions and activities of government. (Edgar, 2007) As in the 'Executive States' of Queensland and Western Australia during the 1980s (discussed below), the role of parliamentary committees in the Legislative Assembly of the NT was negligible for many years following the conferral of self-government. The establishment of a Public Accounts Committee in 1986 and its subsequent linkage with the role of the Auditor-General in particular enhanced the role of parliamentary committees (a relatively high profile Select Committee on Constitutional Development, i.e. the attainment of Statehood, was also established around the same time), though the small membership of the Legislative Assembly remains a substantial (though perhaps not insurmountable) obstacle to the establishment of a comprehensive committee system. (Edgar, 2008)

Two matters often emphasised by analysts of the role of Parliament are the number of sitting days each year, and the period of time between parliamentary sessions. This is minimally provided for in the Commonwealth Constitution (s. 6), which requires that Parliament meet at least once each year and that no more than twelve months shall pass between parliamentary sessions, and is not specified in the Self-Government Act (implicitly however the requirement is the same as the Parliament must meet at least once a year for the appropriation of revenue). During the 1980s and early 1990s the Federal Parliament met on average around 60 days a year, compared to over 160 in Britain, around 150 in Canada and 100 in New Zealand. (Blewett, 1993) In 1990 most State Parliaments met for between 50 and 60 days, the NT Legislative Assembly for 26 days (and continues to convene for around 30 days each year). Thus Jaensch and Wade-Marshall (1994, 177) note that compared with the Parliaments of the States and the Legislative Assembly of the ACT: "In both sitting days, and total sitting hours, the NT Assembly was very much bottom of the list."

While this is merely one part of the duties of Members of Parliament, the frequency and duration of parliamentary sessions is clearly crucial to the effectiveness of Parliament; for instance, increasing both would diffuse the additional workload associated with establishing and maintaining a comprehensive committee system, and

might even reduce the pressure to extract partisan advantage from every parliamentary proceeding somewhat (and shift some of the associated emphasis from demonstrating incompetence of political rivals to demonstrating competence in the performance of parliamentary duties).<sup>23</sup> Although this would impinge on the time dedicated to direct constituency work, Members of Parliament already enjoy considerable advantages over their political rivals in this respect, and even if there were around 50 sitting days each year this still leaves substantial opportunity for other duties.

As in the Westminster Parliament, the Standing Orders of the Legislative Assembly “provide comprehensively for the conduct of proceedings of the house, the means and process of the passage of legislation, the rules of debate, the maintenance of order and the operation of various committees.” (Jaensch & Wade-Marshall, 1994; 140) Although of distinct form (administered and enforced by the Members of the Legislative Assembly rather than the public administration and the courts), Standing Orders are similar to legislation in that they are permanent rules that may be repealed and amended (though they can also temporarily suspended) by a resolution supported by a majority of the Members of the Legislative Assembly (and not otherwise). The Standing Orders provide that should a question of procedure not be covered by the Orders, the matter shall be decided in accordance with the practice in the House of Representatives of the Federal Parliament (which has a similar provision invoking the practices of the House of Commons). A parliamentary committee has responsibility for the maintenance and review of the Standing Orders, which are interpreted, implemented and enforced in parliamentary proceedings by the Speaker. (Edgar, 2008)

The rules and conventions of parliamentary privilege are also adapted from and, in the absence of relevant provision or precedent, based on those of the House of Representatives and thereby the House of Commons (and cannot exceed the powers, privileges and immunities of the House of Representatives, its Members and

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<sup>23</sup> As Hogwood, Judge and McVicar (2000, 221-22) argue of the Westminster system: “most MPs are not interested in most agencies nearly all of the time. When they are interested they are rarely interested in accountability issues as such. From the evidence of their written Parliamentary Questions they focus on politically hot issues and constituency cases.” This is of course only one aspect of one aspect of accountability as: “For many agencies, direct contact with ministers or Parliament is minimal, but at the same time they will have intensive accountability links with other parts of government, and with constituencies outside government.”

committees), including absolute freedom of speech (subject only to the Standing Orders and the role of the Speaker), the right to summon and cross-examine witnesses on matters before the Parliament, and to summon, cross-examine and judge individuals for contempt of Parliament. (Self-Government Act, s. 12: *Legislative Assembly (Powers and Privileges) Act* 1992 (NT)) The Office of the Clerk also has a vital role in the administration of and supply of advice to the Legislative Assembly, a “servant of the House” and permanent (though in the NT non-statutory) officer. (Jaensch & Wade-Marshall, 1994; 181-83)

### ***The Federal Parliament***

As the most comparable chamber of the Federal Parliament to the Legislative Assembly, some of the structural and procedural features of the House of Representatives are noted above. Many of these mechanisms and procedures also have basically comparable analogues in the Senate, such as a President (analogous to the role of the Speaker), Standing Orders to provide for such matters as the conduct of debate, question time and the introduction and consideration of bills, and parliamentary committees. The distinct aspects of the composition and constitutional role of the Senate are considered in this section. The complementary review and accountability roles of parliamentary committees and independent parliamentary agencies are considered in more detail below.

The Senate is unique amongst the Upper Houses of Westminster-derived bicameral Parliaments due to the combined effect of its composition, powers and functions, which together provide the basis for a ‘strong’ bicameral system (Lijphart, 1984) in the sense that the basis for “membership is ‘incongruent’ (ie significantly different) and the powers of the chambers are ‘symmetrical’ (ie the same) or only moderately asymmetrical”, and both chambers are elected directly (unlike the Upper Houses of Britain and Canada). (Russell, 2001: 31) One objective of establishing a strong bicameral system was to provide a distinct forum for equal State-based representation in the Federal Parliament to offset the numerical dominance of Members from the more populous States in the House of Representatives. While the intended role of the Senate as a form of direct representation of State interests within the Federal Parliament has been limited, there have been some important exceptions to the usual dominance of partisan allegiances when the members of the Senate from a State have voted as a bloc across

party lines. (Odgers, 1976, 1991: Emy, 1974: Emy & Hughes, 1991: Reid & Forrest, 1989) As an elected chamber with a strong constitutional basis and role the emphasis has shifted from providing distinct representation of the (smaller) States to the potential of the Upper House to maintain the accountability of the Executive (given the tendency of the Lower House to be controlled by one of the ‘major’ parties), increasingly apparent since the introduction of an electoral system based on proportional representation in 1949 – the House of Representatives is much more a ‘first among equals’ than the Lower Houses of the Canadian (Federal) and British Parliaments. (Mulgan, 1996: Uhr, 1995: Emy, 1997: Sharman, 1999: Russell, 2001)

The role of the Senate in relation to the House of Representatives and the Cabinet is in some ways more reminiscent of the distinct roles of the House of Representatives and Senate of the U.S. Congress than the roles of the House of Commons and House of Lords. The power of the Senate to block legislation and supply provides a means for actively holding Ministers and the Government to account directly or indirectly,<sup>24</sup> and also reinforces the development of a relatively strong parliamentary committee system compared to many other Western-derived Parliaments. In addition to the strict formal separation of powers between Executive and Legislature in the U.S., some of the powers and functions of the Congress are divided between the House of Representatives and the Senate (the latter also based on a distinct level of representation for each State); each chamber can block but not dissolve the other (and in the usual course of events may block policies or appointments of but not dismiss the President), hence requiring a compromise to be reached by each House and the President for the adoption and implementation of policies (for a detailed comparison of the Westminster, Washington and ‘Washminster’ systems of bicameralism see e.g. Lane, 1972: Palmer, 1995: Winterton, 1986: Thompson, 2001). Compared to the inability of each of the Houses of Congress to dissolve the other, the provision for a ‘double dissolution’ (at the discretion of the Head of Government since the passage of the Australia Acts) in the event of deadlock between the Houses of

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<sup>24</sup> According to ss. 53-56 of the Commonwealth Constitution only the House of Representatives can introduce bills to appropriate revenue (upon receipt of a message from the Governor-General) or impose taxation; nonetheless, the Senate can request (but not make) amendments or refuse passage of such bills, and otherwise has equal power “in respect of all proposed laws”. Arguably a political convention exists that the constitutional power to block supply will not be exercised - this power has only been used once, in 1975, contributing to a major constitutional crisis. (Winterton (ed), 1994: Blackshield & Williams, 1998)

the Federal Parliament is perhaps a somewhat extreme measure as the only constitutional means to resolve deadlocks over legislation or supply between the two Houses, but may thereby also reduce the likelihood of such disagreements escalating to the point where a double dissolution is considered either necessary or advantageous by the Government or the Opposition. (See e.g. Odgers, 1976; Coper & Williams (eds), 1997; Winterton (ed), 1994)

Measures devised to increase the likelihood of the Senate being an effective ‘house of review’ and accountability agency include “*differing terms* for the Houses of Parliament and *differing systems of election*”; (Thompson, 1994; 98) a ‘first past the post’ system of single-member electorates (modified to include the allocation of preferences amongst candidates in each electorate) for the House of Representatives, proportional representation from multi-member electorates for the Senate.<sup>25</sup> Although the system of proportional representation only provides a very rough approximation of proportionality (as only six members are elected from each of the States and one member from the NT and ACT in regular Federal elections – i.e. unless there has been a double dissolution, creating a substantial threshold to attain representation), these measures increase the likelihood of the Official Opposition obtaining a majority in the Senate, and the possibility of representation being achieved by ‘third parties’ and independents. The switch to a proportional voting system for the Senate therefore increased the significance of its role as an autonomous entity and even a constitutional equal in many respects, apparent when the balance of power is held by third parties and independents or the Official Opposition (similar changes in electoral systems and political dynamics have occurred in many of the bicameral State Parliaments). (Barker, 1995a; Stone, 2002)

While the Upper Houses of the bicameral Parliaments in Australia have a strong constitutional basis and role (Russell, 2001; Stone, 2002), the continued dominance of an essentially bipartisan system in the Lower House (discussed below) remains a major element of the political culture and at times subverts the institutional mechanisms and procedures designed to safeguard the ‘rule of law’ within and between the Houses of

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<sup>25</sup> The electoral systems for the Lower and Upper Houses of the State Parliaments vary considerably; in the NT the electoral system consists of single-member constituencies with first past the post preferential voting. (Stone, 2002; Jaensch & Wade-Marshall, 1994)

Parliament. In addition to the inhibiting effect bipartisan dominance and associated rivalry can have on the effectiveness of Parliament (whether from a substantial level of Executive control over the institutional safeguards within the Parliament such as parliamentary committees, or a reduction of the deliberative, participatory and accountability functions of the Parliament to the elaboration of predetermined partisan positions and objectives), the Government may sometimes bypass Parliament entirely in the formulation and implementation of major policies. The ‘quarantining’ of major decisions and areas of government from parliamentary scrutiny was a central feature of the ‘Executive States’ of Queensland and Western Australia in the 1980s and the NT during the 1980s and 1990s (discussed below). Such functions and activities remain subject to the formal powers of review, inquiry and investigation by the Parliament, but these powers may remain dormant if the majority of members of all key mechanisms within the Parliament are from the same political party as the Government.

### **The ‘conventions’ of responsible government**

In a comparative analysis of the U.S. and British systems of government, Palmer (1995, 170) states of the systemic implications of the separation and concurrent exercise of legislative and executive powers in relation to the management and review of the public administration:

While the Westminster system relies on the anticipation of ex post competition to affect a political organization’s direction of government coercion [i.e. conduct of operational management], the U.S. system relies on spontaneous, simultaneous transactions between separated political institutions to separate, ex ante, the incidence of government coercion.

In contrast to the direct and exclusive responsibility of departments to the relevant Minister and thereby to the Cabinet and Parliament in the conduct of operational management, the brokerage politics between and within legislative and executive institutions of the U.S. system of government, as well as the separate and concurrent lines of responsibility for policy and public administration to the House of Representatives, Senate and President, can disrupt the temporal and functional coherence and continuity of policy and public administration. A considerable level of consistency in policy objectives

and operational management is secured between elections in Westminster-derived systems by the formal responsibility of the public administration to the relevant Minister as the primary reference point for decision-making and source of policy direction. The formal political impartiality of the public service and review and accountability role of the Parliament provide some insulation against Executive abuse of this power, as well as providing for a degree of continuity following a change in government. Although in this respect the Upper House generally has a much more substantive role in Australia than in Britain or Canada, the majority party(s) of the Lower House retains a monopoly over operational management of most of the public administration. Thus Reid (1981, 17) states: “The hub of government when it is conducted in accordance with the principle of responsible government and ministerial responsibility is the cabinet.”

As noted in chapter 2, traditionally there are two principle aspects of ministerial responsibility, each of which has a subsisting set of ‘conventions’ (principles and precedents); the collective responsibility of the Cabinet to Parliament (including the confidentiality of the proceedings of Cabinet, and Cabinet ‘solidarity’ before the Parliament and the electorate once a matter or policy has been decided), and the individual responsibility of Ministers to the Parliament for the conduct of departments and other government instrumentalities and the implementation of policy within their respective portfolio(s). While the role of the Cabinet and associated conventions of ministerial responsibility are integral to the functioning of the system of representative and responsible government, the terms were deliberately not included in the Commonwealth Constitution. Consequently, as Reid (1980, 302) has noted of s. 64 of the Commonwealth Constitution providing for the administration of departments by ‘Ministers of State’: “nothing is included in that or other sections about the relationships between those ministers and their officials, or between the ministers and the elected parliament”. While the constitutions provide for the existence of the Executive Council (s. 64 of the Commonwealth Constitution and s. 31 of the Self-Government Act), “the most important feature of our entire administrative system remains a matter of practice rather than a matter of law.” (Whitmore, 1980; 30) The political conventions of responsible government, and the proceedings within and privileges of Parliament generally, can be recognised as a distinct zone of functions and powers within the

Constitution subject to certain principles and precedents, but cannot be enforced directly by the courts.<sup>26</sup>

Political conventions have therefore been used to limit and modify (and given the constitutional ambiguity and anachronisms provide the primary basis of many aspects of) the functions and ‘reserve powers’ of the representative of the Head of State of each polity of the Commonwealth of Australia (at the Federal level the role of the Governor-General), the exercise of the powers of the Prime Minister and the Governor-General to dissolve Parliament, and the roles of the Prime Minister (as the Head of Government and Cabinet) and Leader of the Opposition (particularly if the Opposition has a majority in the Upper House). Other than the requirement that Ministers become Members of the Federal Parliament within three months, the provisions of the Constitution “merely *permit*, and *do not necessarily oblige*, compliance with the principles which make up the system of responsible government”. (Lindell, 1995; 85-86)

While conducive to flexibility to meet constitutional and political exigencies, this lack of specificity also creates “a convenient cloak of ambiguity and arcane knowledge over these key processes, and limits the possibility of constitutional challenge.” (Sharman, 1994; 117) Similarly, Thompson notes of the political conventions determining the operation of the system of responsible government within the bicameral Parliament and the constitutional provisions establishing and prescribing the powers and functions of the Governor-General: “there is no agreement on exactly what these conventions are; each side has its own version.” (Thompson, 1994; 104) Furthermore, each version tends to consist of two further versions depending on whether the party is in Government or the Official Opposition. The dual heritage of the Constitution provides support for each interpretation of the conventions of responsible government:

In changing circumstances the so-called doctrine, despite its unchanging terminology, is likely to be attributed different meanings in different places at different times...

Thus, as an operational rule in governing, it is open to varying interpretations in varying political contexts; in its application, some participants [usually the Government] will claim prescriptive ties to the methods of Westminster and thereby win political gain; others [usually

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<sup>26</sup> See e.g. *Waters v Northern Territory* (1993) 119 ALR 557.

the Opposition] will claim commitment to federal principles, or to bicameralism, and similarly win political gain. (Reid, 1981; 54-55)

Consequently, crucial aspects of the respective powers, responsibilities and procedures of the Cabinet and individual Ministers, the Lower and Upper Houses of Parliament and the representative of the Head of State often occur around and beyond rather than within the terms of the Constitution. Due to these ambiguities and the numerous obsolete or archaic references to the powers and functions of the Monarch and British Parliament in the Constitution (much reduced but still apparent in the Self-Government Act): “Australia’s constitutional system is an awkward mixture of symbolism and substance. To a large extent, the symbolic façade of the system masks its substance.” (Blackshield & Williams, 1998; 1)<sup>27</sup> Some clarification of the respective powers and functions of the Cabinet, the Lower and Upper Houses of Parliament and the Head of State is clearly required. (See e.g. Sampford & Wood, 1987; Winterton (ed), 1994; Coper & Williams (eds), 1997; Odgers, 1991) Even if agreement on the substance of extant conventions or endorsement by referendum is not attained, there might be a more authoritative statement of what those conventions are in certain situations, and clarification of areas of dispute. There are also some distinct political conventions of importance to the constitutional status and powers of the NT (discussed in chapter 4).

As a further complication of the conventions of responsible government: “Australia’s federal system has imposed three major distorting influences upon the doctrine of responsible government and ministerial responsibility as it is known in Britain.” (Reid, 1981; 50) First, the degree of legalism associated with a written constitution and the role of the High Court, as well as the more substantial use of statutory rather than prerogative ministerial powers in Australia. Secondly, as noted above the composition, powers and functions of the Senate have some features in common with the Upper Houses of other bicameral Westminster-derived Parliaments but overall are unique, and unlike the Parliaments of Britain and Canada the Cabinet and

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<sup>27</sup> For example, according to the preamble of the *Commonwealth of Australia Constitution Act 1900* (Imp) the legislation is an “Act to constitute the Commonwealth of Australia”, whereas the people of the Australian colonies “have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland”, and s. 59 provides that “The Queen may disallow any law within one year from the Governor-General’s assent, and such disallowance ... shall annul the law”.

Ministers are ultimately ‘responsible’ to both Houses in many respects; the support or at least acquiescence of a majority of Members in each is necessary to pass legislation and secure supply, and the Senate has a system of parliamentary committees that can be a powerful focal point for investigation, inquiry and review of the activities of the Executive. Thirdly, the federal division of powers can (further) obscure the allocation of responsibility for specific areas or activities of government; this has numerous elements, including the exercise of concurrent powers by Ministers of separate polities, the prominence of executive federalism in intergovernmental relations, and the dominance of essentially the same two party system within each polity (which can also have a significant effect on the tenor of intergovernmental relations).

### **The Parliament, the Executive and public administration**

The integrated yet distinct roles of the legislative and the executive arms of the body politic and the high level of secrecy traditionally covering many Executive functions in Westminster-derived systems can provide significant barriers to the review and accountability of government. While there are some important differences in functions (discussed in chapter 4), the formal status and role of the Administrator as the representative of the Crown in the NT is similar to that of the Governors of the States.<sup>28</sup> The conceptual unity of the state and persistence of descending sovereignty (see chapter 2) has been maintained and reinforced throughout the public administration by the principles of responsible government and:

the very impossibility of making a clear distinction between Crown and Government, Government and Administration, and Crown and Administration ... [By] historical tradition and legal fiction, the Government and the Cabinet are associated directly with the Crown, and the latter personifies the Executive and the Administration above all...

Civil servants, services, departments, Ministers and the Government are all merged in the Crown and benefit in various ways from some or all of its privileges. (Law Reform Commission of Canada, quoted in Blackshield & Williams, 2002; 503-4)

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<sup>28</sup> *R v Toohey; ex parte NLC* (1981) 151 CLR 170.

The Administrator and the members of Cabinet meeting in formal session comprise the Executive Council, the formal decision-making centre of the government (the Administrator is in effect a passive member of the Executive Council). Whitmore (1980, 30) notes that the Executive Councils of the Commonwealth of Australia “occupy a comparable position to that of the Privy Council in the United Kingdom”, holding regular meetings to “give formal effect to the making of delegated legislation, to the making of appointments to the public service and other public offices, to the promulgation of proclamations and orders of varying types and such like matters.” Whitmore further notes that notwithstanding the pivotal role of the Cabinet in this mechanism: “Nowhere in the Australian constitutions will be found express provisions directing the operation of cabinet government”. This was also noted in a major inquiry into the system of government in Western Australia: “Cabinet has a pivotal role in our system of government. Traditionally, the major decisions of government are made in this forum.” (COG, 1995a; 131) However, as the existence of the Cabinet is not acknowledged in Federal, State or NT Constitutions: “Its decisions have no legal standing until they are put into effect, either by a decision of Executive Council or by the responsible minister.” Whitmore (1980, 10) cites the 1918 report of the Haldane Committee in Britain on the machinery of government as a useful summation of:

the functions of the modern cabinet as follows - (1) the final determination of the policy to be submitted to Parliament; (2) the supreme control of the ... executive in accordance with policy determined by Parliament; (3) the continuous co-ordination and delimitation of the authority of the several Departments of State. (See also Winterton, 2003)

Thus the (political) Executive (i.e. the Ministers of the NT Government in their political and administrative capacities),<sup>29</sup> selected by and from the majority party of the Legislative Assembly, “has a *combination* of legislative and executive roles, but with a clear *separation* of functions and responsibilities.” (Jaensch & Wade-Marshall, 1994; 243) Notwithstanding an enormous amount of case law on aspects of the status and

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<sup>29</sup> Also often referred to as the Cabinet or Ministry – the terms are essentially interchangeable, though the term ‘Executive’ also generally includes the components and activities of the public administration, and in the case of the Federal Government not all Ministers are members of the Cabinet.

activities of the Executive and specific government instrumentalities, the influence of the principles of responsible government and the constitutional ambiguity as to the structure and functioning of the Executive and linkages with the administration are also apparent in the basic component of the machinery of government:

A department is nowhere defined, although its existence is implicitly assumed in section 64 of the [Commonwealth] Constitution... The essential mark of a department in the Australian system is that it works directly to and for a minister and that it is, except where otherwise provided by legislation, subject to his direction. At the non-political level it is under the direction of a single 'permanent head'. Departments can be created and abolished at the discretion of the executive and they share a common framework of control starting with ministers and Cabinet and extending through the Public Service Act and Regulations, the Public Service Arbitration Act, some specific staffing legislation, and the Audit Act and Treasury Regulations. (RCAGA, 1976; 67)

In the NT as in other jurisdictions of the Commonwealth of Australia, therefore, the details of the respective rights and duties of Ministers and the Cabinet, officers of the public administration and the Parliament are defined and prescribed primarily by legislation, political convention and the common law rather than by the Constitution directly (the 'common framework of control' in the NT is examined further below and in chapter 4). The overlap of the executive and legislative functions of the Cabinet, and the strength of party discipline in the major political parties, has had a major impact on the system of government in Australia; in the event of a parliamentary majority there is "almost automatic endorsement of cabinet policy" by Australian Parliaments. (Whitmore, 1980; 31) Furthermore, as Loveday (1981; 23) argues of the Executive and its accountability to Parliament in Australia: "the [political] parties and bureaucracy have both intervened between legislature and the executive. The executive and administration authority conferred may be used to enhance or obstruct the efficacy of [Parliament]".

Thus while ultimate authority is formally vested in the Parliament, many functions have devolved to the machinations of political parties, and each may be susceptible to dominance by the Cabinet. The complex machinery of the derivatives of the 'administrative state' are also potentially significant autonomous sources of power as

the abstracts of legislation and policy are implemented. Although the potential for components of the machinery of government to become semi-autonomous sources of power and influence was apparent in the transfer of functions associated with the establishment of the NT Government (Heatley, 1990: see also Coombs, 1993: Reid (ed), 1981: Jaensch & Weller (eds), 1980), the compact nature of the NT Government, the short time it has existed and the dominance of the Cabinet during this time have generally prevented the bureaucracy of the NT from becoming established as a significant additional source of administrative (as opposed to instrument of political) Executive power. These factors have been reinforced by substantial parliamentary majorities held by the governing political party (with the exception of 2001 to 2005, when the Labor Government had a majority of one); consequently, the NT has had one of the most dominant Executives (and Cabinet in particular) of the governments of the Commonwealth of Australia. While the number of portfolios held by Ministers can preclude detailed supervision of all aspects of administration, the compact nature of the NT Government compared to the States has facilitated a substantial level of central control by the Cabinet, co-ordinating agencies and Ministers over key policy areas.

### **Other aspects of review and accountability**

Even as considerable improvements were being made to the functions and procedures of the Westminster Parliament and the institutions of representative and responsible government were consolidated, the continued prominence of the sovereignty and prerogatives of 'the Crown' (and by extension the Parliament and the Executive), as well as other developments, served to undermine their democratic potential; thus, as the proceedings of Parliament became open to public discourse, electorates were revised to more closely approximate 'one man one vote' and the franchise was extended, the exercise of powers and decision-making were increasingly transferred to the Cabinet. Similarly, as the liberal state was consolidated and expanded during the 1800s and the welfare state established in the 1900s the public sphere both became more intrusive (into

the private sphere) and ineffective (as the real exercise of power often remained hidden behind screens of ‘Crown’ secrecy).<sup>30</sup> (Habermas, 1962)

Together with the overlap in the executive and legislative arms of government and the ‘constitutional’ superiority of the Lower House (albeit much reduced in Australia) designed to provide stability (by ‘single-party majority parliamentary government’ within a predominantly bipartisan system as noted in chapter 2), the configuration and operation of the electoral system and the Parliament has usually worked to the advantage of the Government party over the Official Opposition, and to the advantage of both major parties over ‘third parties’ and independents. (Lijphart, 1999) In this sense Lord Hailsham (quoted in Webb, 1991; 312) stated in 1976 of the effect of incremental developments in the Westminster Parliament:

Today the centre of gravity has moved decisively towards the Government side of the House, and on that side to the members of the Government itself. The Opposition is gradually being reduced to insignificance, and the Government majority, where power resides, is itself becoming a tool in the hands of the Cabinet... (See also e.g. Jennings, 1959; Kettel, 2006)

Around the same time a major review of the Federal machinery of government identified two key features of the relative strength of the Cabinet (in effect ‘the Government’) over Commonwealth Parliaments:

Ministers as a group have a twofold strength in our system of government. They are the most influential moulders of the policy of the legislature as well as having powers of direction over the executive arm... Though this dominant position is certainly not absolute, especially in a bicameral system, there may be insufficient recognition that the Constitution ... was helping to promote reciprocal conditions which would give the executive great strength in the legislature. (RCAGA, 1976; 57)

Essentially similar arguments have been made against this aspect of the Westminster system of government since the various developments of the 1800s began to

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<sup>30</sup> While the extent of ‘Crown sovereignty’ in general and as it pertains to the secrecy of the proceedings of government in particular has diminished, it has been replaced to some extent in the latter sense by the emergence of the contract state and the ‘sovereignty’ of commercial confidentiality (see chapter 4).

coalesce into their modern form as a coherent set of representative institutions.<sup>31</sup> Although the traditionally very high level of support for the major parties has declined somewhat: “The party label of a major party in Australia is an historical entity, and the premium that the label provides to a pre-selected candidate is considerable.” (Johns, 2000; 404) The consequences of different electoral methods are clearly apparent in the membership of the Houses of the Federal Parliament; although the bipartisan monopoly over the membership of the Senate has been substantially eroded if not broken by the introduction of proportional representation, the monopoly over the membership of the House of Representatives remains almost complete. (Thompson, 2001) Blewett (1993, 4) surmises of Reid’s conclusion on the functions of political parties:

[Reid argues that ‘the] simplification of electoral choice via political parties, has many obvious benefits; it has also many operational costs; [one of those costs] is that parties have made it possible to for the House of Representatives to be subordinated to the will of the Executive Government.’ He never resolved that dilemma. It is the critical dilemma for any realistic modern parliamentary reformer: How do you secure the obvious benefits of the political party yet minimise the operational costs?

Of course, as with a predominantly two party system there are potential risks as well as advantages in changes that favour the development of a multi-party system:

Should voter movement towards independents and minor parties continue, positive and malign scenarios can be drawn. A ‘benign’ outcome would involve more transparent and participatory policy mechanisms that would usher in more flexibility and adaptability in policy-making... An alternative, ‘malign’ outcome would involve fragmentation of the party system into self-defeating sectionalism. (Marsh, 1991; 159: see also Marsh, 1995)

Nevertheless, by providing greater ‘freedom of choice’ amongst the various ‘policy baskets’ of the political parties, as well as creating an opportunity to place

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<sup>31</sup> The increased role of political parties between 1867 and the 1880s resulting from the combined effect of electoral and parliamentary reforms, and the possible implications of this for the respective roles of the Cabinet and Parliament, was identified by some analysts at the time (Birch, 1964; chapter 5) and remains a major challenge to the conceptual role and effectiveness of Parliament. (See also Reid, 1981)

emphasis on specific topics or values, there can be no doubt that proportional representation both reduces the likelihood of the Executive controlling all functions and procedures of Parliament, and increases the democratic legitimacy of the Parliament and the system of government (whether or not this translates into more effective government and identification of and compliance with the 'public interest(s)'). While institutional design must attempt to take the prevailing political culture(s) and dynamics into account: "The key element is a structure to make discussion of current, strategic and emerging issues more public and accessible." (Marsh, 1991; 204: see also e.g. Panebianco, 1988: Maier (ed), 1987: Johns, 2000: EARC, 1992b: Brogan & Phillips (eds), 1995: Barker, 1995: Norris, (ed), 1997: MacIvor, 1996: Gallagher & Marsh (eds), 1988: Lijphart, 1999)

Notwithstanding the arguments above that aspects of their respective roles could be improved, the basic structure and functions of the two Houses of the Federal Parliament are arguably a reasonable compromise between 'stable government', diversity of representation and accountability in this respect. Nonetheless, the introduction of citizen-initiated referenda could provide an institutional mechanism for constitutional, institutional or policy reform beyond the control of the major parties, and confirm 'the people' as both the ultimate source of the legitimacy of the state and (potentially) the ultimate wielder of that authority. (See e.g. Suksi, 1993: Williams & Chin, 2000: Saunders, 1995: COG, 1996) This does not however resolve the challenge of enhancing the efficacy of unicameral Parliaments. In terms of the electoral system, one possibility to improve the 'representativeness' of these Parliaments is the compromise adopted in New Zealand, in which the respective advantages and disadvantages of stable majoritarian government and diversity of representation has been addressed by the introduction by the *Electoral Reform Act 1993 (NZ)* of a 'mixed member proportional representation' electoral system combining single-member (first past the post) and multi-member (proportional representation) electorates, as well as by providing for a minimum number of seats allocated to Maori representatives since 1867. (Durie, 2005: Boston *et al*, 1996)

The complexities of modern government clearly cannot be legislated (or deregulated) away. In many Westminster-derived systems the (perceived?) crisis in the legitimacy of the system of government arises from a combination of factors, the susceptibility of civil rights to parliamentary sovereignty (or supremacy, discussed in

chapters 2 and 5) and some of the principles and features of representative and responsible government that can develop in political cultures favouring strong and stable Executive government dominated by a two party system. These are compounded by developments common to all modern states such as the rapid expansion in the size, functions and requirements of public administration (including the increasingly limited relevance of the traditional distinctions between legislative and executive functions and between policy and administration), the dissolution of lines of demarcation between the public and private sectors and the interpenetration of each by the other, the scale and power of global financial and industrial capital, and the erosion of the sphere of rational-critical debate.

Although detailed examination of the argument is beyond the scope of the thesis, it is worth noting that the decline in the effectiveness of Parliament can therefore also be considered as part of ongoing political, economic and socio-cultural rationality and legitimation deficits, apparent to some degree in many Western liberal democracies. As Habermas (1962, 1973, 1998, 2002) argues, these developments may arise from or be exacerbated by the de-linking of legitimation, decision-making, administration and production systems in the modern state and the asymmetrical operation of 'representative' democratic systems, with policy formulation and implementation usually favouring well organised, resourced and connected groups and the adverse effects of policies (and non-policies) displaced to those most marginalised from the political system.<sup>32</sup> As Fitzgerald (1989, 123-24) notes of the diminished role of Parliament in Queensland during the 1980s:

The effect of modern practice is that the law is shaped outside Parliament. Ministers present bills to the Parliament which are the products of resolutions in Cabinet and sometimes the Government party room (or both). Similarly, policy on executive and administrative matters is largely formed and developed outside Parliament...

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<sup>32</sup> For examination of various aspects of such 'de-linking' see e.g. Carrere & Lohmann, 1996: Colchester & Lohmann (eds), 1992: WRM, 2007: Chomsky, 2006: Chomsky & Herman, 2002: Kolko, 2006: Johnson, 2006: Strange, 1996: Blum, 1995: Agee & Wolf (eds), 1981: Melvern, 2006: Madsen, 1999: Fitts, 2007: Head (ed), 1993: Paehlke & Torgerson (eds), 2005: Shiva, 2000: Howitt *et al* (eds), 1996: Morley, 1987: De Witte, 1999: George (ed), 1991: Musah & Fayemi (eds), 2000: Singer, 2003: Baker, 2005: TJN, 2007.

The operation of the party system in an unicameral assembly, the continuing growth in the scale and extent of Government activity, and the increasing complexities of policy making affect the ability of Parliament to review the Government's legislative activity or public administration...

The Fitzgerald Inquiry (primarily into organised crime and associated police corruption, though some of the activities investigated involved the highest offices of the government) followed twenty years of in effect single-party government, a length of tenure in Government surpassed by the CLP in the NT. Consequently, Jaensch and Wade-Marshall (1994, 281) surmise of the NT system and machinery of government:

Simply on the basis of twenty successive years in office, the CLP government has established its control over the affairs of the Territory and the Assembly to a degree, if not unprecedented in Australia, then at least approaching the dominance of the long-term Playford government in South Australia and the long-term Bjelke-Petersen government in Queensland. The government has, even more, established a firm control over the Assembly.

Heatley (1981b; 283) commented of the early years of self-government: "whatever 'shadow system' - portfolio based or function-based - is used, the Territory opposition, faced with the short sitting periods of parliament and the government's covert style of administrative behaviour, has limited opportunity for effective parliamentary scrutiny." Although there were numerous changes of leadership of the CLP and an abundance of Cabinet reshuffles: "when the data of ministers are analysed, there has been more stability than first appears... [with] a core of members who served long terms in the ministry..." (Jaensch & Wade-Marshall, 1994; 261) The dominance of the CLP over the unicameral Parliament and the system of government generally for over twenty years resulted in significant spheres of 'Executive state' in relation to land administration in particular. (Edgar, 2007) Yet a similar situation of systemic abuse of power by the Executive (even more extreme in some respects) developed within a very short period of time in Western Australia in the 1980s following the election of a Labor Government, facilitated by the by-passing of Parliament (and also the Cabinet in this instance) in the conduct of many public sector activities (and major commercial activities in particular),

the absence of effective parliamentary committees, the very limited authority of independent parliamentary agencies, and media (and public) complacency or complicity (some sections of the media in Western Australia were owned by companies associated with the above-mentioned commercial activities).<sup>33</sup>

As noted above, a fundamental aspect of the Parliament's role as an 'accountability agency' is the efficacy of mechanisms and procedures providing for the 'rule of law' within the Parliament. As O'Brien (1991, 10) stated of the system of government in Western Australia following the development of an extreme form of 'Executive State' (in the context of Australian politics and public administration) during the 1980s:

Accountability and responsibility must be an ongoing, institutionalised process so that potentially disastrous decisions are checked before they fully impact on society.

The order of precedence is now the exact reverse of what it should have been – which is the people first, parliament second, and the executive third and last, the servant and not the master of the people.

The second report of the ensuing Royal Commission (Kennedy *et al*, 1992; 3-11) stated of the regimes for accountability within the system of government:

The first of these agencies, both in power and responsibility, is the Parliament. Constitutionally, it is obliged to review and exercise control over the governmental system... If accountability to the agencies acting for the public [the Parliament and independent parliamentary agencies] is to be anything more than accountability in name only, these agencies together must bring the entire governmental system under scrutiny and they must share between them three broad powers. These powers are:

- (a) to require and receive information about the conduct, processes and practices of the executive and administrative arms of government;
- (b) to undertake investigations of specific governmental decisions and actions on the complaint of the individual citizen or at the request of Parliament; and

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<sup>33</sup> Emphasising the need for constitutional clarification of the role and procedures of Cabinet and the respective roles of political officers (ministerial staff) and public officers (formally political neutral public servants) in operational management. (Kennedy *et al*, 1992: COG, 1995a; chapter 3: Kettel, 2006)

(c) to conduct their own independent inquiries and examination of governmental activity.

The potential for a ‘double majority’ in both Houses of bicameral Parliaments (and a simple majority in the unicameral Parliaments) to render ineffective the principal institution of review and accountability emphasises the crucial role of the procedures and mechanisms maintaining the ‘rule of law’ within Parliament, and the existence of authoritative and operationally independent extra-parliamentary mechanisms (independent parliamentary agencies), designed to provide a minimum level of insulation against unaccountable exercises of power by the Executive. Accountability must therefore exist as a set of ongoing and systematic as well as occasional and diffuse (electoral) processes. Although the increased representation of third parties and independents in some Parliaments since the 1970s has greatly enhanced the accountability of the Executive and the effectiveness of Parliament more generally during these periods (particularly when they hold the balance of power), this has not eliminated the susceptibility of the systems of government to regress to varying degrees of Executive State; as Finn and many others argue of Commonwealth Parliaments generally: “Far from the Executive being subservient to the Parliament – a premise of responsible government – [political] party has inverted the balance of power.” (Finn, 1994; 48: see also e.g. Finn (ed), 1995: Brogan & Phillips (eds), 1995) Finn (1994, 54) also emphasises the importance of the Upper House to the accountability of the Executive, and the vital role of effective extra-parliamentary mechanisms for systemic integrity, accountability, review and evaluation. The role of extra-parliamentary mechanisms is most crucial in systems of government with a unicameral Parliament. (Fitzgerald, 1989)

### **Co-ordinating agencies, operational management and accountability**

A fundamental aspect of responsibility for operational management (as well as the accountability of those responsible for operational management)<sup>34</sup> is the conceptual and

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<sup>34</sup> Responsibility and accountability: “describe two aspects of the relationship between a person entrusted with a task towards that task and towards the authority which entrusts him with it. Thus, a person is responsible *for* performing the task and *to* the authority which entrusts him with it. If there is a procedure by which he can be called upon to report on and justify his performance, and can be rewarded or penalised according to judgment on it, then he is also accountable.” (RCAGA, 1976; 11)

functional roles of, and actual levels of control or influence exercised by, “co-ordinating agencies”. (RCAGA, 1976; chapter 11)<sup>35</sup> There are many dimensions to co-ordination, including the co-ordination of strategic and operational control over policy and the system of public administration (operational management), co-operation in the conduct of related activities by different agencies to achieve greater cohesion and consistency within the public administration, and the co-ordination of functions pertaining to the review and accountability of government. Two aspects of the conventional roles of co-ordinating agencies within the machinery of government are vertical and horizontal co-ordination and control. (O’Faircheallaigh *et al*, 1999; Wright & Hayward, 2000) The tasks of vertical co-ordination are achieved at the agency level (in varying degrees temporally and within each administrative component of each portfolio) primarily by the Minister and permanent head of the department (or board of management and chief executive officer in the case of statutory authorities). In the systems of government of the Commonwealth of Australia the horizontal co-ordination of strategies and operational management is achieved in several ways, the primary instruments being Cabinet and the central co-ordinating agencies of the Department of the Head of Government and the Treasury (also referred to as primary co-ordinating agencies in the thesis), both of which provide strategic direction and ‘whole-of-government’ co-ordination in terms of both operational management and review and accountability. (DCM, 2001)

The Attorney-General and Minister for Public Employment also have important though subsidiary roles in co-ordination (referred to in the thesis as secondary co-ordinating agencies).<sup>36</sup> A major aspect of the co-ordination of operational management and accountability is also provided for by the common framework of control for key structures and procedures of the system of public administration (discussed in chapter 4). Co-ordination of operational management may also be conducted by inter-departmental committees (for co-ordination within the administrative component of the Executive),

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<sup>35</sup> The term “central agencies” is also frequently used to refer to co-ordinating agencies (e.g. Halligan & Wettenhall, 1990; Warhurst, 1990; Weller & Sanders, 1982); Wright & Harward (2000) refer to them as the ‘core executive’.

<sup>36</sup> The role of the Public Service Commissioner also remains significant though much reduced since the abolition of Public Service Boards and delegation of many aspects of human resource management to senior departmental staff. (Halligan & Wettenhall, 1990; O’Faircheallaigh *et al*, 1999)

and also Cabinet committees in larger governments (providing more detailed co-ordination within the political component of the Executive).

In the NT the Cabinet and Department of the Chief Minister have provided the primary centres for overall co-ordination of government policy and activity since the conferral of self-government; the primary co-ordinating agencies of operational management have been the Department of the Chief Minister and the Treasury, both of which have “a portfolio role and a coordinating role” in administration and have retained the same form and basic functions throughout self-government. (Warhurst, 1990; 34) The Department of Law (administered by the Attorney-General, since late 2001 the Department of Justice) also has a significant co-ordinating role, as well as administering the courts, other legal functions and representing the NT Government in major litigation, and providing legal services and advice to other departments.<sup>37</sup>

These concurrent roles of co-ordinating agencies are apparent in Weller and Sanders (1982, 28) description of the filtration of Cabinet decisions through the administration in the early years of self-government: “Cabinet decisions are circulated to departments on a need to know basis. Law, Treasury and the Public Service Commissioner’s office receive all of them while the other departments receive any that may be relevant to their activities.” The Office of Aboriginal Development (OAD) established in 1992 is another secondary co-ordinating agency (the OAD is much smaller than the other co-ordinating agencies), formed “to provide a whole of government focus in Aboriginal Affairs across Northern Territory Government agencies.” (Annual Report, 1995; 6) The key functions of the office are to:

seek to engender a whole-of-government approach to Aboriginal Development through: coordinating Government activities; enhancing communication between the government and Aboriginal people; generating policy initiatives across government; and, ensuring informed government decision-making. (Annual Report, 2000; 8)

Coordination of policy by the OAD takes place primarily in relation to economic development and law and justice issues, as well as preparing the NT Government’s

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<sup>37</sup> *Administrative Arrangements Order* No. S46 of 13 Nov 2001.

assessment of its implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody; the Department of the Chief Minister has primary strategic responsibility for most other aspects of Aboriginal Affairs within the NT Government.

In addition to these conventional conceptual and functional roles of co-ordinating agencies to provide for operational management, evaluation and accountability within the Executive, similar factors and objectives can be of relevance in the design and functions of mechanisms primarily responsible for accountability and review of the Executive. Thus while in the NT the Department of the Chief Minister and the Treasury have primary responsibility for these functions as an essential element of effective operational management, parliamentary committees and independent parliamentary agencies also have an essential role in this respect. Each aspect of governance (operational management and review and accountability) has distinct requirements and objectives, the respective structures and functions of parliamentary committees and independent parliamentary agencies in particular requiring much more emphasis on systemic design and co-ordination, capacity, and operational independence (from the Executive). These roles and objectives can be conceptualised as involving concurrent responsibility for the review of operational management amongst the co-ordinating agencies of the Executive and the Parliament, with the primary responsibility for accountability allocated amongst parliamentary committees and independent parliamentary agencies (both reinforced by and reinforcing internal procedures of and audits by the public administration).

As in the Westminster Parliament, the Federal Parliament has regularly used a multiplicity, and since the early 1970s in the Senate a relatively comprehensive system, of parliamentary committees. The primary objective of parliamentary committees is to enhance the accountability of the Executive and the role of all Members of Parliament: they can provide “a means to greater surveillance of government activity and policy”, an opportunity for backbenchers and the Opposition(s) to consider legislation and other matters in much more detail, as well as providing a more conducive format within the Parliament for a “focus of public input and a pipeline between the constituents and the government”. (Barnhart, 1999; 7)

The Federal Parliament has had two key permanent joint committees established by statute for many years, a Public Accounts Committee and Public Works Committee

(numerous other more or less permanent committees have also been established pursuant to Standing Orders or legislation over time). (MacGibbon, 1999) Other than the appointment of temporary select committees to consider specific topics, a Senate Standing Committee on Regulations and Ordinances established in 1932 was the only other major committee dealing with functions beyond the precincts of the Parliament for many years. (RCAGA, 1976; 110-12; Solomon, 1978) The introduction of a set of much more active and prominent parliamentary committees in the Senate in 1970 provided impetus to consideration of the structure and functions of committees in the House of Representatives, resulting in the appointment in 1974 of a joint committee “to undertake a comprehensive review of the parliamentary committee system” within both Houses. (RCAGA, 1976; 113) Nonetheless, both the attempt to enhance the role of committees in the House of Representatives and the later recommendations of the joint committee to establish a comprehensive system met considerable resistance. Solomon (1978, 84) stated of the former attempt:

in the House of Representatives, proposals by backbenchers of both sides, and from the Speaker ..., were rejected by government and opposition leaders, who saw that a stronger committee system would bring political problems for the government of the day – those who didn’t want the committee system either were the government of the day (the Liberal-Country Party leaders), or, in Labor’s case, calculated they soon would be.

Nonetheless considerable improvements have been made to the functions and powers of committees since the 1970s, the Parliament using a combination of permanent and temporary committees in a much more systematic and rigorous manner, though arguably not yet comprising a comprehensive system providing regular coverage of all key functions of Parliament and activities of the Executive in either the NT or Federal Parliaments.<sup>38</sup> (Edgar, 2008) In addition to enhancing the range and depth of parliamentary functions when the Parliament is in session, some committees may meet at other times and therefore conduct much more detailed analysis and investigation of

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<sup>38</sup> Consequently, as Hogwood, Judge and McVicar (2000, 222) argue of the Westminster system there are “both accountability gaps and accountability overload, often relating to the same agency”, and “no-one is accountable for the overall pattern of accountability”.

specific topics. Some of the committees of the Federal Parliament of particular significance for the NT are examined in subsequent chapters, including inquiries by parliamentary committees into constitutional development in the NT (1974-75), land rights and the associated ‘complementary legislation’ of the NT (1976-77), and the recommendations of the Reeves Report on the Land Rights Act (1999).

As in Britain the role of the Auditor-General as an independent parliamentary agency: “provides a critical link in the accountability chain between the public sector, and the Parliament and the community. It alone subjects the practical conduct and operations of the public sector as a whole to regular, independent investigation and review.” (Kennedy *et al*, 1992: 3-15) The position of Auditor-General has been central to the financial accountability of the Executive since federation, established at the Federal level by the *Audit Act* 1901 (Cth) and reinforced by the establishment of a Public Accounts Committee in 1913 (though the committee lapsed between 1932 and 1951 and the activities of the committee were not formally linked to those of the Auditor-General until 1979). (Funnell & Cooper, 1998: English & Guthrie, 2000) <sup>39</sup>

In the NT the Self-Government Act provides that the Federal Auditor-General may be appointed as auditor of the public accounts of the NT (s. 48), and the Federal Auditor-General conducted such audits until an Auditor-General was appointed by the NT Government in 1982. The role of the Auditor-General is reinforced by regular reports to and interaction with the Public Accounts Committee (established in 1986), and since the 1990s the consolidation of earlier incremental extensions of the traditional role of financial auditing to the review of adherence by public sector agencies to statutory and policy objectives and requirements, and the adequacy of performance indicators and internal accountability mechanisms (‘performance assessment’). (Stone, 1993: English & Guthrie, 2000: Funnell & Cooper, 1998)

To be most effective therefore the accountability mechanisms of the system of government requires the insulation of key mechanisms and procedures of the Parliament (such as the Speaker and parliamentary committees) from Executive control to the extent this is possible, and for the jurisdiction and powers of parliamentary committees and

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<sup>39</sup> The Public Accounts Committee was established by the *Public Accounts Committee Act* 1913 (Cth) and subsequently reconstituted by the *Public Accounts Committee Act* 1951 (Cth).

independent parliamentary agencies to cover all aspects of government. This might include parliamentary committees with roles analogous to those of the main co-ordinating agencies (as well as to conduct regular reviews of overall constitutional and administrative design and reform), and ensuring each specific area and aspect of government (including finances, legislation, subordinate legislation and policies within each area of government) is within the jurisdiction of a parliamentary committee and independent parliamentary agency. Reinforcing the status, powers and operational autonomy of all of the independent parliamentary agencies, and forging a direct link between them and parliamentary committees (as between the parliamentary commissioners and committees in the Westminster Parliament), is therefore essential to maximise the effectiveness of their roles and those of parliamentary committees. (Edgar, 2008)

The importance of public opinion and elections for the conduct of government in a representative democracy cannot be discounted, but remains an extremely limited form of accountability, review and participation (described as ‘minimalist democracy’ by Phillips (1993)), even with a system (or multiplicity) of parliamentary committees, independent parliamentary agencies, and the possibility of judicial review. In addition to the exercise of statutory and prerogative powers associated with monopoly control over operational management of the machinery of government, if the Executive has a secure majority in the Parliament the Head of Government and Cabinet can usually dominate if not determine the legislative programme and the level of funding for Parliament and independent parliamentary agencies, nominate the representative of the Head of State of the polity, decide the timing of elections and exercise considerable discretion over which election promises were ‘core policies’ and which were peripheral or contingent, determine the timing and duration of sittings of Parliament, appoint many senior public servants and statutory officers, and appoint (or not appoint) and set the terms of reference of major inquiries into and reviews of the Government and specific policies.

## **Conclusion**

Notwithstanding the introduction of many procedures and practices devised to strengthen the role of the Parliament and increase the accountability of the Executive, the events in many States (and Western Australia and Queensland in particular) in the 1980s

demonstrated the susceptibility of the system of government to the development of significant spheres of essentially arbitrary power within the otherwise constitutional state. Comprising both the 'seat of government' and 'house of review', the Legislative Assembly of the NT has been particularly susceptible to domination by the Executive since the conferral of self-government. Nonetheless, Parliament clearly remains the primary constitutional mechanism for accountability, review and evaluation of the Executive, reinforced by the role of the Upper House in the bicameral Parliaments (in the NT and Queensland other methods of parliamentary and extra-parliamentary accountability therefore assume much more importance).

The significance of the concepts of parliamentary supremacy, ministerial responsibility and strong Executive (Cabinet) Government to the system(s) of government of the Commonwealth of Australia, reinforced by the bipartisan rivalry within the dominant political cultures for control over operational management, has been a major obstacle to the recognition of prior and concurrent Indigenous sovereignty; governments have traditionally been very reluctant to cede (or acknowledge) Indigenous authority and rights in a manner that cannot be subsequently amended or revoked by the government should this be considered necessary or politically expedient (arguably the only exception is the Land Rights Act, discussed in chapters 6 and 7). There are additional obstacles to achieving such a level of recognition and protection of Indigenous authority and rights by constitutional amendment (as noted in chapter 2, and discussed further in chapter 10). The following chapter considers in more detail the manner in which the structures, principles and processes of the system of government, whether derived from the Westminster system or local adaptations and innovations, have been incorporated within the system of government of the NT, in order to provide a more detailed account of the evolution of the institutional environment and a set of reference points from which specific processes of institutional change associated with the recognition of Indigenous rights can be examined.

## ***Chapter 4***

### ***The evolution of the system of government in the NT***

#### **Introduction**

As with the basis and evolution of the Constitutions and the systems of government of the other polities of the Commonwealth of Australia, the machinery of government (system of public administration) of the NT has been heavily influenced by the concepts, structures and processes of the Westminster system. Also as with constitutional development generally, there have been significant departures from the Westminster system, such as institutional features associated with a significant 'public' role in economic development in the self-governing colonies (particularly since the 1880s) and, following federation, the States. The establishment of 'developmental states' with 'hybrid' or 'mixed' economies rather than the very limited economic role of the classical liberal state or 'contract state' (discussed below) has involved the creation of a distinct set of administrative devices (state owned enterprises, often in the form of statutory authorities) alongside or within the typical departmental structure that became the core of the machinery of government of the Westminster system during the 1800s.

Statutory authorities have also been used for a large variety of representative, Executive (delegated 'ministerial' and administrative powers of operational management) and 'quasi-judicial' functions and purposes. As in Canada, distinctive mechanisms and processes have also been established to meet the requirements of political and administrative intergovernmental cooperation for the exercise of concurrent powers and functions within the federal system of government. There are therefore many statutory authorities and other government instrumentalities outside the conventional departmental structure, with several sets of structures and procedures providing the basic building blocks for the establishment of local governments, many environmental, natural resource and land use planning and management agencies and committees, the recognition and implementation of land rights and self-government for Indigenous peoples, and combinations of these functions.

Although many of the basic elements of the system of government established in the NT following the conferral of self-government are similar to those of the State and Federal Governments, the Northern Territory has a distinctive constitutional, political and administrative history and remains in some ways an odd polity of the Commonwealth of Australia. While in many ways the polity and system of responsible government of the NT now resemble those of the States, constitutional status as a territory, the terms of the legislation conferring self-government and other Federal legislation applying in the NT by paramount operation pursuant to s. 122, the short period during which the system of responsible government and many sectors of the public administration have been in place and the high proportion of Aboriginal residents are some of the many factors that combine to make the system of government in the NT very different from those of the States. This chapter examines the manner in which the constitutional status and system of government have evolved in the NT since the British assertion of sovereignty.

### **The consolidation of British colonial settlement in the NT**

The NT was nominally under the jurisdiction of New South Wales from the British assertion of sovereignty until 1863 when it was annexed to the Colony of South Australia. During the period of South Australian rule pastoralism (cattle production) was the primary form of non-Aboriginal land use in the territory, expanding rapidly (particularly during the 1880's) from the south (into central Australia) and the east (into and then through the Barkly region). By 1890 almost all relatively arable areas of the NT were subject to pastoral leases (though many were not yet permanently stocked). Mining was sporadic during this time and not a major contributor to the economy of the NT until after World War II, though it had a major impact locally in those areas where minerals were found and exploited during the early years of British colonial settlement. Heatley (1979; 10-11) states of developments prior to the conferral of self-government in the NT:

Territory history falls fairly readily into four major periods: the pre-1863 era of discovery and the first abortive attempts at settlement, the South Australian administration from 1863 to 1911, the early years of Commonwealth control from 1911 to 1946, and the post-war period. Although any periodization is somewhat unsatisfactory in that it cuts across general long-term processes, this division is less arbitrary than most.

The British assertion of sovereignty in 1788 extended to that part of the NT eastwards of 135 degrees of east longitude, which thereupon became a part of the Colony of New South Wales. The assertion of sovereignty was extended to the remainder of the territory of the NT (extending to 129 degrees of east longitude) in 1824.<sup>40</sup> The first attempts to establish permanent British settlements in the NT involved several military outposts located along the northern coast following two major expeditions to explore and chart the coastline in 1802-3 and 1818-22, Fort Dundas from 1824-29, Fort Wellington from 1827-29, and Port Essington from 1838-49. (Heatley, 1979; 11) Extensive exploration of the interior did not occur until the 1840s, including the first overland expedition by Ludwig Leichhardt in 1844-45, and several other expeditions in the 1850s; Charles Stuart first traversed the continent from Adelaide to the British outpost at Palmerston in 1862. (Duncan, 1967)

The NT was annexed to the Colony of South Australia in 1863 by Letters Patent promulgated pursuant to the *Australian Colonies Act* 1861 (Imp). The Province of South Australia had been created by Letters Patent in 1836; a Legislative Council was created to exercise legislative authority in South Australia (subject to all Imperial laws and ordinances) in the 1840s, initially consisting entirely of appointed members, then a combination of appointed and elected members. An elected Legislative Assembly was created by the Legislative Council, providing the basic bicameral structure of the legislature of the Province when full powers of self-government were conferred and a constitution adopted in the 1850s (the *Constitution Act* 1855-1856 (SA)). (Pike, 1967: Jaensch, 1977)<sup>41</sup> The rapid expansion of British settlements and cattle production during the 1880s was followed by two decades of economic and policy stagnation (exacerbated by severe droughts, widespread economic depression in the 1890s and the rapid deterioration of grazing lands). Analysis of the period of administration by the South Australian Government: “has traditionally been divided into three parts: the first chaotic years to 1870, the ‘boom’ conditions from 1870 to 1890, and the unrelenting depression and stagnation of the last two decades.” (Heatley, 1979; 13)

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<sup>40</sup> *Yarmirr v Northern Territory* (1998) 156 ALR 370 at 389.

<sup>41</sup> See also *Milirrpum v Nabalco* (1971) 17 FLR 141 at 274-83.

The permanent settlement at Palmerston (now called Darwin) was surveyed and a basic system of land administration established in the late 1860s. The construction of the Overland Telegraph between Palmerston and Adelaide during 1870-72 employed hundreds of Europeans and became a “major carriageway” for immigrants and supplies through central Australia, providing the basis for regional supply depots and “the key communication link” with the other colonies. (McGrath, quoted in Toohey, 1981b, 10) Although the initial system of tenure devised to provide for the survey and allocation of land to colonial settlers collapsed, the industry expanded rapidly from the late 1870s and by 1890 “nearly 30% of the Territory was declared stocked with over 200,000 head of cattle, over 50,000 sheep, and about 12,000 horses”. (Heatley, 1979; 15; Duncan, 1967) Combined with the discovery and exploitation of minerals during this period (the most significant of which in the early years was gold mining in the Pine Creek district from 1871) and the consolidation of infrastructure to facilitate economic development, the non-Aboriginal population increased from 710 in 1876 to over 5,000 by 1890, over 80% of whom were Chinese. The construction of a railway between Darwin and Pine Creek in the late 1880s (extended to Katherine in 1917) was another significant addition to the infrastructure of the Top End, further accelerating economic development and the influx of non-Aboriginal people to surrounding regions.

After federation the number of Chinese “dwindled rapidly” for several years with the introduction of legislation to implement an inter-colonial agreement on a White Australia policy; the total number of non-Aboriginal inhabitants decreased to just over 3,300 by 1911, the number of European immigrants remaining at about 1000 from the 1890s until the period of Federal administration. (Heatley, 1979; 15) South Australia ‘surrendered’ the NT at the end of 1910, the Federal Government assuming responsibility for governance under the *Northern Territory Acceptance Act 1910* (Cth) and the *Northern Territory (Administration) Act 1910* (Cth). From this transfer of jurisdiction until the end of World War II ‘citizens’ of the NT had no formal representative forum to take part in decisions of local governance (and no representation at all in Federal politics from 1911 to 1922 and very limited representation in the Parliament thereafter for many years), the NT usually being governed by the Federal Minister for External Affairs (whose portfolio

included the administration of territories) and an Administrator acting at the direction of the Minister (in practice responsible for most aspects of governance).<sup>42</sup>

The pastoral industry was rapidly consolidated, the number of cattle doubling between 1890 and 1911; the number of stock had again doubled by the late 1930s to around 900,000 and the area stocked increased to around 40% of the NT. (Duncan, 1967: Bauer, 1959a, 1959b) The completion of a railway to Alice Springs (from Oodnadatta) in 1929 confirmed Alice Springs as the second major population centre of the NT. The decline of gold mining in the vicinity of Pine Creek from the 1890s until the discovery of gold in the Tennant Creek area in the 1930s was offset to some extent by the discovery of other minerals (including tin, copper and wolfram). The development of commercial air services in the 1930s further reduced the isolation of the non-Aboriginal NT population from the rest of Australia, which following a long period of slow growth was around 5,600 in 1938. During this time the core industries of cattle production and mining were supplemented by small but regionally significant fishing (including pearl shell) and buffalo skin industries, and limited agricultural (cropping and horticultural) production (which had occurred intermittently since the 1870s in the more arable and accessible areas, including along the Daly and Adelaide Rivers and rural areas in the vicinity of Darwin). (Heatley, 1979: Kearney, 1988b: Toohey, 1981b, 1982a)

The outbreak of World War II led to a substantial and permanent increase in the non-Aboriginal population with the establishment of numerous military bases (the largest of which was at Katherine, which due to its strategic location and abundant fresh water sources has since been the third major population centre) and associated infrastructure, including the rapid upgrading of the Stuart Highway. This expansion of the non-Aboriginal population and infrastructure was consolidated following the war by much more intensive mineral exploration from the 1950s and an ongoing surge in the non-Aboriginal population. Aboriginal people remained a majority of the population until the 1950s; the non-Aboriginal population had risen to over 10,000 by the late 1940s and

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<sup>42</sup> See e.g. *Hayes v Northern Territory* (1999) 97 FCR 32; Heatley 1979, 1990: *Milirrpum v Nabalco* (1971) 17 FLR 141; *Rogers v Squire* (1978) 23 ALR 111; Powell, 1982; Jaensch & Wade-Marshall, 1994.

increased steadily thereafter, to over 24,000 in 1961, 34,000 in 1966, 63,000 in 1971, and 71,500 in 1976. (Heatley, 1979; 132)<sup>43</sup>

A Legislative Council consisting of appointed and elected members was established in 1947 to provide a limited form of local representation. Despite a persistent campaign for the devolution of substantive legislative and executive powers only limited and incremental gains were made in terms of expanding the functions and representative basis of the Legislative Council. As in the larger British colonies in Australia prior to and during the mid-1850s, central topics included obtaining a majority of elected members on the Legislative Council (achieved in the NT in 1968), 'representation by taxation' (i.e. control over government revenues and spending), and a greater role in operational management. The gains that were made in terms of increasing the functions of the Legislative Council were achieved primarily by carrying out inquiries into specific matters and the creation of numerous statutory authorities, including a Housing Commission and Reserves Board in 1959, a Tourist Board and Port Authority in 1962, and a Town Planning Board in 1964. (Heatley, 1979; 98) The Legislative Council remained an advisory body to the Administrator, with very little effect on major decisions and the Federal Government retaining complete financial and executive control until the process of devolution associated with the conferral of self-government commenced in the mid-1970s. (Nicholson, 1985, 1992: Heatley, 1979)

In 1973 a Joint Parliamentary Committee on the Constitutional Status of the Northern Territory was established by the Federal Government to: "examine and report on measures that might be taken in the long and short term to provide the NT with responsible self-government in relation to local affairs - including appropriate divisions of legislative and executive responsibility at the National and Territorial or other level." (JPC, 1974; iii) The final report recommended the use of certain processes to implement the transfer of authority, but left the details and timing of the transfer of legislative and executive State-type matters to negotiation by members of the relevant committee,

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<sup>43</sup> The total population continued to increase rapidly until stabilising in the mid-1990s (though still with a high rate of growth compared to the national average); in 1981 there were approximately 123,000 residents, rising to approximately 154,000 in 1986, 165,000 in 1991, 182,000 in 1996, 198,000 in 2001 and 207,000 in 2006, the proportion of Aboriginal people remaining around one quarter of the population since the 1980s. (ABS, 2008)

“comprising the [Federal] Minister for the NT and ‘Ministers’ of the Territory Executive.” (JPC, 1975; viii) The first election of the Legislative Assembly (a fully elected assembly established to replace the Legislative Council as a precursor to self-government) took place in October 1974, and although the Administrative Council was renamed the Executive Council in 1976 it was not until 1 July 1978 that the Legislative Assembly and Executive Council assumed responsibility for most of the transferred legislative and executive functions (the remaining functions were transferred over the following two years). (Heatley, 1981d; Nicholson, 1989; Heatley, 1990; 113-19) The structure, powers and functions of the Legislative Assembly since the conferral of self-government, as well as those of the co-ordinating agencies of the Executive, are discussed in chapter 3.

Although pastoralism remained the primary form of land use of the NT in terms of area, revenue and private sector employment until the 1950s, the mining industries surpassed cattle production in terms of the value of production in 1959-60; (Heatley, 1979; 8; O’Faircheallaigh, 1987) tourism industries surpassed both as the largest source of private sector employment in the 1990s (though mining continued to dominate as a source of revenue). (ABS, 1996) The NT remains a primary commodity economy dominated by the core industries of mining, pastoralism and tourism, and the public sector remains the largest single source of employment. The differences in the overall structure of the NT economy and that of the Commonwealth of Australia have been summarised as follows: “Most notably, mining and government administration and defence make a much larger contribution to the Territory economy. Conversely, the manufacturing, business and financial services and wholesale trade sectors are less significant in the Territory than nationally.” (NTG, 1998; 9)

The differences with State economic structures are in most cases similar (although mining is of similar importance to the economy of Western Australia). There has however also been significant diversification in the NT economy since the 1970s with significant growth in agricultural and horticultural production, fisheries and other wildlife-based products, and service and secondary industries. The timing and nature of economic development (including infrastructure, demographics, major patterns of land ownership and forms of land use, and sources of employment) in each region has resulted

in distinct regional political (sub-)cultures within and amongst the diverse regions of the NT polity, including a variety of remote/ rural/ urban allegiances and rivalries and the emergence of Darwin as the ‘Canberra’ of the NT. (Heatley, 1979; 132) As noted in previous chapters, the most distinctive developments since the 1970s for the purposes of this thesis have been the establishment and implementation of the Land Rights Act, and the electoral dominance of the CLP in the NT from 1974 to 2001. The large proportion of Aboriginal residents and operation of the Land Rights Act, the campaign for Statehood, the period of the ‘CLP state’ and the political emphasis on ‘developmentalism’ are among the most dominant factors affecting governance and public administration in the NT since the conferral of self-government. (Edgar, 2007)

### **A “body politic under the Crown” is born**

Section 5 of the Self-Government Act establishes the Northern Territory of Australia as a “body politic under the Crown”, s. 6 creates and vests legislative authority for the Northern Territory in the Legislative Assembly, and ss. 7-9 provide the procedures for assent to proposed legislation by the Administrator and (in the case of powers and functions retained by the Federal Parliament) the Governor-General. Part IV of the Act provides for the establishment and exercise of executive and administrative powers and functions, including s. 31 which provides for the exercise of the Executive powers of the NT Government by the Administrator, Executive Council and individual Ministers. Section 35 provides a further basis for the vesting of executive authority in the Ministers of the NT Government, the specific areas for which responsibility is transferred from the Federal Government being listed pursuant to that section in a series of regulations promulgated between 1978 and 1980 (most Crown lands of the Federal Government were vested in the NT in 1978 but Executive authority for land administration was not conferred until 1979: s. 35 reg. 4 and ss. 69, 70). While this is unusual in that the executive authority of the Federal and State Governments is made by plenary grant, the areas of responsibility specified are extensive,<sup>44</sup> and it has been suggested that the detailed specification of functions transferred is a result of the staged

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<sup>44</sup> Including taxation, maintenance of law and order and the administration of justice, regulation of businesses and professions, tourism, (most) mining and minerals, public and private land and internal waters, urban planning and development, ports and harbours, environment protection and conservation, public utilities and works, local government, housing, family law and social welfare.

transfer of authority rather than an attempt to segment and strictly limit the scope of Executive authority.<sup>45</sup>

Nonetheless, as noted in chapter 1 some State-type powers and functions remain with the Federal Government, and the division of Executive authority also distinguishes the formal role of the Administrator in the legislative and executive processes from the role of the Governor in the States. (Jaensch & Wade-Marshall, 1994: Nicholson, 1985, 1992, 1997) In addition, the Governor-General may disallow Territory legislation or parts thereof within six months of enactment, and the Federal Government retains paramount jurisdiction pursuant to s. 122 of the Constitution. There is therefore no equivalent to the protection afforded the States as viable polities (and also against discrimination by the Federal Government) by Chapters V and VI of the Commonwealth Constitution. The retention of complete legislative and executive jurisdiction by the Federal Government over some State-type matters is subject to ministerial agreements that delegate executive authority for specific matters (a territorial variant of ‘executive federalism’).<sup>46</sup> As noted in chapter 1, all concurrent legislative and executive powers of the NT Government are subject to the operation of the Land Rights Act; this provides constraints on but does not eliminate the powers of the NT Government in relation to land and natural resource management on Aboriginal land held under the Land Rights Act (e.g. mineral and energy exploration applications must be approved by the NT Minister as well as by traditional Aboriginal owners). The removal of these ‘constitutional’ requirements and limitations and the ‘patriation’ of all State-type powers to the NT have been the subject of persistent demands for Statehood from the NT Government since the conferral of self-government (discussed in chapters 6 and 10).

Notwithstanding the formal constitutional ‘inferiority’ of the NT Government, legal and political analysts commented for many years that, despite having the capacity to do so, the Federal Government was unlikely to substantially revise the conferral of authority in a manner that would amount to a “forced retraction of that grant except perhaps in times of major crisis or as part of an Australia-wide constitutional change.” (Nicholson, 1992; 56: Jaensch & Wade-Marshall, 1994) Similarly, Heatley (1979, 44)

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<sup>45</sup> *Wake v Northern Territory* (1996) 124 FLR 298 at 310-11.

<sup>46</sup> *Margarula v Minister for Resources* (1998) 157 ALR 160.

stated in this respect: “As a general principle, the Northern Territory government would be accorded autonomy in relation to the transferred matters ‘subject to the general oversight of the Commonwealth but without direction from it other than in exceptional circumstances.’”<sup>47</sup> For many purposes then the authority and functions of the NT Government are comparable to those of State Governments, particularly since the passage of the *Native Title Act 1993* (Cth) which also recognises the rights of Indigenous peoples to certain land and waters and places comparable though much less stringent conditions on land and natural resource management in the States to those of the Land Rights Act in the NT (see chapters 6 to 8). Consequently:

Although not constitutionally equivalent to the states, the NT has, since its creation as a self-governing polity in 1978, evolved into a ‘quasi-state’; it is now thoroughly integrated into prevailing federal relationships. The new polity enjoys substantial functional parity with the states and its governmental structure and processes follow broad state-type patterns. (Heatley, 1996; 54-55)

Nonetheless, following the invalidation of the *Rights of the Terminally Ill Act 1995* (NT) and the ‘forced retraction’ of legislative competence (albeit tightly circumscribed) by the *Euthanasia Laws Act 1997* (Cth),<sup>48</sup> the possibility of Federal Government intervention has become more apparent as a qualification on the autonomy and capacity of the NT Government; although the situation could be considered ‘exceptional’, it hardly amounted to a constitutional or political crisis (compare, for example, the Federal Government’s response to extensive domestic and international criticism of ‘mandatory sentencing’ legislation introduced by the NT Government: Carment, 1998b, 1999a, 1999b, 2000a, 2000b, 2001a: ATSIC, 1999: Amnesty International, 2000). The paramount powers of the Federal Government were subsequently invoked to carry out a much more extensive ‘forced retraction’ of the functions and powers of the NT Government in 2007 to implement an ‘emergency response’ for the management of designated Aboriginal communities in the NT (discussed in chapter 9).

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<sup>47</sup> As suggested by an interdepartmental committee in 1977. (Heatley, 1990; 63)

<sup>48</sup> See the decision of Gleeson CJ and Gummow J in *Northern Territory v GPAO* (1999) 196 CLR 553.

### **Executive orders and statutory authorities in the machinery of government**

The public administration consists of government departments, statutory authorities and other government instrumentalities with many functions and forms, such as advisory committees (which may include members based on technical expertise or interest group representation) and administrative boards, ‘tribunals’ (“a body (other than a court) established by or under an Act that has judicial or quasi-judicial functions”: *Information Act* 2002 (NT), s. 3), scientific and other technical bodies, and government enterprises established to undertake infrastructure, trade or service provision. In addition there are hybrid (consisting of government and non-government members) and private sector bodies exercising what are usually considered public powers and functions (notably for the administration of Jabiru and Nhulunbuy, originally mining towns and more recently also major regional service centres). Notwithstanding the relatively short duration of the NT Government, in many respects the basic structure now resembles the public administration of other governments of the Commonwealth of Australia.

The common framework of control and accountability underpinning the structure and operation of the NT public administration consists primarily of the *Financial Management Act* 1995 (NT), *Audit Act* 1995 (NT) and *Public Sector Employment and Management Act* 1993 (NT) (PSEMA). The establishment of the basic accountability regimes was substantially completed (in terms of the distinct components underpinning the common legislative framework of the other Commonwealth polities) by the passage of the *Information Act* 2002 (NT), containing provisions for access to information, archives management and the protection of privacy that apply to all public sector organisations (unless specifically exempted) and establishing the office of Information Commissioner. Though not defined as such, there is a general description of the department in s. 18 of the *Interpretation Act* 1978 (NT): “‘department’ means a department of the Public Service of the Northern Territory”. Departments are established by the Administrative Arrangements Order, an executive instrument promulgated by the Executive Council in the *Government Gazette*. Those units of government (departments, statutory authorities and other government instrumentalities) identified as agencies by the Administrative Arrangements Order comprise the NT Public Service proper: the “Public Sector means all the Agencies” (PSEMA, s. 3). These designated agencies are therefore

“parts of an integrated system of public personnel and financial management, so that public service boards [since the 1980s usually a Public Service Commissioner] and treasuries (or departments of finance) are influential over them as central co-ordinating bodies”. (Wettenhall, 1983; 15)<sup>49</sup>

The Financial Management Act provides the basis for “the financial management of the Territory and certain Government business activities”, including Public Accounts, Treasurer’s Statements and Directions, and providing for an accountable officer in each ‘agency’ with principal responsibility for the completion of annual financial statements. Further guidelines and standards are provided by the *Procurement Act 1995* (NT), Regulations and Board Guidelines. (Auditor-General, 2000) The Treasurer is responsible for administering the Financial Management Act, a key element of the role of the Treasury as a “co-ordinating agency”, and the provisions of the Act also provide the basis for many aspects of the jurisdiction of the Auditor-General. The primary functions of the Auditor-General are established by the Audit Act, though some aspects of the jurisdiction and functions of the Auditor-General are provided for by other legislation (such as legislation establishing statutory authorities) and the Administrative Arrangements Order.

The PSEMA provides for the appointment of a Commissioner for Public Employment with responsibility for human resource management policies and employment conditions within the ‘Public Sector’. The Act also provides for the establishment and alteration of the departmental structure (by promulgation of the Administrative Arrangements Order, as noted above), and for the appointment and functions of a chief executive officer for each agency, including administrative responsibility for operational management and the completion of annual reports on the functions, objectives, operations, organisation and performance assessment of the Agency. (Hawkes, 1995; Heatley, 1996)

Another prominent type of administrative unit is the statutory authority, autonomous or semi-autonomous instrumentalities established directly by legislation rather than the Administrative Arrangements Order, though most are subject to the

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<sup>49</sup> Administrative Arrangements Orders are provided for by s. 7 of the PSEMA as amended by Part 3 of the *Financial Management (Consequential Amendments) Act 1995* (NT), and s. 35 of the Interpretation Act. Administrative Arrangements Orders have also provided the primary basis of the allocation of Executive authority of the Federal Government since 1906. (van Munster, 1976)

common legislative framework (or comparable requirements) in whole or in part. As Halligan (1982, 2) notes, a large number of non-departmental instrumentalities have been “formed to conduct enterprises, market commodities, advise, execute, regulate and adjudicate. Only a minority were constituted [directly] by statute, but these include the most important authorities”. Wettenhall (1983; 17, 43) has surmised of the statutory authority ‘sector’ of government:

For present purposes, the essential point is that, while the Westminster-system designers created a high-political-control area of public administration where the MDs [ministerial departments] live, they also recognized a remote-control area where the courts live. This latter area has furnished many of the forms and precedents used in the creation of a wide variety of other SAs [statutory authorities]...

In the recent consideration of this matter, it has been fairly consistently held ... that there should be a requirement that all ministerial directives to SAs should be in writing, tabled in Parliament within a specified time after issue, and recorded also in the relevant SA’s annual report... The merit of such a proposal lies in its three-in-one effect. First, it acknowledges the SA’s separate organizational identity and its right – indeed, obligation – to make its own judgment about what is best for the enterprise under its management. Secondly, it recognizes that, in the event of conflict, the democratically elected government should have the last word. But thirdly, it ensures that the intervention of the government is made clear for all to see, in such a way that the government must accept full responsibility for the intervention.

Although the development of ministerial departments as the core of the public administration in the Westminster system during the second half of the 1800s was followed in Australia, statutory authorities and other distinct forms of government instrumentality have assumed a much larger role due to the relatively active economic role of colonial and Commonwealth (Federal and State) Governments (which can therefore be considered distinct types of ‘developmental state’: White (ed), 1988: Gottlieb, 1988) and also their utilisation to conduct other functions. (Willson, 1955: Whitmore, 1980: Wettenhall, 1987, 1995) Statutory authorities are generally required to provide an annual report to the Minister allocated responsibility for the enabling legislation and in some cases to Parliament directly, or may be included in the annual

report of an associated ‘agency’. Nonetheless: “The term ‘statutory authority’ covers such a broad spectrum of government bodies, in terms of size, function and level of managerial autonomy, that a high degree of diversity exists across the statutory authority spectrum in terms of the quality and content of annual reports.” (JCPA, 1991; 6) As Galligan and Wettenhall (1990, 27) argue:

The basic formula is simple: parliament enacts legislation creating a public body to perform a particular specified function, and vests the requisite powers and duties in the requisite body – *instead of vesting the powers straightforwardly in a minister...*

Administration by statutory authority represents a form of decentralisation: ... functional decentralisation as distinct from the territorial decentralisation of local government.<sup>50</sup>

Statutory authorities therefore derive their authority and functions from ‘the Crown’, but may or may not be ‘under the Crown’ (e.g. within the shield of the Crown for certain purposes, or existing and functioning as an entirely separate legal entity)<sup>51</sup> depending on the provisions of the relevant legislation. (Sawer, 1983) Wettenhall provides a summary of the usual types of links between Ministers, statutory authorities and Parliaments, and the formal and informal mechanisms by which they may be both vested with a degree of managerial autonomy and subjected to review and control (a parliamentary committee may also be involved in some cases: Russell, 1982; Forrest, 1983). In terms of the manner in which statutory authorities have been established, Wettenhall (1983, 18-19, 20) suggests that “the basic principle governing the operation of SAs is that they are responsible not *to* their ministers like departments, but *through* their ministers to Parliament.” Of fifteen basic types of measures listed that may be exercised by Parliament and Ministers to control statutory authorities Wettenhall (1983, 29) states: “In virtually all these types of reservation on the independent discretion of statutory

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<sup>50</sup> The usual formula is along the lines of: [the authority (commission, corporation)] is hereby established, as a body corporate with perpetual succession, having a common seal, and capable in its corporate name of suing and being sued.

<sup>51</sup> The ‘shield of the Crown’ comprises a vast array of “privileges and immunities that the common law had bestowed on the Crown in proceedings by and against it, and of which our colonial and later Commonwealth governments were beneficiaries”. (Finn, 1995; 6)

authorities ... emphasis needs to be placed on the word [such powers] 'may' [be exercised]." (See also Mantziaris, 1998)

Although the percentage of ministerial control is subject to enormous variation amongst statutory authorities and fluctuations over time, in general the Minister allocated formal responsibility for a statutory authority acts as a "5 *per cent* minister". (Wettenhall, 1983; 17) The remainder may be delegated to the executive management of the statutory authority or retained by Parliament. With the creation of statutory authorities to operate railways in the 1880s in Victoria and New South Wales and the subsequent proliferation of State and Federal statutory authorities, Australia can claim a pioneering role in the development and refinement of 'public corporations' in common law countries following the industrial revolution. The early development of relatively autonomous statutory authorities as a distinct form and sector(s) of the public administration designed to conduct infrastructure and industrial development activities contributed to:

a tradition which, on the world front, had produced the British Broadcasting Corporation in 1926 to serve (in the grand phrase of the Crawford Committee) as 'a trustee for the national interest', and the Tennessee Valley Authority in 1933 (in President Roosevelt's words) as 'a corporation clothed with the power of government but possessed of the flexibility and initiative of a private enterprise'. (Wettenhall, 1983; 20; Sawyer, 1954)

In establishing developmental (hybrid economy) states in Australia, statutory authorities have been used for many purposes beyond the traditional Westminster roles (once other instrumentalities such as administrative boards had been largely absorbed within ministerial departments towards the end of the 1800s) of creating local authorities, tribunals and the courts, including for major infrastructure projects, transport and industrial development, primary commodity marketing boards, public research institutes (including tertiary education institutes), communications, finance, and for a large variety of independent regulatory and accountability agencies. As the above quote suggests, similar public corporations and authorities have also become an integral feature of the Westminster system during the 1900s. (See e.g. Wettenhall, 1964, 1987, 1995: Friedmann (ed), 1954)

The independent parliamentary agencies (see chapter 3) that report to the Legislative Assembly of the NT (with largely ‘dormant’ administrative responsibility allocated to the Chief Minister), the Auditor-General, Ombudsman, Information Commissioner and Electoral Commission (the Public Service Commissioner reports through the Minister for Public Employment) are a distinct form of statutory authority providing for the accountability of the Executive. Their functions are more analogous to the supervisory role of the courts than most other statutory authorities in some respects (as noted above, the basic method to provide for the structural and operational autonomy of statutory authorities was derived in part from legislation establishing the courts), such as their formal operational independence (in most instances) and in some cases investigative rather than or as well as purely administrative roles and functions, and their roles in maintaining the integrity of the system of government. There is however substantial variability in the degree of insulation provided for the structural integrity and operational autonomy of ‘independent’ parliamentary agencies from direction or other forms of control by the Executive. (Edgar, 2008)

A fundamental factor underlies the enormous variety of statutory authorities: unless the enabling legislation provides an ongoing means for formal operational autonomy, and parliamentary involvement in review and accountability (including notification of all formal communications between the Minister and executive board and/or officer of the statutory authority), the effect may be little different from departmental arrangements. As Wettenhall (1983, 17) states: “Autonomy is an important part of their make-up: if not, why have them?” For instance, the Public Service Commissioner is responsible for recruiting the chief executive officers of departments; responsibility for the recruitment of other departmental staff is shared with the chief executive officer (and in some cases the board of management of statutory authorities). Although often formally autonomous, the executive members of statutory authorities are usually appointed directly by the relevant Minister or Cabinet. An associated requirement where complete autonomy in operational management is required is that there be no overlap between senior officers of statutory authorities and departments (other than subject to formal ‘seconding’ arrangements). (Kennedy *et al*, 1992; 3-28) While formal control may be illusory, this may also be the case for formal independence.

### **Phases in the evolution of the system of public administration**

Following the foundation of parliamentary ‘sovereignty’, the emergence of the administrative state and consolidation of the basis and role of an independent judiciary in Britain in the 1600s and 1700s, the development of the features, principles and processes of the liberal state and system of representative and responsible government in the 1800s, the establishment of the welfare state of the 1900s (and in Australia the concurrent establishment of the developmental state), and since the 1970s the emergence of the ‘contract state’ (Smith & Hague (eds), 1971; Funnell & Cooper, 1998; O’Faircheallaigh *et al*, 1999) have generally been incrementally grafted onto (or carved from in the latter instance) rather than replaced the previous system in a deliberate and comprehensive manner. As argued in chapter 2, in Australia the accretion of at times unwieldy reforms within existing structures is most apparent in the area of constitutional reform, compounded at the Federal level by the significant procedural obstacles to amendment.

Halligan and Wettenhall (1990, 19-20) identify five basic phases in the history of public administration in Australia: the period of direct British colonial government from 1788 until the conferral of self-government on the Australian colonies; the early ‘settling-in’ period “of responsible parliamentary government” (lasting until the early 1880s); the ‘progressive era’ of consolidation of the structures and functions of government (until World War I) marked by “extensive administrative change” and growth; a period during which the functions and size of government continued to expand but during which there was very little in the way of administrative reform (from approximately the 1920s until the 1970s);<sup>52</sup> and, a fifth period of intensive change since the 1970s during which there has been much more emphasis on administrative reform across the system of public administration including systemic design and review, the basic structures and procedures of public administration as well as those of specific agencies, simultaneous processes of political centralisation and administrative decentralisation, and the introduction of principles and mechanisms of ‘new administrative law’ (including the Administrative

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<sup>52</sup> Thus the final report of a major public inquiry in the 1970s (RCAGA, 1976; 3) noted that although certain aspects of the Federal system of public administration were formally reviewed during this time: “It is more than fifty years since Commissioner Duncan McLachlan conducted the first and only comprehensive review of that system.”

Appeals Tribunal, Ombudsman, a 'freedom of information' regime and codified principles and procedures for judicial review of administrative decisions: Kirby, 1981).

Though there are many differences amongst specific policy sectors,, there has generally been an essentially pragmatic and bipartisan approach to the structure and functions of public administration in Australia. The development of the Federal and State systems of public administration continued largely by way of *ad hoc* growth until the 1970s when numerous reviews of the structure, functions and interactions of the public administration, Executive and Parliament, and the rights of citizens in dealings with sectors of the public administration, were completed.<sup>53</sup> Since the 1980s the emphasis on systemic design, the consolidation of parliamentary committee systems and the emergence of the contract state have had a marked impact on public administration. Notwithstanding the extent of the changes that have occurred within the system(s) of public administration since the 1970s statutory authorities and other government instrumentalities outside the departmental structure continue to have a major role. A crucial aspect of systemic design that is not always attended to is the establishment and maintenance of relatively precise correspondence in the concurrent operation of all key institutions and components of the system of government (in particular the constitutions, and the jurisdiction and activities of parliamentary committees and independent parliamentary agencies in relation to the structures and activities of the public sector, as argued in chapters 2 and 3). (See e.g. RCAGA, 1976: Davis (ed), 1982: Curnow & Saunders (ed), 1983: RSSCFGO, 1986: JCPA, 1991: Horrigan (ed), 1998)

Rapid economic development has been a primary objective of successive NT Governments, Heatley (1986, 233) commenting that: "Debate has not occurred for the most part on the need for development but on questions like the rate, the scale, the direction, the appropriate measures, the distribution of benefits and the social and environmental consequences of development..." (See also Rawling, 1987) Warhurst (1981, 36) notes that: "The general philosophy has ... been translated into action through

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<sup>53</sup> Thus Kennedy *et al* (1992, 6-2) stated of the need for a comprehensive review of the entire administrative system in Western Australia in the early 1990s: "It has grown in the fashion of a coral reef, the new simply being added to the old. Some rationalisation has occurred. But much which has passed as reform has been designed more to further the managerial objectives of government than to give organisational integrity to the system itself."

the creation of new agencies to manage key sectors of the economy.” Wettenhall’s (1987, 1-2) summation of the role of public enterprise in economic development in Australia as essentially pragmatic rather than ideologically based is also an apt description of the situation in the NT: enterprises have been established in response to particular conditions or objectives, “as often seen as stimulus to future growth as response to past growth”. Although several were based on existing administrative agencies, the process of ‘natural growth’ that occurred over more than a century in other Australian jurisdictions occurred in a very condensed timeframe in the NT. Thus the Northern Territory Development Corporation, Northern Territory Tourist Commission, Agricultural Marketing and Development Authority and Territory Insurance Office were established between 1978 and 1980 by separate legislation (i.e. in the form of statutory authorities) as key administrative vehicles for the economic development strategy of early Territory Governments, and numerous other government business enterprises exist as units within departments. (Auditor-General, 1997)

While government enterprises are an important type of statutory authority, in the NT the term generally refers to a “corporation, commission or authority incorporated by name for a public purpose by a law of the Territory” (the Interpretation Act uses the analogous term statutory corporation: s. 3), other than local governments and statutory authorities specifically excluded from the definition by their enabling legislation. In the NT statutory authorities are apparent in every major area of government. Most statutory authorities have been brought within the ambit of the common legislative framework for certain purposes over time, the arrangements for each developing by a combination of specific and generic amendments. (See e.g. Heatley 1981a) A set of basic formats for the statutory delegation of Executive-type powers and functions to an autonomous board of management or officer has gradually evolved, though most have remained under varying degrees of direct or indirect ministerial control. While amendments have generally improved measures for accountability and increased the formal autonomy of the boards of management and/ or chief executive officer of each statutory authority there are many significant exceptions, the most notable of which are the Northern Territory Land Corporation (established by the *Northern Territory Land Corporation Act 1986* (NT))

and Conservation Land Corporation (established by the *Parks and Wildlife Commission Act 1995* (NT)). (Edgar, 2007)

As statutory authorities are established by separate legislation, it is usually easier for a government to change departmental structures and functions than to make even a minor alteration to a statutory authority if legislative amendment is required (though the passage of Government bills is usually a procedural formality in the unicameral Parliament of the NT). Almost all statutory authorities have provisions, usually detailed, for operational management and accountability including the completion and auditing of financial statements and an annual report on objectives, activities, and performance assessment (usually provided to a portfolio Minister and tabled in the Legislative Assembly), and specific provisions defining the respective roles of the portfolio Minister and board of management or executive officer and requiring directions by the Minister be reported either to Parliament directly or in the statutory authority's annual report.

Another type of government instrumentality is 'statutory sub-bodies', usually established by the relevant Minister or the Administrator pursuant to statutory powers. For example, the Parks and Wildlife Commission Act established the Parks and Wildlife Commission directly; in addition, s. 123 of the *Territory Parks and Wildlife Conservation Act 1977* (NT) authorises the Administrator to establish local management committees for specific NT parks and reserves.<sup>54</sup> Alternatively, an administrative unit may be created by some other executive arrangement (e.g. the NT Law Reform Commission, and Orders-in-Council). The latter administrative units, established by 'prerogative' executive orders and arrangements (not deriving their authority from statute directly or indirectly), have been described as 'non-statutory bodies' (NSBs) – "bodies which are not departments (or parts of departments) nor statutory authorities (or sub-bodies of statutory authorities) nor incorporated companies/ associations". (SSCFGO, 1986; 10)

Statutory sub-bodies are often similar to NSBs in structural and procedural terms, as indicated in a definition suggested to the RCAGA (1976) that NSBs "may be regarded as those agencies which can be dissolved without repealing or amending an Act of

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<sup>54</sup> Government departments have a similar procedural basis, established by promulgation of the Administrative Arrangements Order by the Administrator pursuant to s. 7 of the PSEMA (as are local governments, generally established by and in important respects subject to the Minister for Local Government pursuant to the *Local Government Act 1993* (NT)).

Parliament”. (SSCFGO, 1986; 4) In 1986 most Federal NSBs were established by, and reported to, a Minister, statutory authority or department (many had also been created by other NSBs), and “NSB financial accounts were usually absorbed (without separate identification) into departmental accounts which were audited in the general manner and subject to general parliamentary scrutiny.” (SSCFGO, 1986; 124-25) These are not intended as exhaustive or mutually exclusive categories, but provide an indication of the variety of types and functions of government instrumentalities in the NT – “useful constructs to facilitate understanding of government structures but in practice rather less than watertight components of the field of government.” (Halligan & Wettenhall, 1990; 19) Together these basic types of administrative units “form the building blocks in the design of government”. (Halligan & Wettenhall, 1990; 17) Given their potential for operational autonomy and the conduct of a wide range of specific functions, various types and derivatives of statutory authorities, statutory sub-bodies and non-statutory bodies have been central to many of the arrangements used to recognise and provide for the exercise of specific Indigenous rights (examined in chapters 6 to 9), including to provide legal recognition and capacity to Indigenous institutions (also achieved pursuant to private sector incorporation regimes in many cases), as well as to establish bicultural mechanisms and arrangements for co-management of functions of mutual concern to Indigenous and Commonwealth institutions.

### **The establishment and evolution of the NT Public Service**

Rather than the gradual evolution of the British system of government, the legislatures of the Australian colonies received their powers of self-government (including the ‘conventions’ and traditions associated with parliamentary sovereignty and responsible government) and a corresponding “legal and institutional presence at a precise historical moment by the operation of a ‘higher law’”, authorised by (and remaining subject to) the British Parliament (e.g. the *Constitution Act 1854* (Tas), *Constitution Act 1855* (NSW)). (Blackshield & Williams, 1998; 131) Each of the major colonies (New South Wales, Victoria, Queensland, South Australia - including the NT between 1863 and 1910 - and Tasmania) attained self-government during the 1850s, Western Australia in the early 1890s. The developments leading to the conferral of self-government on the NT by the Federal Government demonstrate some institutional and

jurisdictional similarities with both of the previous major jurisdictional changes in Australia following the British assertion of sovereignty (the conferrals of self-government on the British colonies in Australia and the founding of the Commonwealth of Australia).

Similarities include the instant creation of a new polity and system of government, and the persistent campaign by the more established Australian colonies prior to the conferral of self-government demanding that the Imperial Parliament grant representative and responsible government to them as self-governing colonies (including representation by taxation and complete responsibility for land administration as core demands). These demands resulted in incremental changes to the proportion of elected to appointed members of the Legislative Councils prior to the conferral of substantive powers of self-government, replicated in many respects in the incremental changes in the NT prior to the conferral of self-government. As with the creation of the Commonwealth of Australia as a polity when some functions carried out by the States were transferred to the new Federal Government (the respective departments responsible for customs and excise, naval and military forces and facilities, posts, telegraphs and telephones, lighthouses and associated marine navigational infrastructure, and quarantine were transferred on or soon after the commencement of the Constitution), although the political institutions were new the NT inherited portions (in this instance substantial) of an extant public administration (as had the self-governing colonies). (McMinn, 1979; Halligan & Wettenhall, 1990)

Immediately prior to the conferral of self-government the primary divisions of the Federal Department of the Northern Territory were Lands and Community Development, Resource Development, Social and Commercial Affairs, Constitutional Development, and Management, Legislation and Planning. (Heatley, 1979; 88-90) In addition to the lack of parliamentary experience amongst members of the Legislative Assembly during the 1970s and early 1980s (see chapter 3), of the Cabinet in 1981: “None of them had administrative experience in large organisations.” (Weller & Sanders, 1982; 7) Nonetheless, by 1980 the basic structure of the new administration was in place, including many departments and other government instrumentalities continuing functions they had previously performed as Federal administrative units (and those of the boards

established by ordinance by the Legislative Council) prior to the conferral of self-government, as well as several completely new statutory authorities.

While many of the existing divisions of functions and agencies were retained following the devolution of power to the Legislative Assembly, the following two years saw an enormous amount of change described as an “administrative revolution”. (Heatley, 1981a; 54) At the start of 1977 the NT Public Service (NTPS) had almost 1300 employees, including 707 from the previously existing NTPS (staff of the Administrator and Legislative Assembly, and the police, prisons and fire services), 276 from statutory authorities that had been established by the Legislative Council (including the Tourist Board, Port Authority, Museums and Art Galleries Board, Housing Commission, Bush Fires Council and Reserves Board) and 294 from sections of the Federal Department as their functions were transferred. Around the same time there were still over 9000 Federal public service employees in the NT, many of whom performed State-type functions. (Heatley, 1991; chapter 3) With the further transfer of functions on 1 January and 1 July 1978 most of the other transfers from the Federal to the NT Public Service of staff responsible for State-type functions occurred (however the subsequent transfers of health and education were also significant additions to the NTPS).

There were over 11, 000 staff in the NTPS by the mid-1980, as well as over 3,000 “employed in government instrumentalities outside the Public Service Act” including the NT Teaching Service, Electricity Commission (reconstituted as the Power and Water Authority in 1987 and renamed Power Water Corporation in 2002) and Darwin Community College (the predecessor of Charles Darwin University). (Heatley, 1981; 284-85) The development of ministerial portfolios and the basic institutional structure of the ‘body politic’ of the NT is depicted in Diagrams 2 to 5. Between 1976 and 1991, of all persons employed in the NT the proportion employed by the Federal Government fell from 30.9% to 9.8%, the proportion employed by the NT Government rising by a similar amount (from 1% to 20.8%). The proportion employed by local governments increased slightly (from 1.8% to 3.3%). (Jaensch & Wade-Marshall, 1994; 33) The proportion of persons employed by all levels of the public sector has remained substantial, usually accounting for around one third of total employment. (ABS, 2008)

The main co-ordinating agencies of the NT Government (Department of the Chief Minister, Treasury and Department of Justice) have retained essentially the same form and functions throughout self-government (discussed above and in chapter 3). There were incremental alterations of and additions to the public administration during the 1980 and 1990s: several new departments had been created by 1981, including a Department of the Legislative Assembly. Following considerable experimentation during the mid-1980s major restructures in 1989 and 1990 during Perron's tenure as Chief Minister stabilised the basic departmental form in many areas of government though incremental additions and reforms continued (see Diagrams 2 to 5). Another significant restructure of the departmental structure in 1995, and revisions around the same time of the common framework of control (primarily by the introduction of the Financial Management Act, Audit Act and Public Sector Employment and Management Act), consolidated the basis and structure of the public service, retaining essentially the same form (as in Diagram 4) until the election of the Labor Government in 2001, by which time the number of ministerial portfolios had increased to over thirty (there were usually eight or nine Ministers). An administrative restructure subsequently carried out substantially altered the form of the administrative apparatus with the amalgamation of numerous departments that are now divisions and portfolios within an 'umbrella' department and ministerial portfolio, reducing the number of departments from 35 to 18.<sup>55</sup> (Edgar, 2007)

Some of the features and operational implications of administrative reform are apparent in the development of administrative arrangements associated with land and natural resource management functions of the NT Government since the conferral of self-government. The relative continuity of statutory as opposed to departmental (and other non-statutory) agencies and regimes is apparent in the differentiated effects of administrative restructures; many departmental functional divisions have been amalgamated with or separated from other functions over time, but the legislation, statutory authorities and other government instrumentalities associated with each specific function has generally remained quite constant. For instance, there have been many changes to the functional alignments within and amongst departments with responsibility for different aspects of land and natural resource management functions, while associated

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<sup>55</sup> Notified in the *Government Gazette* on 13 Nov 2001, No. S46.

statutory regimes have remained relatively constant (some of these are examined in chapters 6 to 9).

Heatley distinguishes between two types of 'regime transformation' following the conferral of self-government, in terms of the transfer of constitutional jurisdiction from the Federal to the NT Government (jurisdictional), and the structure of and management practices within the system of public administration (operational). Heatley (1996, 57-58) argues that although the regime transformation associated with the delegation of constitutional jurisdiction to the newly created NT polity was substantially completed by 1980, "the most vigorous period of managerial reform occurred between the mid-1980s and the early 1990s". Heatley (1996, 63) therefore suggests that the period of self-government (until the mid-1990s) can be divided into two periods, from 1978 to the mid-1980s (a time of "strong growth and fiscal buoyancy"), and a subsequent "wave of reform" towards 'managerialism' within the context of tighter fiscal conditions.

Features and objectives that have underpinned both broad-ranging and tightly focused programs of administrative and managerial reform and the 'new managerialism' in the NT (and other jurisdictions) include: the disparate trends of political centralisation (the concentration of strategic decision-making power within the Department of the Head of Government, the Cabinet and Treasury) and the delegation and dispersal of managerial authority and responsibility for the implementation of policy; the development by agencies of 'corporate objectives' and 'service charters'; the principal that, other than in strictly defined situations, information on the structure and activities of government should be publicly available and hence subject to independent accountability and evaluation; clarification of the respective rights and duties of Ministers and senior public servants, and the significant devolution of formal responsibility for decision-making and activities to staff within agencies (and the chief executive officer and accountable financial officer in particular); professionalisation (such as training programs and the introduction of more comprehensive public service standards and guidelines); a shift in emphasis from inputs and legal and fiscal regularity and compliance to include an assessment of outcomes and effectiveness in achieving agency objectives, and a corresponding shift to adapt accrual accounting methods and include program budgeting as core elements of financial management, auditing and performance assessment systems,

further enhanced by the introduction of rolling three year estimates; and, an increasing shift of functions from 'the state' to 'the market' and corresponding shift of emphasis from service provision to cost recovery, whether by way of commercialisation (revising management practices and objectives within existing public sector organisations), corporatisation (structural change and adoption or adaptation of company law), privatisation of government enterprises, or outsourcing of government functions and services to private sector organisations (including companies and voluntary associations). (See e.g. Horrigan (ed), 1998: Kaul, 1995: Halligan & Power, 1992: Wettenhall, 1983, 1995: JCPA, 1991: Stone, 1993: Funnell & Cooper, 1998: Rhodes (ed), 2000a, 2000b)

During the initial period of self-government mechanisms for executive and legislative accountability were minimal, and "most attention was given to structural arrangements, notably to the mix of departments and statutory authorities in the new system." (Heatley, 1996; 58) In the NT the period of managerial (and some structural) reform was further prompted by a reduction in funding from the Federal Government and a slowdown in economic activity, with staff reductions within the NT Public Service and a substantial reduction in overall development funding and activities by the NT Government in the mid-1980s. There had also been major reviews of the public sector, including departmental and statutory authority arrangements as well as the extent and functions of other 'quasi governmental' organisations, by the Federal and some State governments during the 1970s and 1980s. The increased emphasis on 'system design' and 'managerialism' within the public service was accompanied by the gradual establishment of mechanisms to enhance accountability of the Executive and the effectiveness of the Legislative Assembly more generally (see chapter 3), reinforced by structural and operational reforms to the system of public administration; these measures were probably also encouraged in the NT by the determination of the Government to demonstrate competence to strengthen the campaign for Statehood.

Nonetheless, while the period of reform that began in the mid-1980s was distinctive in these respects, in the NT the reforms were more a part of ongoing refinement of the inherited public administration (which had been subject to the extensive reviews of the public sector in the 1970s as part of the Federal administration) and subsequent additions than the 'administrative revolution' of 1978-79 associated with the

transfer of functions and powers. As Wettenhall (1995, 15-22) argues of the various specific structural reforms, initiatives and rhetoric associated with ‘corporatisation’ and ‘managerialism’ in Australia, in the NT reform since the consolidation of the conferral of self-government has generally occurred as an ongoing evolution and refinement of existing administrative structures, performance management systems and accountability rather than by the sudden discovery of notions of efficiency and accountability. Nonetheless, in the established public administrations of other Australian jurisdictions there have certainly been major changes in the methods and objectives of performance assessment and accountability since the early 1970s, and a substantial increase in the extent of review and structural reform and emphasis on economic efficiency and the outsourcing of government functions to the private sector that in their combined effect over the course of the 1980s and 1990s amount to a transformation of the system of government. (Power (ed), 1990: Funnell & Cooper, 1998)<sup>56</sup> The nature of the shift in the respective roles of public and private sector organisations in the formulation and implementation of policies and provision of services in the contract state is described by O’Faircheallaigh, Wanna and Weller (1999, 298-99):

we are entering an era, not of small government through market replacement, but big government delivered more by market means.

However, the new theories and their consequences cannot settle questions regarding the nature of public programs or their appropriateness. These are essentially political dilemmas that are derived from the ‘publicness’ of the programs...

While with the emergence of the contract state in Australia since the 1980s in particular it is increasingly the case that analysis exclusively focused on the formal institutions of public power (the Parliament and Executive) “seems, if not beside the point, at least to be missing a large part of the point”, (Mulgan, 2000; 87) detailed consideration of ‘neo-pluralist’ factors and forces (Nadel, 1972) is beyond the scope of

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<sup>56</sup> Similarly, Stone (2002, 274) argues that although proceeding by gradual evolution based predominantly on the selective adoption or adaptation of existing concepts, mechanisms and practices, the combined effect of changes to the Upper Houses (Legislative Councils) of bicameral State Parliaments amounts to transformation of the system: “while developments from 1950 [and most emphatically since the 1970s] were evolutionary in nature, their effects ... were transformative”.

the thesis. (See e.g. Sampford, 1991: Bottomley, 1997: Funnell & Cooper, 1998: Rees & Wright (eds), 2000: De Maria, 2001)

## **Conclusion**

Despite the many modifications that have been made to the traditional components and procedures of the Westminster system, the preceding chapters demonstrate the strong influence of the Westminster system of government on the establishment and evolution of the systems of government of the Commonwealth of Australia, and explore the basis and nature of major types of modifications that have occurred. Whether conceptualised as manifesting a primarily ascending or descending form of sovereignty (as demonstrated in chapters 2 and 3 both aspects are apparent in the system of government), the Parliament remains the conceptual and formal pivot of the system of government and the focal point of public power according to the Constitution, political conventions and the common law, irrespective of the extent to which its powers and functions have been delegated (explicitly or by default) to the Executive, supranational institutions and private sector organisations. The remaining chapters examine the complete denial and subsequently the gradually increasing level of recognition of the rights of Australia's Indigenous peoples by the governments and courts of the British colonies and (from 1901) the Commonwealth of Australia and the manner in which arrangements for the suppression or recognition of Indigenous rights have evolved and been incorporated within the system of government, and make a preliminary evaluation of the progress made in recognising, protecting, and providing for the exercise of Indigenous rights in different regimes.

## **Chapter 5**

### ***The denial and recognition of Indigenous rights in Australia***

#### **Introduction**

Having provided an overview of key features of the establishment and evolution of the system of government of the Commonwealth of Australia, the remainder of the thesis identifies major factors and regimes involved in the suppression and, since the 1960s, increasing recognition of the civil rights of the Indigenous peoples of Australia, and the processes of institutional change that have accompanied this policy shift. Due to the prolonged period of systemic and systematic dispossession, oppression and marginalisation of Indigenous peoples in Australia following the British assertion of sovereignty, the belated recognition of Indigenous rights by governments and courts of the Commonwealth of Australia, albeit in a selective and limited manner, has required a reconsideration of many fundamental aspects of constitutional, administrative and property law and principles. This has resulted in the incremental development of distinct sets of principles and mechanisms to provide for the recognition, protection and exercise of Indigenous rights within the Commonwealth systems of government and land tenure, features not present in the Westminster system of government 'proper' (i.e. other than in some colonies of the British Empire).

In some case these processes of institutional change are well advanced in their implementation (e.g. the Land Rights Act), in others they are yet to make an impact on components of the system of government (e.g. constitutional reform). The changes have occurred at the same time as more generic reforms to the systems of government of the Commonwealth of Australia examined in chapters 2 to 4, such as increasing acceptance since the 1970s in particular of the concept of popular sovereignty as the ultimate source of the powers and functions of 'the Crown' and of open government in the exercise of those powers, elaboration of the fiduciary duty of representatives and officers of the Crown to the people of Australia in the exercise of public powers and functions, the extension of constitutional protection to certain individual rights inherent in and essential to the operation of democratic and constitutional government ('implied rights'), and also

in the increasing incorporation of the objectives of ecological sustainability within the structures, procedures and principles of the systems of government and economies of the Commonwealth of Australia.

As in Canada and New Zealand (Aotearoa), recognition of the rights of Australia's Indigenous peoples and attempts to incorporate recognition of specific sets of rights within the constitutions, political institutions, machinery of government and systems of proprietary rights of the Commonwealth of Australia has had a profound effect on perceptions of the adequacy of their basis, components and objectives. As Howitt, Connell and Hirsch (1996, 2) argue, the topics involved go "to the heart of discourses about national identity, constitutionality, democracy and the legitimacy of government processes", and are "constructing a new discourse of geopolitics, identity and sovereignty within rather than between states". They further note that the overall context in which the recognition of Indigenous rights is occurring is "simultaneously political, economic, cultural, biophysical and intellectual", as well as local, regional, national and supranational. Many contributors to the resulting discourses (e.g. Colchester & Lohmann (eds), 1992; Leach *et al*, 1999; Daes, 1993a; Alfred, 1999) contest the dispossession and disempowerment of Indigenous institutions and the marginalisation of Indigenous peoples (and in many cases local communities more generally) from other decision-making procedures by central governments deriving their authority from and exercising public powers in accordance with conceptions and systems of government based on the European 'Law of Nations' and representative democracy. According to such arguments much more emphasis must be placed on recognition of the distinct collective and individual rights of Indigenous peoples within the dominant institutions and discourses of nation-states from a position of approximate constitutional equality.

### **Analytical framework for chapters 5 to 10**

The recognition of Indigenous rights is examined from two principal analytical perspectives: the identification of more or less distinct phases in relations between Indigenous and non-Indigenous peoples over time (sometimes marked by abrupt shifts in the basis or objectives of specific regimes, on other occasions the result of incremental and overlapping changes in policy and/ or practice), and the concept of the Indigenous

right of self-determination stemming from prior and concurrent sovereignty,<sup>57</sup> examined in detail in the remainder of the thesis in the context of the approximate analytical categories of land rights and self-government. Together with the concepts and methods of analysis of processes of institutional change discussed in chapter 1 these perspectives provide the basis for a methodology to identify and make a preliminary assessment of the manner in which Indigenous rights and interests have been recognised by and accommodated within, or excluded from and suppressed by, the systems of government and property rights of the Commonwealth of Australia.

### **Temporal phases in Indigenous – non-Indigenous relations**

Numerous attempts have been made to identify, categorise and compare phases and significant factors in relations between Indigenous and non-Indigenous peoples in Australia, Canada and New Zealand, which demonstrate many basic similarities (albeit subject to significant differences between and within each jurisdiction) due to their common basis and development as former British colonies founded by ‘discovery’ and ‘settlement’ with Westminster-derived systems of government and a substantial white majority in the dominant society (thus McHugh (1996) refers to them as the ‘Anglo-Commonwealth’ countries).<sup>58</sup> In a comparative analysis of the basis of and significant shifts in the Indigenous policies of Anglo-Commonwealth Governments, Armitage (1995, 186) argues that the principle objectives of colonisation in each jurisdiction had a common basis: “[The] forms of contact differed in detail in each of the three countries, but the powerful, acquisitive, exploitative and proselytizing nature of the European invasion was common to all.” Havemann (1999, 4) also examines and compares developments and policies in these jurisdictions, arguing that: “The economic imperatives that stimulated colonisation – particularly the drive for cheap land, and to

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<sup>57</sup> As provided for by the Declaration on the Rights of Indigenous Peoples (discussed below).

<sup>58</sup> In this sense, Fletcher comments that: “Australia’s celebration of [cultural] diversity took place after the ‘White Australia’ policy ... began to be relaxed after the Second World War (although it was not officially abandoned until 1973)... The core institutions of the State, though, remain firmly grounded in British traditions: civil society, the Westminster model of parliamentary democracy, and the mixed economy.” (Fletcher, 1999; 346-47) Former Prime Minister John Howard (quoted in Mansell, 2007; 74) argues that: “Most nations experience some level of cultural diversity while also having a dominant cultural pattern running through them. In Australia’s case, that dominant pattern comprises Judeo-Christian ethics, the progressive spirit of the Enlightenment and the institutions and values of British political culture.”

establish ‘law and order’ in the interests of commerce and settlement – seem to explain the patterns of genocide and ethnocide that are woven into the history of settlement.”

The period during which policies and practices of displacement (and in Australia large-scale extermination) of Indigenous peoples by European ‘settlers’ predominated was facilitated by discourses and perceptions featuring portrayals of empty (or ‘uncultivated’) lands, and of Indigenous peoples as primitive barbarians (in some cases a somewhat less disparaging variant, the ‘noble savage’, featured) and nomads (i.e. with essentially random and opportunistic rather than specific and managed relations to land and resources), racially, intellectually and spiritually inferior to Europeans (the foundation of the legal fiction of *terra nullius*). These portrayals underpinned the stated objectives of extending the benefits of civilisation and religion to the natives (to ease their inevitable demise), and the conclusions of ‘sciences’ such as phrenology, eugenics, and social Darwinism. (Reynolds, 1974: Attwood *et al*, 1994: Grimshaw *et al*, 1994: Markus, 1994: Nettheim (ed), 1974: Rose, 1994, 1997: Armitage, 1995: Tully, 1993, 1995: Williams, 1990) Armitage (1995) notes the significant and enduring influence of the recommendations of the final report of the House of Commons Select Committee on Aborigines (HCSCA, 1837), heavily influenced by such discourses, on the subsequent policies of each jurisdiction, including segregation and the appointment of ‘protectors’ of Aborigines, the establishment of reserves, and the policy of assimilation.<sup>59</sup> These recommendations of the report of the Select Committee were not substantially displaced as the basis of government policies in the Anglo-Commonwealth countries until the 1960s and 1970s.

Analysts have identified several phases in government policies and practices, usually overlapping and subject to incremental change in effect even if shifts in formal policy have at times been sudden. (Armitage, 1995: McRae *et al*, 1997: Havemann (ed), 1999) Armitage (1995) suggests five basic periods are apparent in the development of

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<sup>59</sup> However, the recommendation of the Select Committee that control over Indigenous land not be transferred to local settlers, adopted in the Canadian Constitution by vesting jurisdiction for policies pertaining to Indigenous lands and peoples in the Federal Governments (and by the retention of Imperial Government control over land administration and relations with the Maori in New Zealand until the early 1860s), was not followed in Australia: “Unlike in the United States and Canada, and contrary to Imperial suggestion, jurisdiction vested in the representatives of the settlers whose interests were most antipathetic to those of the indigenous people.” (Bartlett, 2000; 11)

policies by Imperial, colonial and Anglo-Commonwealth Governments, an initial period of contact and domination (in the areas most conducive to European settlement this mode of relations was usually prevalent until approximately 1860), two phases of paternalism during which the assumptions and recommendations of the 1837 Select Committee report continued to have a significant influence (primarily based on policies of segregation and ‘protection’ between 1860 and the 1920s and ‘assimilation’ between the 1920s and 1960s), a period of ‘integration’ in which formal restrictions on civil rights were removed and systematic efforts to produce cultural homogeneity eased (during the 1960s and 1970s), and pluralism (since the mid-1970s). The objective of entrenching the dispossession of the Indigenous peoples of each jurisdiction continued to underpin government policies and the jurisprudence of each jurisdiction throughout the periods of assimilation and integration. As Armitage (1995, 193) argues of the implementation of social policy in all three countries:

Common services were part of a total social policy framework which was designed to repeal all recognition, including territorial recognition, of aboriginal status as a distinct policy category. There would then be no need for special land tenure, social policy, or political institutions; racial origin and cultural heritage would be an entirely private matter.

McRae, Nettheim and Beecroft (1997) and Havemann (1999) in particular refine these phases in applying them specifically to the establishment and consolidation of the British colonies in Australia, and the subsequent policies of the governments of the Commonwealth of Australia. They categorise five distinct though overlapping and regionally differentiated periods of government policy and practice distinguished by: the time of first contact and introduction of permanent British occupation throughout the continent (described by Rose (1997, 30) as an “extended Year Zero”), at least in some cases involving formal efforts at conciliation and co-existence;<sup>60</sup> a period in which policies (or ‘non-policies’: Nadel, 1972) and practices of displacement, conflict and extermination predominated (the “killing times”); policies based on official protection

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<sup>60</sup> For example, as required by early instructions to the Governor of the British colony in Australia and Imperial policy during the founding of the Province of South Australia (discussed below).

and segregation; policies of assimilation and integration; “and, finally, the current (since 1972) policy of self-determination” (McRae *et al*, 1997; 31: see also Heatley, 1979: McGrath (ed), 1995: Havemann (ed), 1999). These approximate phases in the foundation and objectives of government policy have occurred within the context of the phases and specific events noted in chapters 2 to 4 pertaining to constitutional, economic and demographic developments in the NT. Numerous studies (e.g. Merlan, 1998: Rowse, 1998a: Lyon & Parson, 1989) and many land claim reports examine these phases and contemporaneous developments within specific localities and regions of the NT in detail.

Each Australian colony had primary responsibility for Indigenous policy and land administration following the conferral of self-government by the British Parliament. Since the founding of the Commonwealth of Australia the States have retained primary responsibility for most policies directly affecting Indigenous peoples, though the Federal Government has been increasingly involved in Indigenous policies and their implementation since the 1967 referendum (discussed below). Kelsey (1990) provides another set of phases based on the political economy of British colonisation within New Zealand that has considerable similarity with the timing and nature of underlying factors and forces in the NT, identifying eras of acquisition (1840-70) and consolidation (1870-1935) coinciding with a predominantly liberal state and philosophy, the era of the welfare state (1935-75), and the era of international capital (from the mid-1970s, largely corresponding with the emergence of the contract state in Australia and coinciding temporally with the emergence of the recognition of Indigenous rights by the dominant society). (See also Wilkes, 1993: Durie, 2005)

The period of most relevance for the purposes of the thesis (the period since the conferral of self-government in the NT) can therefore be considered as preceded by an era of assimilation merging into an era of integration, followed by an era of increasing recognition of Indigenous peoples as peoples with distinct collective identities, rights and interests within the state. The period corresponding to increasing acceptance of the Indigenous right of self-determination has been described as an era of ‘pluralism’ by Armitage (1995) and, in the case of Canada, ‘confrontation’ by Miller (1990) and “negotiation and renewal” by the Royal Commission on Aboriginal Peoples. (RCAP, 1996) The partially contradictory elements of which these characterisations are

comprised are amalgamated in Havemann's (1999, 24) description of the period since 1975 as an "era of Aboriginal rights talk and confrontation", involving the adoption of government policies and practices based in varying degrees on recognition of the Indigenous right of self-determination (and Indigenous protest and confrontation to the extent these policies fall short of their interpretations of their rights), occurring simultaneously with the era of international capital and the emergence of the contract state (also entailing an "era of the commodification and commercialisation of Aboriginal rights": Havemann, 1999; 24).<sup>61</sup>

In addition to the basis and objectives of government policies therefore, other important factors affecting relations between Indigenous and non-Indigenous peoples in each area include the timing and nature of first contact, the prevailing social and political cultures underpinning government administration and other relations between Indigenous and non-Indigenous peoples, the distance of specific regions from colonial centres and their suitability for European settlement and economic development, and the strength of Indigenous resistance to colonial settlement and the extent to which local Indigenous populations were displaced by and brought within the non-Indigenous society and economy. (Goodall, 1995: McGrath (ed), 1995: McRae *et al*, 1997) In the NT the latter phases have occurred within the context of a unique set of intergovernmental relations between the Federal and NT Governments and Aboriginal peoples due to the constitutional status of, and large proportion of Aboriginal people in, the NT.

### **Phases and significant factors and developments in the NT**

The section of the report of the House of Commons Select Committee on 'New Holland', and the contemporaneous events surrounding the establishment of the South Australian colony (to which the NT was annexed in 1863), illustrated "a consistent feature of Australian history – that is to say, the consciousness that a native land problem

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<sup>61</sup> Although the commodification of many aspects of Indigenous heritage by non-Indigenous people has intensified since the 1970s this is not a new phenomenon. Daes (1997, 3) surmises of the situation of Indigenous peoples worldwide: "European exploration and colonization of other regions beginning in the fifteenth century led to the rapid appropriation, by major European empires, of indigenous peoples' lands and natural resources. But this was not all that was taken. European empires also acquired knowledge of new food plants and medicines ... As industrialization continued, European States turned to the acquisition of tribal art and the study of exotic cultures. Indigenous peoples were, in succession, despoiled of their lands, sciences, ideas, arts and cultures."

existed together with the absence of even a proposal for a system of native title.”<sup>62</sup> Although the recitals to the 1834 enactment providing for the creation of the province of South Australia referred to the land as “waste and unoccupied lands which are supposed to be fit for the purpose of colonization”, several letters and instructions from the Colonial Office to provincial administrators during the second half of the 1830s stated that there could be no doubt that the Aboriginal peoples had a proprietary interest in the land. For example, a letter from the Secretary of State in 1835 expressed concern about the possibility of the system of land administration proposed in the ‘Wakefield Scheme’ leading to the dispossession of “numerous Tribes of People, whose Proprietary Title to the Soil, we have not the slightest ground for disputing”, and instructions to Governor Gawler in 1840 referred to the principle that Aboriginal peoples should have the right of selection to “reasonable portions” of land from the extensive districts “over which, from time immemorial, these Aborigines have exercised distinct, defined and absolute rights of proprietary and absolute possession”; there were similar though less emphatic provisions in the Letters Patent of 1836 establishing the colony.<sup>63</sup>

These statements and instructions were strongly refuted by the Colonization Commission of the colony which sought to establish unfettered local legislative and executive control over land administration and Indigenous policy based on the principles of *terra nullius*. All suggestions of prior and concurrent rights vesting in the Aboriginal inhabitants of the colony were subsequently omitted from the enactments of the 1840s and 1850s providing the basis of the institutions of self-government. As Blackburn J noted: “The preferred policy was that of ‘general measures for the protection and preservation’ of the aboriginals ... [, a policy which] does not provide for the recognition of any communal title to land.”<sup>64</sup> In rejecting an instruction from the Secretary of State in 1835 that land not be alienated without investigation in each instance as to whether “earlier and preferable Title exists”, the Colonization Commission noted that throughout the colonies it had been “assumed as an established fact that aboriginal tribes in Australia had not arrived at that stage of social improvement in which a proprietary right to the soil

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<sup>62</sup> Blackburn J, in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 259.

<sup>63</sup> The documents are examined in detail in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 257-83.

<sup>64</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 259.

existed”.<sup>65</sup> As with the other Australian colonies, faced with implacable resistance to any form of recognition of Indigenous rights by colonial settlers and administrators in South Australia from the 1830s and demands for complete control over land administration, the British government “largely resigned itself to anarchy and the extermination of Aborigines at the frontier...” (Neal, 1991; 80) Until the expansion of government settlements from the 1930s the ‘protection’ regime in the NT largely consisted of ration depots located at police stations and missions, the latter also providing refuge from conflict or drought in some areas.

Consequently, the era and extent of ‘conciliation’ in the NT was largely confined to relations during the establishment of the military outposts on the northern coast during the 1820s-40s, the expeditions of explorers during the mid-1800s, and formal (though unenforceable) provisions recognising the right of Aborigines to remain on and utilise the natural resources of pastoral leases. The area in the vicinity of Palmerston (from 1915 called Darwin) was subject to permanent European occupation from the late 1860s and the area around Alice Springs (originally called Stuart) from the early 1870s. The range and intensity of colonial settlement increased rapidly from this time with the construction of the Overland Telegraph (as discussed in chapter 4 - see also e.g. Toohey, 1981b; Trigger, 1992; Rowse, 1998a). There was a time of relatively peaceful coexistence in some areas following the arrival of British colonists (including some of the supply depots along the Overland Telegraph), however such cordial relations usually rapidly deteriorated; in many other areas intense conflict occurred immediately, usually following the introduction of livestock or mining camps. As in the other Australian colonies there was no formal attempt to resolve frontier conflict during the height of the “killing times”: official inquiries into the widespread killing of Aborigines “raised the ire of land-hungry white settlers and antagonised the governor’s only agents for the imposition of the rule of law at the frontier, the military [in New South Wales and several other colonies] and the police.” (Neal, 1991; 79)

In the NT the “killing times” or “the shooting time” (Kearney, 1985b; 2) extended from the early 1870s to the 1930s, varying in intensity spatially and temporally depending on the timing and nature of colonisation, compounded by the simultaneous

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<sup>65</sup> Blackburn J, in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 279-80.

devastating impacts of the introduction of new diseases, liquor and opium. The report of the Government Resident of the South Australian administration (the approximate equivalent of the Administrator of the subsequent Federal administration) in 1890 was unequivocal as to the attitude of many Aborigines to European 'settlement', stating that: "Entrance into their country is an act of invasion. It is a declaration of war, and they will halt at no opportunity of attacking the white invaders". (Quoted in McGrath, 1987; 7: see also e.g. Reynolds, 1982; McGrath (ed), 1995; Rowley, 1970; Lyon & Parsons, 1989; Attwood *et al*, 1994; Rose, 1991) There were no resident magistrates to prevent or reduce the scale of killings conducted by the constabulary and colonists in frontier areas:

The logic of colonisation and the white invasion of Aboriginal land required the use of force to quash resistance... [Colonial authorities] could only have stopped the killing by stopping the invasion... The rule of law had only a very tenuous hold at the frontier. The police enforced a very lopsided version of equality before the law: they punished Aboriginal resistance savagely and only very occasionally intervened on their behalf. The law of murder – in relation to the Aboriginal victims of white settlers – went into virtual suspension as an adjunct to the dispossession of the Aboriginal landowners. (Neal, 1991; 154)

Heatley (1979; 135-36) notes that although the system of pastoral lease administration included statutory and lease provisions recognising the right of Aboriginal peoples to remain on leases and use natural resources in their accustomed manner:

To police the huge area into which pastoralists and miners were moving and where racial conflict was acute, all that was provided was a part-time Chief Protector (full-time from 1908) assisted by a few sub-protectors... If protection was meagre, so too was government aid, which was distributed through a number of scattered ration stations... The half-century of South Australian administration was, for the Aborigines, most dismal; the pattern of race relations that had been a feature of other frontier situations was repeated in the Territory...

The scarcity of water in the NT ensured the inevitability of widespread conflict and displacement of Aboriginal inhabitants. As Heatley (1979, 5) states: "Throughout the Territory the availability of water is the key to the utilization of the land. Nowhere is it

ideal.” As in other British colonies in Australia, the geography of residence and land use often replicated that of the Aboriginal peoples.<sup>66</sup> In the preface to the Warumungu Land Claim the Aboriginal Land Commissioner (Maurice, 1988b) commented that:

In this region, there is a striking correspondence between topography and soil type on the one hand, and patterns of human occupation on the other. The low ranges feed springs and concentrate rainfall into watercourses: better soils hold more moisture and support more abundant plant growth and animal life. The siting of European occupation largely mimics that of the Warumungu. The most precious resource is not cattle or gold but water.

In a sense, white Australia has been caught *in delicto* with the Warumungu. We have taken all their good land; no watercourse remains which does not have some European claim to it.

Compared to the extensive range of cattle production across the NT mining activity had a more limited presence (with most mining activity occurring within a small number of localities prior to the 1950s), but also had a devastating impact on Aboriginal peoples in areas where mining occurred as local water sources were appropriated and contaminated and exotic diseases and drugs introduced by the residents of mining camps. (Kearney, 1988a) Estimates of the Aboriginal population suggest the population continued to decline significantly until the 1930s (Heatley, 1979; 132; Armitage, 1995; 28-31), Aboriginal peoples having a precarious existence: “The ambiguous legal status of Aborigines – some hybrid of outlaw, foreign enemy and protected race seemed to be the white attitude – exacerbated the problem.” (Neal, 1991; 151) Severe droughts during the 1890s and 1920s further compounded the plight of Aboriginal peoples during this devastating period.

In addition to the influx of people and livestock from South Australia, two major stock routes from Queensland were established during the 1870s. As noted above the most intense conflict occurred between the 1870s and 1930s as cattle production was established in the core pastoral areas (some of the more remote cattle producing areas of

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<sup>66</sup> For example, in Western Australia: “much of what the early settlers achieved was often due to their adaptation of the Aboriginal cultural landscape. Aboriginal tracks laid the ‘basis of the road networks, Aboriginal camp sites became homesteads and towns, Aboriginal yam grounds became arable fields and Aboriginal hunting grounds, carefully tended by regular burning, became ideal pasture for sheep.” (Webb (quoting Cameron), 1991; 21)

the early period of this phase were abandoned until the 1930s due to strong Aboriginal resistance), followed by a period of adjustment by the survivors of the initial onslaught in each area to seasonal employment on cattle stations, usually in the vicinity of traditional country where possible. Cattle speerings continued at least until the late 1930s in the more remote and rugged pastoral areas (the Victoria River District, Roper River, and Gulf country regions in particular). (McGrath, 1987) As conflict subsided in each area a condition of mutual dependency developed: “By 1913 Baldwin Spencer reported: ‘At the present day, practically all the cattle stations depend on [Aboriginal] labour, and, in fact, could not get on without it ...’ Bleakley reported to the same effect in 1928.” (Kearney, 1985b; 2) Aboriginal labour became essential to most sectors of the colonial economy including agricultural production, mining and manual and domestic labour in towns.

Induction into the colonial economy involved combinations of ‘push’ (compulsion) and ‘pull’ (inducement) factors, the respective proportions of which varied over time and by region and individual; in some cases people were induced by the exotic technologies, foods and lifestyles, in others people were forced to work on cattle stations following the depletion of natural resources. (McGrath, 1987: Toohey, 1981b, 11-12: Maurice, 1989: Kearney, 1985b: Toohey, 1982d: Stevens, 1974: Tatz & Sharp (eds), 1966: Lyon & Parsons, 1989: Wright (ed), 1998: Berndt & Berndt, 1987) Employment on pastoral stations provided an opportunity for many Aboriginal people to remain outside the system of reserves and institutions that was subsequently established, and maintain culture and contact with the land.<sup>67</sup> Although the scope for Aboriginal resistance was substantially reduced as the European population, infrastructure and forms of land use spread and were consolidated and the displacement, incarceration and indoctrination of Aboriginal people was intensified, resistance continued in many forms:

Aboriginal resistance is defined here as the refusal to accept cultural domination. Black violence against Europeans and their animals was more than a protest against imposed economic structures: it was a reassertion of their culture and its Law. This was important to

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<sup>67</sup> In the Upper Daly Land Claim the Aboriginal Land Commissioner commented that: “the Aboriginal people of the general region [around Katherine] were subjected to early, lengthy and intensive disruption of their lives by non-Aboriginals. They adapted to these pressures, supplying their labour, but retaining in large measure their traditional lifestyles and values.” (Kearney, 1991; 3)

the individual's identity. When viewed in this light, many Territory Aborigines never totally lost their battle. (McGrath, 1987; 6: see also Langton, 2005)<sup>68</sup>

The South Australian Government introduced the *Northern Territory Aborigines Act* 1910 (SA) just prior to the transfer of jurisdiction to the Federal Government to provide a legislative basis for the appointment, functions and powers of the Chief Protector and sub-protectors, the establishment of Aboriginal reserves, and the leasing of Crown lands to religious organisations for the establishment of 'missions'. The regime was reviewed following the appointment of anthropologist Baldwin Spencer as Chief Protector of Aborigines in 1911 and the *Aboriginals Ordinance* 1918 (NT) enacted (largely based on the previous legislation). The regime was reviewed again in 1928-29 (by Bleakley, a former Protector of Aborigines in Queensland); although many recommendations were made in both reviews to improve aspects of the regime and its implementation, neither resulted in major changes to the provisions or objectives of the Ordinance. (Tatz, 1964: Rowley, 1970: Read, 1995)

The period of policies based on segregation and 'protection', involving a combination of supervised and unsupervised reserves, was not widely implemented until the period of direct Federal administration. The Hermannsburg mission was established in 1877 and the Roper River mission in 1908; numerous others were founded in the following decades and Bleakley recommended an increase in government assistance to such missions in 1929 (by which time there were seven: Wilson, 1997). The missions managed by religious organisations "were seen as offering a secure refuge for Aborigines and as a way of reducing racial conflict without incurring much financial commitment besides a small subsidy to the missions." (Heatley, 1979; 137) By the 1950s "the Lutherans (Hermannsburg), Catholics (Daly River, Bathurst and Melville Islands), Methodists (Milingimbi, Goulburn Island, Elcho Island, Yirrkala), and the Anglicans (Roper River, Groote Island, Oenpelli) were established in mutually respected 'patches'." (Read, 1995; 275)

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<sup>68</sup> Similarly, in examining the situation in North America Alfred (1999, 1) argues that: "Without a good understanding of history, it is difficult to grasp how intense the European effort to destroy indigenous nations has been, how strongly Native people have resisted, and how much we have recently recovered."

Implementation of the policy of segregation was gradually extended during the 1920s and 1930s by the promulgation of Aboriginal reserves (pursuant to the *Crown Lands Ordinance* 1927 (NT)) and the establishment of Aboriginal settlements managed by the NT administration in some areas, and the intensification of formal restrictions on freedom of movement and the powers of the Chief Protector and superintendents of reserves and institutions. The restrictions on the civil rights of Aborigines included the forced removal or incarceration of Aborigines in the vicinity of European population centres,<sup>69</sup> and the strict separation of men and women and adults and children within and amongst institutions to implement prohibitions on the use of Aboriginal languages and performance of ceremonies and other cultural activities, providing the basis for indoctrination and training as menial labour for households and farms. In the first annual report of the Aboriginal and Torres Strait Islander Social Justice Commissioner (ATSISJC, 1993; 44) Dodson states that:

Our homeland had become a totalitarian institution: basic rights which other Australians took for granted were denied or parcelled out as privileges dependent on blood lines. Curfews, dog-tags, missions, reserves, permission to travel, permission to marry, the removal of children, surveillance and reports by police-protectors and native welfare officers dominated our lives as the waves of paternalistic policies of segregation, integration and assimilation washed over us. Always a white boss. Always the right to say *please*.<sup>70</sup>

While formal restrictions were intensified during this period, Heatley (1979, 136) argues that in the NT: “In practice, protection and control were only possible in the town areas and on the missions and reserves and [prior to the 1950s] only pursued diligently by the administration with respect to some of the part-Aboriginal population.” (See also e.g.

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<sup>69</sup> For example, Wootten (1993, 10) notes that in the late 1800s and early 1900s: “Alice Springs became a police station and a major ration depot where large numbers of Aborigines regularly camped. Tension grew as the white population of the town increased, and throughout most of this century legislation and practice were directed towards ridding the town of the presence of town campers. On at least four occasions (1928, 1940, 1942 and 1960) Aboriginal town campers were physically rounded up and shifted to settlements out of town. From 1928 to 1965 Aborigines were not allowed to enter the town area – except Aboriginal people with permits, usually for the purpose of employment, who were permitted to enter the town between sunrise and sunset.”

<sup>70</sup> As Ehrensaft (1985) notes, the policies of assimilation in Canada and Australia and apartheid in South Africa had many similar features.

Nettheim (ed), 1974: RCIADIC, 1991: Wilson, 1997: Hasluck, 1988) In the most remote areas, and the extensive tract of Arnhem Land in particular, contact between Aboriginal peoples and others continued to be minimal until World War II. (Jones & Meehan, 1991) As noted above, in many areas Aborigines were also able to remain outside institutions, or the tenuous existence of fringe dwellers, by employment in the pastoral industry; while extremely poor living conditions were endemic (usually involving work for rations and negligible facilities for accommodation, with the government refusing to provide assistance to supply housing, basic infrastructure and services for Aboriginal workers and their families) conditions on pastoral stations varied considerably, and the possibility of moving to other stations, or areas not subject to pastoral lease in more remote areas, ameliorated the conditions of some. (McGrath, 1987: Lyon & Parsons, 1989: Kearney, 1991: Wright (ed), 1998: Sharp & Tatz (eds), 1966)

The early stages of the policy shift to assimilation (endorsed at a Federal-State Conference in 1937: Sanders, 1991) were disrupted by the dramatic impact of World War II, with the NT a major focus of military activity. Many Aboriginal people were relocated to army compounds during the war, particularly those north of Edith River (which was proclaimed a prohibited area) not involved in the defence of missions and other infrastructure and military outposts. (Ball (ed), 1991: Read, 1995) This was the first time many Aborigines received wages, and the pioneering studies of anthropologists such as Baldwin Spencer, Thomson, Stanner, Elkin, Berndt and Berndt from the early 1900s (e.g. Baldwin Spencer, 1914: Thomson, 1932, 1948, 1949, 1983: Elkin, 1927, 1954: Berndt, 1957, 1964: Berndt & Berndt (eds), 1965: Berndt & Berndt, 1987: Stanner, 1965, 1979), together with widespread interactions with army personnel, began to make significant inroads into the lack of knowledge about Indigenous societies and associated prejudices. (Ball (ed), 1991: Heatley, 1979: Loveday *et al*, 1989)

Nonetheless, the policies of segregation and assimilation remained. The policy of assimilation was elaborated and affirmed at the Native Welfare Conference of Federal and State Ministers in 1951, and further refined in the subsequent conferences of 1961 and 1965: “The basic government aim of homogeneity remained, but it was softened by changing ‘same’ to ‘similar’ and by introducing the notion of Aboriginal choice.” (Broome, 1994; 173) There were substantial improvements in the level and standard of

service provision to missions and government settlements, though this was also part of an intensified effort at assimilation. The increased attention given to Aboriginal Affairs in the NT from the 1950s is apparent in the number of staff and resources allocated during this period, and the increased emphasis on cultural and other professional training for staff; in the NT-based 'Welfare Branch' of the Federal administration there were 64 positions in 1953, 128 in 1956 and 504 in 1964. (Heatley, 1979; 157)<sup>71</sup>

The period following World War II was marked by regular protests and strikes by Aborigines, initially usually primarily for wages and improved living conditions, subsequently for civil rights and land rights. These activities received moral and material support from emerging social movements and interest groups within the dominant society, including the Northern Territory Council for Aboriginal Rights and the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (established in the 1950s), which together with the activities of the North Australian Workers Union provided support for and publicised Aboriginal demands. (Read, 1995: ATSI, 2001) Legislation enacted in South Australia during the 1960s "set the agenda for the reform of Aboriginal administration throughout Australia". (Brock, in McGrath (ed), 1995; 233) Major statutes of the reform program included the *Aboriginal Affairs Act* 1962 (SA), *Aboriginals Lands Trust Act* 1966 (SA) and an amendment to the *Aboriginals Lands Trust Act* in 1966 providing for the establishment of Reserve Councils to manage and control entry to Aboriginal communities on reserves (complemented by the authority of the *Aboriginals Land Trust* over land management decisions).

During the 1960s most of the formal restrictions on the civil rights of Aborigines in the NT (such as strict legal and administrative controls over freedom of movement, marriage and property) were removed, as the emphasis of government policy shifted to 'integration'. (Heatley, 1979) Although the formal restrictions had been removed: "For the great majority of Aborigines who lived on government settlements, missions and pastoral properties, legal emancipation affected them very little immediately." (Heatley,

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<sup>71</sup> The budget allocated to service provision to settlements and missions increased from around 175,000 pounds in 1950-51, to around 500,000 pounds in 1956-57 and almost 2,000,000 pounds in 1963-64. (Heatley, 1979; 142)

1979; 144) Hall (1991, 33-34) surmises of the (dis)enfranchisement of Aborigines that in the early 1940s:

In general, Aborigines did not have the franchise, but there were exceptions to this rule. In New South Wales, Victoria and South Australia, Aborigines and 'part-Aborigines' could be enrolled to vote in State elections, but in Queensland, Western Australia and the Northern Territory ... access to the vote was very restricted, usually only being possible for Aborigines or 'part-Aborigines' exempted from the relevant State Aborigines' Act. In Commonwealth elections no Aborigine could vote, but 'part-Aborigines' who had abandoned their Aboriginality to live as Whites could vote and any person, including 'full-blood' Aborigines entitled to vote for the more numerous House of the Parliament of a State, could vote.

An amendment to the *Electoral Act* 1908 (Cth) in 1962 permitted Indigenous people to vote in Federal elections, and the constitutional referendum in 1967 removed the restriction on the power of the Federal Government in relation to the enactment of legislation specifically affecting Aboriginal people and the exclusion of Aborigines from the census count. (Blackshield & Williams, 1998; 162: see also Chesterman & Galligan, 1997: Attwood & Markus, 2007) An increasing number and diversity of Aboriginal organisations, such as community councils, housing associations, progress associations, and co-operative societies were founded after this time. (Heatley, 1979)

The proliferation of Aboriginal strikes and protests, and their extension to determined campaigns for the recognition of land rights in the 1960s, culminated in the Bark Petition from the community at Yirrkala in 1963, leading to a parliamentary inquiry into mining operations in the area (and subsequently the first land rights case in Australia), and the Wave Hill dispute when the Gurindji walked off the Wave Hill cattle station and founded an autonomous community on adjacent land in 1966, demanding equal wages and land rights. This followed the Conciliation and Arbitration Commission determination of 1965 that the NT cattle industry must move towards equal wages for Aboriginal employees (though implementation was deferred for three years). (Wells, 1982: Keon-Cohen, 1980: Hookey, 1972: Rogers, 1973: Stevens (ed), 1972: Hardy, 1968: Lyon & Parsons, 1989: Gibb, 1971: Attwood, 2003) Although the Arbitration Commission ruling was technically a success for Aboriginal people, combined with the

increasing mechanisation of the cattle industry and improvements in infrastructure it substantially decreased the opportunities for employment on cattle stations, and the lack of employment and supplies subsequently forced many Aborigines resident on pastoral stations to move to settlements, missions or town camps. The period following the official adoption by the Federal Government of a policy recognising the Indigenous right of self-determination in 1972 is examined in most detail in the following chapters, corresponding temporally with the policy of conferring self-government on the NT.

### **Conceptual framework: The Indigenous right of self-determination**

In terms of the concept of the right of 'self-determination' in international law (in accordance with the United Nations Charter and Universal Declaration of Human Rights, International Covenant on Economic, Social and Economic Rights, International Covenant on Civil and Political Rights, and International Convention on the Elimination of All Forms of Racial Discrimination in particular):

In theory, it is possible to distinguish between 'external' self-determination – which means the act by which a people determines its future international status and liberates itself from alien rule [-] and internal self-determination which means, mainly, the selection of the desired system of government ... The right to internal self-determination is best viewed as entitling a people to chose its political allegiance, to influence the political order under which it lives, and to preserve its cultural, ethnic, historical or territorial identity...

[However, this] does not resolve the question of what constitutes the term 'a people' for the purposes of self-determination. Governments often have sought to narrow the definition of 'peoples' in order to limit the number of groups entitled to make a self-determination claim... Indigenous peoples are unquestionably peoples in every social, cultural and ethnological meaning of this term...

[The right of Indigenous peoples to self-determination] should ordinarily be interpreted as the right to negotiate freely these peoples' political status and representation in the State in which they live. This might best be described as a kind of belated State-building, through which indigenous peoples are able to join with all the other peoples that make up the State on mutually agreed and just terms, after many years of isolation and exclusion. I am not talking about the assimilation of individuals, as citizens like all others, but the recognition and

incorporation of distinct peoples in the fabric of the State, on agreed terms. (Daes, 1993a; 54-57; Daes, 1993b: see also e.g. Magallanes, 1999)

A fundamental aspect of recognising the Indigenous right of self-determination therefore is the right to negotiate their constitutional and political status to achieve status and representation within the institutions of the state, as well as to establish or maintain Indigenous institutions (as discussed in chapter 1). The importance of the distinction between the external and internal dimensions of the right of self-determination is also emphasised in the first annual report of the Aboriginal and Torres Strait Islander Social Justice Commissioner. (ATSISJC, 1993) Daes (1997, 1) states of the fundamental importance of the collective identity of Indigenous peoples as the basis of the right of self-determination and, consequently, for the principles and methods by which co-existence, mutual recognition and ongoing cooperation (co-management) between Indigenous and non-Indigenous institutions in areas of government subject to concurrent jurisdiction can occur: “The very concept of ‘indigenous’ embraces the notion of a distinct and separate culture and way of life, based upon long-held traditions and knowledge which are connected, fundamentally, to a specific territory.”<sup>72</sup>

The overall trend since the 1970s, in international law and institutions and in the Anglo-Commonwealth countries, has been towards greater recognition of the Indigenous right of self-determination, though subject to enormous differentiation amongst and within jurisdictions as well as temporal fluctuations. Nonetheless, Dodson argues that the recognition of Indigenous rights and development and implementation of policies of particular significance to Indigenous peoples in Australia during the 1980s and 1990s was in essence a policy decision and set of administrative arrangements of the Federal Government rather than recognition of the right of Australia’s Indigenous peoples to self-determination in the sense described above and that: “Accordingly, self-determination, considered as a component of the Commonwealth social justice policy, is not a matter of

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<sup>72</sup> The terms Indigenous people (as individuals) or peoples (as groups of people with distinct cultures and collective identity) are used in the thesis in the context of Australia-wide or international developments and topics. The terms Aboriginal people or peoples (or specific peoples – for example, the Aboriginal Land Commissioner commented that the claimants in the Jawoyn (Katherine Area) Land Claim “contend that the word ‘Jawoyn’ embraces a people, a language and a territory”: Kearney, 1988b; 7) are used when analysis is specific to the NT (as in these instances Torres Strait Islanders are not involved). (See also e.g. Cobo, 1986, quoted in Howitt *et al*, 1991; 11: Alfred, 1999: Alfred & Corntassel, 2005)

right: when finally reduced, it is a welfare measure directed at Aboriginal and Torres Strait Islander peoples.” (ATSISJC, 1993; 43) This argument is elaborated in an article written around the same time:

The rights based approach stands in contrast to the more common methodology adopted by governments, where policies concerning indigenous peoples are constructed on the basis of perceived need and comparative disadvantage... Whether the response be benevolent or withholding, our position as powerless recipients is subtly reinforced. By contrast, when we assert our entitlements, as we define them, we are reshaping not just specific responses but the power structure which has oppressed us...

Self-determination, the right to ‘freely determine ... political status and freely pursue economic, social and cultural development’ is held to be the most fundamental of our rights as peoples; the pillar on which all other rights rest; a right of such a profound nature that the integrity of all other rights depends on its observance...

[As Ghazali states]: ‘Self-determination is to peoples what freedom is to individuals ... the very basis of their existence’. (Dodson, 1994; 67-68)

As argued in the following chapters, the overwhelming weight of analytical opinion is in accordance with this interpretation of the fundamental basis and objectives of most of the regimes and policies of Commonwealth governments, i.e. that many policies and arrangements are constructed as conferrals of privileges and a measure of administrative ‘self-management’ rather than recognising entitlements in accordance with the Indigenous right of self-determination, and that the expansive definition of self-determination provides a more appropriate basis for relations between Indigenous and non-Indigenous Australians. Major obstacles to such recognition of the Indigenous right of self-determination are conceptual, ideological and pragmatic. As discussed in chapters 2 and 3, notwithstanding the federally structured system of government the influence of the concept of unitary and absolute Crown sovereignty (exercised by the ‘Crown in Parliament’) has been extremely influential at the level of each polity within the Commonwealth; although sovereignty is divided amongst the polities each Parliament

remains supreme within its prescribed constitutional sphere, and the Commonwealth Constitution provides a unitary and paramount source of sovereignty.<sup>73</sup>

The dominant political culture(s) and jurisprudence have made no effort to recognise the prior and concurrent sovereignty of Indigenous Australians (and associated right of self-determination) as such. Even though treaties were negotiated during the colonisation of Canada and New Zealand, similar conceptual and ideological barriers contributed to denial of the status and rights of Indigenous peoples for many years. McHugh (1999, 449-50) states of the prevailing concepts and objectives when the system of government of the Colony of New Zealand (which as noted in chapter 2 is much closer to the Westminster prototype) was founded by the British Parliament and ‘settlers’: “The division and limitation of sovereignty were notions that had been at the heart of the revolutionary experience in the USA. New Zealand, however, was influenced by a highly metropolitanised imperial momentum, which since the American Revolution had stressed the absolute supremacy of the Imperial Parliament.” Consequently, the combination of conceptual, ideological and pragmatic barriers to Indigenous self-determination has also been apparent in efforts to implement the principles of the Treaty of Waitangi.

Similar arguments have been made of developments in Canada, although significant progress has been made in establishing a more expansive interpretation of and basis for Indigenous self-determination in many areas since the mid-1990s in particular (by way of numerous constitutionally protected comprehensive land and self-government agreements). Prior to these developments (and arguably concurrently in areas where agreements have not been reached), Armitage (1995, 81-82) argues that the premises and objectives of Canadian Government policy remained essentially “the effective administrative/ bureaucratic management of First Nations Peoples” rather than cooperation to provide a viable basis for the exercise of Indigenous self-determination, whereby “limited functions are exercised by a local jurisdiction which lacks full fiscal autonomy and which is supervised by a senior level of government”. Although local and

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<sup>73</sup> As Dicey (1885, 144) stated of the subordination of ‘parliamentary sovereignty’ to the “Supreme law of the land” in federal systems of government: “every power, executive, legislative, or judicial, whether it belong to the nation or to the individual States, is subordinate to and controlled by the constitution... This doctrine of the supremacy of the constitution is familiar to every American, but in England even trained lawyers find a difficulty in following it out to its legitimate consequences.”

regional institutions provide an essential basis for and element of self-government by Indigenous peoples, their categorisation as ‘municipal’ rather than ‘self-government’ arrangements stems from their limited and subordinate powers and functions in which there have typically been few if any constitutional and legal constraints on regulation or intervention by Anglo-Commonwealth governments. (Loveday *et al*, 1989; 414) As O’Faircheallaigh (1996, 200) argues in relation to resource development, in many instances the time and resources of Indigenous peoples must be allocated amongst two distinct but complementary campaigns as:

The state obviously plays a crucial role in determining the negotiating power of indigenous people and their capacity to harness that power. The state creates the basic legal framework within which resource development takes place, and so plays a major role both in determining whether negotiations will occur and, if they do, the parameters within which they will be conducted...

Thus the challenge for indigenous people is both to maximise their negotiating position within any given set of parameters, and over the longer term to modify those parameters by bringing about favourable changes in state policy.

The struggle for recognition of the Indigenous right of self-determination can also be conceptualised as a distinct aspect of the world-wide struggle to achieve independence from imperial (and ‘neo-colonial’: Nkrumah, 1966) systems, as emphasis shifts from the de-colonisation of ‘nation-states’ (between the end of World War II and 1960s in particular) to de-colonisation within nation-states. Just as other cultural and ethnic minorities (and other marginalised groups) seek enhanced constitutional recognition and rights in the “politics of cultural recognition”, Indigenous peoples are “fighting to be recognised as First Nations in international law and in the constitutions of modern societies that have been imposed over them during the last five hundred years of European expansion and imperialism.” (Tully, 1995; 3)

The negotiation of treaties during the European colonisation of Canada and New Zealand has facilitated the introduction of a much higher minimum threshold of recognition and protection of Indigenous rights within the dominant society since the 1970s, reinforced by constitutional recognition of Indigenous rights in Canada since

1982. The barriers faced by Indigenous peoples attempting to exercise the right of self-determination within the dominant political and economic systems of the Commonwealth of Australia are compounded by the refusal or inability of courts and governments to acknowledge the broader definition of the right of self-determination as a conceptual basis for and long-term objective of the recognition of Indigenous rights. This limits the scope for and efficacy of attempts to jointly devise schemes to recognise and protect prior and concurrent Indigenous sovereignty by providing an adequate land and resource base and powers of self-government, and shielding Indigenous peoples and institutions from the whims of Commonwealth Parliaments and the ‘government of the day’.

The lack of recognition of the right of self-determination in these terms exacerbates and multiplies the difficulties of providing culturally appropriate mechanisms for mutual recognition and co-management stemming from the “incommensurability” (Mantziaris & Martin, 2000; 29-43) of Indigenous and non-Indigenous cultures, concepts and systems of government. For example, Christie and Perrett (1996, 58-59) state that for the Yolngu people of Northeast Arnhem, land, knowledge and perception, and the organisation of society generally, are:

immersed in a plethora of names which label constellations of alliances between significant entities in the Yolngu world – people, groups of people, totems, land and songs ... [that contribute to] a great plasticity in the constructions of Yolngu religious and political reality... Every Yolngu belongs to a clan or tribe or phratry or extended family group (Yolngu ways of naming groups defy English taxonomic classifications)... (See also Williams, 1987)

In further consideration of the necessarily artificial conceptual constructs designed to facilitate the co-existence of and mutual recognition by Indigenous and non-Indigenous institutions Daes suggests the concept of cultural heritage provides a useful starting point for mutual recognition, whereby:

heritage includes all expressions of the relationship between the people, their land and the other living beings and spirits which share the land, and is the basis for maintaining social, economic and diplomatic relationships - through sharing - with other peoples. All of the aspects of heritage are inter-related and cannot be separated from the traditional Territory of

the people concerned. What tangible and intangible items constitute the heritage of a particular indigenous people must be decided by the people themselves. (Quoted in Janke, 1998; 2-3: see also e.g. Williams, 1998: Howitt *et al* (eds), 1996)

Although the nature and combination of relevant factors vary considerably, numerous basic elements are likely to be of significance to Indigenous peoples in their efforts to establish and exercise the right of self-determination. As the dimensions of Indigenous self-determination and cultural heritage of most relevance to the thesis must be correlated with the concepts and system of government of the Commonwealth of Australia to the extent this is possible, for analytical purposes and in order to identify principles of and mechanisms for mutual recognition and co-management the concepts of the development of recognition space providing for mutual recognition of and by concurrent systems of law and government, and a strong legal carapace for Indigenous institutions and rights within which Indigenous domains can be consolidated, are used. In an analysis of the High Court's recognition of native title rights and interests at common law Pearson (1997, 154-55) argues:

Native title is, for want of a better formulation, the recognition space between the common law and the Aboriginal law which [is] now afforded recognition in particular circumstances. Adopting this concept allows us to see two systems of law running in relation to land... It is fictitious to assume that Aboriginal law is extinguished where the common law is unable to recognise that law.

Coombs (1994, 137) notes that as Indigenous organisations began to be formed in increasingly significant numbers Rowley (1971a, 1971b) argued that incorporation regimes could provide:

a 'carapace' within the protection of which Aboriginal groups could experiment the development of mechanisms which might enable them to devise an acceptable working relationship with white society... Incorporation gave to Aboriginal groups an identity within the Australian legal system and with it the potential for greater autonomy and future self-determination. (See also e.g. Weaver, 1983a, 1983b: Rowse, 1992: Rowse *et al* (eds), 1999)

The concept and objective of establishing strong legal and administrative carapaces within which Aboriginal systems of government and law (domains) can operate informed the development of the provisions of the Land Rights Act relating to the ownership and management of Aboriginal land,<sup>74</sup> and the drafting of the first legislation providing specifically for the incorporation of Indigenous organisations, the *Aboriginal Councils and Associations Act* 1976 (Cth). The preliminary inquiries and procedures establishing both of these regimes were commenced by the Federal Government following the election of Labor in 1972 as the policy of recognising the Indigenous right of self-determination was adopted; the policy implemented during this period remains the strongest affirmation of Indigenous rights made by a government of the Commonwealth of Australia. The legislative basis of the regimes was enacted by the Coalition Government following the 1975 Federal election; although the basis of Indigenous policy was redefined as ‘self-management’, both acts were substantially based on the interim regimes established by the previous government. Providing a strong legal and operational carapace for Indigenous organisations was identified as the primary objective of the incorporation regime, the Minister for Aboriginal Affairs (Ian Viner) stating in the second reading: “What is so important about this measure is that it will recognize cultural differences between the Aboriginal and non-Aboriginal societies and enable Aboriginal communities to develop legally recognisable form bodies which reflect their own culture and do not require them to subjugate this culture to overriding Western legal concepts.” (Quoted in Dalry, 1988: 11)

The combined concepts of recognition space for Indigenous domains within strong external carapaces guaranteeing Indigenous rights, institutions and operational autonomy are explored within the analytical categories of land rights and self government as two major aspects or sub-sets of Indigenous self-determination. Land rights regimes also provide a pivotal (though not always determinative) basis for the exercise of Indigenous rights pertaining to other natural resources; similarly, institutions of self-

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<sup>74</sup> Apparent in Woodward’s (1973, 1974) emphasis on the need for Land Councils to be independently funded and operationally autonomous, for all land use and natural resource management decisions on Aboriginal land to be made by traditional owners, and also in comments on the increasing number of incorporated associations formed by Aboriginal groups arguing for maximum discretion and flexibility for Indigenous institutions to develop their own alignments, structures and procedures.

government can provide a basis for more effective maintenance and protection of many aspects of Indigenous cultural heritage. Construed primarily as a legal concept to explain and assess the High Court's doctrine of native title (as stated in *Mabo v Queensland (No. 2)*<sup>75</sup>), the concept of recognition space can also be applied to the regimes providing for the incorporation of Indigenous organisations (Mantziaris & Martin, 2000), and is also useful to examine the basis and development of other regimes providing for concurrent Indigenous and non-Indigenous constitutional, political, administrative and economic systems and their interactions.

A feature of the increasing level of recognition of Indigenous rights in Australia, Canada and New Zealand has been the incremental development of stronger carapaces for Indigenous domains, and an increasing number of principles and mechanisms for mutual recognition and co-management of concurrent functions. Nonetheless, unequivocal recognition of the Indigenous right of self-determination stemming from prior and concurrent sovereignty requires a combination of 'devolution' (of power and authority) and 'decentralisation' (of administrative functions) from the central government(s), (Ward & Hayward, 1999) as well as the creation of constitutional space (carapaces) within which autonomous Indigenous institutions (domains) can function. As McNeil (2001, 214) argues of developments in Canada:

Decolonization of the Canadian Constitution therefore involves envisaging space for Aboriginal governments to exercise their inherent powers, which can be done by interpreting section 35(1) in an expansive way... Moreover, it empowers the Aboriginal peoples to take charge of their own communities at whatever pace they choose. Self-government is neither withheld from nor forced upon them... The process could be a step-by-step one, permitting an Aboriginal people to gain confidence and expertise in one area, before gradually extending its jurisdiction into other fields. This would allow for both stability and growth. But most importantly, it would provide a way to acknowledge immediately, without more constitutional haggling, that Aboriginal governments have a rightful place in the Canadian Constitution.

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<sup>75</sup> (1992) 175 CLR 1.

The provision of constitutional space can be reinforced by treaty(s); implementation may be facilitated by parliamentary, legal, administrative and property rights reform, the existing and potential roles of which are explored in the following chapters. In this sense Poynton (1996, 51) notes of the basis of constitutional pluralism within ‘the state’:

Diaz (1992) argues that with the establishment of autonomous territories for distinct peoples a state moves to a pluralist structure which explicitly recognises a distribution and decentralisation of political power, not merely a new administrative decentralisation. In effect, a distribution of legislative power, executive-administrative power and (at some levels) judicial power occurs. Diaz lists self-government, legislative autonomy, constitutionally declared autonomy and executive power, judicial autonomy, administrative and financial power, and separation of the autonomous from the central power hierarchies as the criteria for indigenous autonomy. He also states that central governments’ interference in autonomous governance must be minimal, and the right to impugn the powers or acts of the autonomous region ought to lie only in constitutional grounds before an appropriate constitutional tribunal.

As with the nature and scope of cultural heritage, the necessary elements and boundaries of the right of self-determination can only be effectively defined and exercised by each Indigenous people and ‘the state(s)’ by negotiated agreement in each instance. In this respect the Kalkaringi Statement (1998) currently provides the most comprehensive statement of the ‘inherent’ rights of the Aboriginal peoples of the NT,<sup>76</sup> a statement that builds upon the earlier Barunga Statement (1988) and Eva Valley Statement (1993). (ATSIC, 2001: Nettheim, 1999, 2001a) The Kalkaringi Statement was directed primarily at providing a clear Territory-wide identification of core terms and

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<sup>76</sup> A submission to a Canadian inquiry on Indigenous self-government stating the significance of this term is adopted for analytical purposes in the thesis: “The word ‘inherent’ connotes the notion of right[s] that can be recognized but not granted, rights that may be unlawfully violated but that can never be extinguished.” (Quoted in Morse, 1999; 23) Detailed consideration of the ‘inherent’ nature of these rights is beyond the scope of the thesis (see e.g. Grose, 1997); for present purposes the essential point is that Indigenous rights are inherent rather than contingent as they arise as a necessary adjunct of prior and concurrent sovereignty (see chapter 6) and the right of self-determination, and that in this sense many Indigenous rights in Australia are not recognised by Commonwealth governments and courts, and many of the rights that are recognised are inadequately protected by (and from) Commonwealth governments.

principles for the 1998 Statehood referendum and achieving recognition in the draft NT Constitution of Aboriginal law and systems of government, with many fundamental principles, objectives and minimal requirements for Indigenous consent identified.

Two independent constitutional congresses were held by Aboriginal peoples, prior to the referendum (at Kalkaringi in August) and subsequently (at Batchelor during November-December); the former resulted in the Kalkaringi Statement, the latter adopted and endorsed this statement and developed additional “Resolutions of the Northern Territory Aboriginal Nations on Standards for Constitutional Development”. The Kalkaringi Statement states in the “Introduction and General Principles”:

The Aboriginal Nations of the Northern Territory are governed by our own constitutions (being our systems of Aboriginal law and Aboriginal structures of law and governance, which have been in place since time immemorial). Our constitutions must be recognised on a basis of equality, co-existence and mutual respect with any constitution of the Northern Territory.

1. That we will withhold consent to the establishment of a new State until there are good faith negotiations between the Northern Territory Government and the freely chosen representatives of the Aboriginal peoples of the Northern Territory leading to a Constitution based upon equality, co-existence and mutual respect.
2. That the Northern Territory Government must provide adequate resources and negotiate in good faith a realistic timetable for such negotiations.

Other provisions of the Kalkaringi Statement demand appropriate constitutional recognition and protection of the right of the Aboriginal Nations of the NT to self-determination, including recognition of Aboriginal law as a source of law (including by way of research and negotiations to achieve a mutually acceptable basis for the recognition and concurrent operation of specific regimes such as Aboriginal and Commonwealth justice and family law systems), recognition of rights to land, waters and natural resources, and adequate protection of areas of major cultural significance and cultural and intellectual property. Furthermore, any constitutional amendments “which concern Aboriginal rights must be approved not only by a majority of electors at a referendum, but also by a majority of people of the Aboriginal nations of the Northern Territory”, and the Constitution “must provide effective mechanisms for the

accountability of government”, including a freedom of information regime (subsequently established by the NT Government in statutory form in 2002), the Auditor-General, Ombudsman, independent commission against corruption, electoral office, judicial and administrative review of government decisions, and procedures and standards for government tenders and procurement.

The referendum in the NT in 1998 therefore resulted in a clear statement of principles and preliminary terms for negotiations to provide constitutional recognition of and protection for the Aboriginal right of self-determination, as well as an opportunity to found a constitution on mutual recognition, respect and coexistence (though most principles and provisions of the Kalkaringi Statement were not included in the draft Constitution put to referendum, discussed in chapter 10). As noted in chapter 1, the Declaration on the Rights of Indigenous Peoples provides an authoritative (even though not legally binding) statement of and benchmark for the recognition of Indigenous rights at the international level. The crucial importance of adequately addressing the dispossession of land to the cultural and physical survival and wellbeing of the Aboriginal peoples of the NT was acknowledged by the Aboriginal Land Rights Commission (Woodward, 1973, 1974). Established to report on the recognition of land rights in the NT following the first land rights case in Australia (discussed in chapter 6), Woodward argued that each distinct Indigenous group should have access to and control over an adequate land base whether on the basis of traditional ownership or need. Peterson (1981, 3) subsequently elaborated on the argument that reducing the extensive and in many instances complete dispossession and marginalisation of Australia’s Indigenous peoples, and the associated loss of personal autonomy and collective self-determination, is a fundamental element of the wider objective of achieving a just basis for Indigenous – non-Indigenous relations:

Thus land rights concerns both property and political rights. Land rights movements seek to restore, to the greatest extent, the original rights ... with respect to both land and political autonomy. A further complication arises from the fact that, strictly speaking, it is not so much a matter of restoring particular old rights but of obtaining new rights, in an altered social and political context, that restore more abstract things such as economic and political autonomy, wealth and well being in the new situation.

Many (if not the overwhelming majority of) Indigenous advocates and other analysts accept this basic argument, notwithstanding many differences over the appropriate manner and form of principles and mechanisms to achieve this result, though the basic argument is not uncontested. (See e.g. Brunton, 1993; McRae *et al*, 1997; Hughes, 2007) Accommodating the Indigenous right of self-determination within the dominant system of government therefore includes recognising the right of each people to form their own system of self-government (analogous to the ‘domestic dependent nations’ concept underpinning the Marshall doctrine – see chapters 6 and 9), strong land rights regimes (including restoration of title to Indigenous territories to the greatest extent possible and control by traditional owners of all subsequent land use decisions affecting such lands and waters, as well as adequate forms of restitution or compensation, protection of cultural heritage areas and co-management regimes for land use planning and resource management in areas not restored to Indigenous ownership) and bicultural mechanisms or other co-management arrangements for all areas of government of mutual concern. The introduction and evolution of regimes intended to resolve these distinct but mutually reinforcing objectives and requirements in the NT are examined in the remainder of the thesis. Although much progress has been made to recognise and accommodate many of these principles and sets of rights within the Commonwealth systems of government since the 1970s (particularly in the NT) progress has been very uneven in different jurisdictions, and also within specific regions, agencies and regimes.

## **Conclusion**

This chapter has examined major developments in Indigenous – non-Indigenous (predominantly British and Commonwealth) relations in the NT prior to the conferral of self-government in 1978, and outlined the conceptual and analytical framework of the remainder of the thesis. Chapters 6 to 8 examine the types of institutional change that have resulted from the introduction of land rights regimes in the NT, as well as the basis and operation of several associated regimes (providing for the protection of cultural heritage areas and the co-management of land, waters and natural resources). Chapter 9 examines the regimes in the NT providing the basis for legal recognition of Indigenous institutions, and the basic types of Indigenous organisations that have been established to

provide legal recognition and operational capacity for the exercise of powers and functions by Indigenous institutions within the dominant society. The analysis considers how specific arrangements have developed within each regime, as well as how they might be extended or altered to extend and enhance the recognition of Indigenous rights (including by the adaptation of some of the basic principles and mechanisms of analogous regimes recognising Indigenous rights in Canada and New Zealand).

The final chapter locates the evolution of these regimes and specific developments within the context of overall progress made in the transition towards the de-colonisation of Indigenous peoples within the state (involving unequivocal recognition of prior and concurrent Indigenous sovereignty and the associated right of self-determination) in Australia. Chapter 10 also explores the types of arrangements that have been used to facilitate the transition towards a comprehensive constitutional and systemic basis for coexistence, mutual recognition and co-management in other jurisdictions in order to consider how this transition may further evolve in Australia. Topics considered in most detail are the importance and also the limitations of recognition in ‘organic’ law (treaties and constitutions), and the consolidation of Indigenous institutions and regional agreements to provide a more coherent and secure basis for mutual recognition and co-management – just as the right of self-determination provides the core conceptual basis for Indigenous rights, many analysts argue that negotiated agreements at the regional and local levels provide an essential basis for the exercise of that right.

## **Chapter 6**

### ***The basis and development of Indigenous land rights regimes***

#### **Introduction**

This chapter examines the basis and development of the various principles, structures and procedures by which Indigenous land rights have been recognised. The legal principles established by the ‘Marshall doctrine’, developed by Chief Justice Marshall of the U.S. Supreme Court in the 1820s and 1830s to define the status and rights of Indian Nations (as ‘domestic dependent nations’ with distinct rights to land and self-government), provide a useful basis for analysis and comparison of the nature and extent of the eventual recognition at common law of Indigenous rights in Australia, Canada and New Zealand. In addition to recognition at common law, other basic types of arrangements used to recognise Indigenous land (and other) rights in the U.S., Canada and New Zealand include treaties, constitutional provisions, and statutory and administrative regimes. Although a statutory land rights regime (the Land Rights Act) has been in place since the mid-1970s in the NT, at common law Indigenous land rights have been recognised by the High Court only since 1992 (following which the Federal Parliament enacted the *Native Title Act* 1993 (Cth) to provide a set of requirements and procedures for the recognition of land rights). Consequently (and also due to the absence of treaties between the ‘Crown’ and the Indigenous peoples of Australia during colonisation), statutory regimes provide the primary basis for and definitions of the scope of Indigenous land rights in Australia. Of these regimes, the Land Rights Act is examined in most detail.

#### **The recognition of land rights in the United States, Canada and New Zealand**

The prior and concurrent existence of Indigenous sovereignty was recognised in the early stages of European colonisation of North America, explicitly or by implication. Such recognition occurred by the negotiation of treaties in many areas of the U.S. and Canada and at common law in the U.S. from the 1820s. In addition, relations with Indigenous Nations within each country are a distinct constitutional topic subject to the exclusive power of the Federal Parliament. In terms of the overall timing and patterns of

colonisation and relations between Indigenous Nations and the colonising powers (in this instance Britain, France and Spain all had colonies for many years) in the U.S.:

Most commentators identify six major periods of American Indian policy: Discovery, Conquest and Treaty-Making [primarily from ‘discovery’ and the establishment of effective occupation by European powers until 1789]; Removal, Relocation and Reservations [similar to the policy of segregation in Australia, until 1871]; Allotment and Assimilation [until 1928]; Reorganisation and Self-Government [until 1943]; Termination [until the 1960s]; and Self-Determination. (Nettheim *et al*, 2002; 27)

The recognition of prior and concurrent Indigenous sovereignty and associated rights to land and self-government at common law was most emphatically and elaborately addressed in the U.S.: “It was in the United States that the common law first gave effect to the rights of the indigenous inhabitants of settled territories.” (Bartlett, 2000; 5) In a series of cases during the 1820s and 1830s Chief Justice Marshall of the Supreme Court stated the core elements for recognition of Indigenous peoples as “domestic dependent nations” by the common law with a distinct set of rights within their territories (including land rights - described as “Indian rights of occupancy” - and the right to self-government), subject to the paramount sovereignty of Congress; territorially defined boundaries, collective identity as a people, and the existence of an organised society and system of law formed the basis for common law recognition of those rights.<sup>77</sup> Describing the constitutional status of the Cherokee Nation as a domestic dependent nation with a distinct right to self-government in *Worcester v Georgia*, Marshall CJ stated that the Indian Nations are “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States”.<sup>78</sup>

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<sup>77</sup> *Johnson v McIntosh* 8 Wheat 543; 5 L Ed 681 (1823) at 693, *Cherokee Nation v Georgia* 5 Pet 1; 8 L Ed 25 (1831) and *Worcester v Georgia* 6 Pet 515 (1832).

<sup>78</sup> At 557. His Honour further stated (at 561) that the Cherokee Nation did not “surrender its independence – its right to self-government, by associating with a stronger [power], and taking its protection”, and that it comprises: “a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties, and with the acts of Congress.”

The Indigenous rights of occupancy and self-government could only be abrogated by the Sovereign of the relevant European nation upon discovery and settlement (and the U.S. Congress following the founding of the Republic): “That right, sometimes called Indian title and good against all but the Sovereign, could be terminated only by Sovereign act.”<sup>79</sup> Although these rights do not depend on recognition by legislation or treaty for their existence to be recognised at common law,<sup>80</sup> they required such measures to be effectual as colonial settlement spread and intensified throughout the 1800s. The protection provided for Indigenous rights at common law in the U.S. was substantially reduced between the 1850s and 1960s as the Marshall doctrine was substantially eroded by the ‘Congressional plenary doctrine’ and the delegation by the Congress to the States of substantial spheres of concurrent jurisdiction over functions affecting the territories and powers of self-government of Indian Nations. According to the Congressional plenary doctrine, the exercise of the exclusive and plenary power of the Congress over relations with Indians conferred by Article 1 of the Constitution (“To regulate Commerce with foreign nations, and among the several States, and with the Indian tribes”) was considered not to be subject to constraint or review by the courts:

Once the residual sovereignty of the Indian tribes had been recognised, the history of American Indian law in the courts subsequently became one of judicial containment. As the century progressed, it became plain ... that the vestigial sovereignty set out by the Marshall court was limited hierarchically as well as geographically. (McHugh, 1999; 451)<sup>81</sup>

Although common law recognition of Indian rights remained during the dominance of the Congressional plenary doctrine, there was limited protection against or procedural requirements pertaining to the expropriation or extinguishment of Indian title by the Federal Government for many years. The amount of Indian reservation land

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<sup>79</sup> White J, *Oneida Indian Nation v County of Oneida* 414 US 661 at 666 (1974).

<sup>80</sup> Where the requisite elements of the rights of occupancy are demonstrated, it is not essential to recognition at common law for the rights to “be based upon a treaty, statute or other formal government action”: *United States v Santa Fe Pacific Railroad Co* 314 US 339 at 347 (1941).

<sup>81</sup> Similarly, Poynton (1996, 45) comments that the judicial recognition of domestic dependent nation status in the 1820s and 1830s was “severely eroded by successive state and federal efforts to legislate it away, buy it, sell it, bureaucratise it, and expunge it from the jurisprudence in a variety of other ways”. (See also e.g. Williams, 1990; Wilkinson & Volkman, 1975; Getches, 2001; McHugh, 2004.)

dwindled rapidly between 1870 and 1930 due to a combination of expropriation and purchase (both of which were facilitated by the individualisation of Indian land tenure):

By 1881, Indian reservations amounted to 156 million acres. In 1887, the General Allotment Act 1887 (US) was passed to provide for the allotment of the communal lands to individual tribe members on the basis of 160 acres per head. The 'surplus' could be purchased by the federal government and sold to settlers. The policy was extended to most Indian reservations. Between 1887 and 1933, 86 million acres were opened for settlement and sale as 'surplus lands'. Commencing in 1902, restrictions on the alienation of allotted lands were removed. Between 1902 and 1933, 22 million acres of allotted land were sold. As a result, between 1887 and 1933 the area of Indian reservations was reduced from 156 million to 48 million acres. In 1936, the assimilationist policies of the allotment era were replaced by the policies of development, self determination and cultural plurality given expression in the Indian Reorganisation Act... (Bartlett, 2000; 538-39)<sup>82</sup>

The Supreme Court has continued to elaborate the status of Indian rights,<sup>83</sup> developing principles to define the concurrent powers of State Governments and the institutions of Indigenous Nations in relation to specific topics and guide the Federal Government in the exercise of powers affecting common law, statutory and treaty rights. (Getches *et al*, 1993: Vetter, 1994: Getches, 2001: McHugh, 2004) These principles include re-affirmation of the fiduciary nature of the relationship between Indian Nations and the Federal Government developed in the Marshall doctrine, and a requirement for compensation if Indian lands are expropriated (there is however no prohibition on such expropriation).<sup>84</sup> Nonetheless, unlike the status and implementation of treaties in international law 'Indian treaties' remain subject to the paramount legislative and executive authority of the Federal Government in the event of a clear and plain intention to alter their terms:

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<sup>82</sup> An Indian Claims Commission was established in 1946 to hear Indian claims for compensation for land taken without consent or for inadequate remuneration, and heard claims until 1978 when the remaining applications were transferred to the Court of Claims. (Bartlett, 2000; 537) By the 1990s the amount of Indian reservation land had increased slightly from the 1933 level to approximately 52.5 million acres.

<sup>83</sup> For example, in *McClanahan v Arizona Tax Commission* 411 US 164 (1973), *United States v Wheeler* 435 US 313 (1978), *Santa Clara Pueblo v Martinez* 436 US 49 (1978), and *Montana v Blackfeet* 472 US 759 (1984).

<sup>84</sup> *United States v Sioux Nation of Indians* 448 US 371 (1980).

United States' courts have developed rules of interpretation which, in case of doubt, favour the Indians. They also apply a presumption that Indian treaties are not abrogated by later treaties or legislation, unless it is clear that such abrogation was specifically intended. However, this last point underlines the vulnerability of Indian treaties - they are interpreted in the courts of one of the treaty parties, the United States, and they are capable of abrogation by the United States. (McRae *et al*, 1997; 148: see also Duthu, 1999)

Although the Marshall doctrine has had some influence on the recognition of Indigenous land rights at common law in Canada (referred to as 'Aboriginal title') since the 1970s, until *Campbell v British Columbia (Attorney General)*<sup>85</sup> (discussed below) this did not include common law recognition of a right to self-government. In New Zealand, the existence of similarly based and defined Maori rights (as manifestations of 'modified dominion') were recognised at common law soon after the founding of the British colony in *R v Symonds*,<sup>86</sup> however the common law recognition of Indigenous rights in early decisions was substantially nullified by subsequent decisions and the principles of the Treaty of Waitangi were further undermined by legislative and administrative regimes of the New Zealand Government. The early cases: "were benevolent in recognising customary rights unless they had been destroyed by statute. But they were followed by a series of cases which withheld recognition of such rights unless they had been confirmed by statute."<sup>87</sup> In *Wi Parata v the Bishop of Wellington*<sup>88</sup> (*Wi Parata*) Prendergast CJ of the Supreme Court overruled the decision in *R v Symonds*, stating that to the extent that the Maori signatories to the Treaty of Waitangi purported to cede sovereignty whilst retaining their rights to lands, resources and self-government:

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<sup>85</sup> (2000) 189 DLR (4th) 333.

<sup>86</sup> (1847) NZPCC 387. Chapman J (at 390), noting the decisions of the U.S. Supreme Court, stated: "Whatever may be the opinion of jurists as to the strength or weakness of the Native title, ... it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by with the consent of the Native occupiers. But for their protection and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive 'right', The Treaty of Waitangi confirmed by the Charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled." See also the *Kauwaeranga* case (1870) reported in (1984) 14 VUWLR 227 and *Re 'The London and Whittaker Claims Act 1871'* (1872) NZ 2 CA 41.

<sup>87</sup> Thomas J in *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 at 158.

<sup>88</sup> (1877) 3 NZ Jur (NS) 72 at 78, 79.

it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist ... [In] the case of primitive barbarians, the supreme executive Government ... of necessity must be the sole arbiter of its own justice ... [Furthermore, relations between the Crown and Maori are] acts of State, and therefore are not examinable by any Court...

In *Nireaha Tamaki v Baker*<sup>89</sup> the Privy Council stated of arguments based on the Supreme Court's decision in *Wi Parata* that neither the Treaty of Waitangi nor Maori customary law could be recognised by the court: "Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court." Notwithstanding this decision of the Privy Council, the principles established by the decision in *Wi Parata* prevailed into the 1980s; New Zealand courts denied legal recognition to the principles of the Treaty of Waitangi unless incorporated into legislation, amounting to "a judicial annihilation of Maori status and rights". (McHugh, 1999; 447) During this time the courts consistently held that to be recognised at common law, Maori rights required measures by the New Zealand Government explicitly establishing such rights.<sup>90</sup> It was not until several cases decided in 1986 and 1987 that the doctrine established in *Wi Parata* was overruled.<sup>91</sup>

In Canada also, despite limited recognition of Indigenous rights (pursuant to the Royal Proclamation of 1763) by the Privy Council in 1888<sup>92</sup> treaties and Indigenous rights generally were not recognised at common law until the 1970s:

Early in the nineteenth century, Canadian authorities took the view that relations between the Crown and tribes or bands were non-justiciable... The *Wi Parata*-like position taken by the courts was codified in the federal Indian Act ... This legislation vested such broad and

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<sup>89</sup> (1901) NZPCC 371 at 384.

<sup>90</sup> For example, in *Waipapakura v Hempton* (1914) 33 NZLR 1065, *Re the Bed of the Wanganui River* [1955] NZLR 419, and *Re the Ninety Mile Beach* [1963] NZLR 461.

<sup>91</sup> In *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 and *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

<sup>92</sup> *St Catherine's Milling and Lumber Co v R* (1888) 14 App Cas 46.

sweeping powers in the Crown over Indians and their land that any question as to the legal status of the tribes was silenced effectively for a century. (McHugh, 1999; 452)

Although treaties continued to be negotiated by the Federal Government into the early 1900s: “Aboriginal rights were considered a rather amorphous and general set of rights, which had only a marginal effect on government actions and probably applied only in certain regions of Canada”. (Asch, 1999; 430) As the final appellate court of both countries until well into the 1900s the Privy Council provided some resistance to the complete retraction of common law recognition of Indigenous rights in New Zealand and Canada,<sup>93</sup> but was far removed from legislative and administrative developments in the former colonies. As occurred in the U.S. (and in many cases by basically similar methods), there was a substantial reduction of the area recognised as Indigenous land pursuant to treaties in New Zealand and Canada during this time. In New Zealand, the persistent and multifaceted processes by which Maori land was alienated reduced the total amount from approximately 34 million acres in 1852 to 11 million acres in 1891, 7 million acres in 1911 and 4.7 million acres in 1920. (Havemann (ed), 1999; McHugh, 1991; Renwick (ed), 1991) The causes and extent of the Maori loss of land were examined in a National Overview Report commissioned by the Waitangi Tribunal. (Ward, 1997) After the extensive confiscation of Maori land during and following the Maori-Pakeha land wars:

The two major policies which had caused most harm were large scale Crown purchasing, and private and Crown purchases achieved after the Native Land Court had broken down tribal titles. Other harmful policies included public works takings, the removal of ownership over foreshores and waterways, and incremental loss of land through the imposition and enforcement of rates demands on unused land. (Bennion, 2001; 368)

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<sup>93</sup> Including the two cases appealed from the Canadian and New Zealand courts noted above. The decisions of the Privy Council on the rights of the native inhabitants of British colonies in Africa, e.g. in *Re Southern Rhodesia* [1919] AC 211, *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 and *Adeyinka Oyekan v Adele* [1957] 2 All ER 785, have also been influential on the jurisprudence of native title in the Anglo-Commonwealth countries. (Havemann (ed), 1999; McNeil, 1989)

These encroachments were judicially facilitated and validated by repudiation of the principles of the Treaty of Waitangi as giving rise to legal rights binding on the Crown. In Canada, alienation was often effected by confining Indigenous peoples to small reservations and either treating the remainder of Indigenous territories as vacant Crown land or ‘purchasing’ them at very low prices. (Coates, 1999: Miller, 1990) As noted above, after long periods of judicial nullification the recognition of Indigenous rights was subsequently revived, from the 1970s in Canada and the mid-1980s in New Zealand (following the establishment of the Waitangi Tribunal by the *Treaty of Waitangi Act* 1975 (NZ)). Indigenous rights have been confirmed as existing at common law irrespective of the negotiation of treaties or legislative recognition of and provision for the exercise and enforcement of those rights (albeit susceptible to abrogation), a matter of particular significance in Australia.<sup>94</sup> Nonetheless, the courts of both countries have struggled to find a place for the treaties, and Indigenous rights more generally, within the jurisprudence: “An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.”<sup>95</sup>

With the revival of common law recognition the existence of treaties in both countries provides a stronger and more coherent basis for the definition and protection of Indigenous rights against essentially arbitrary (unilateral) legislative and executive encroachment than in Australia, particularly in Canada where the Aboriginal and treaty rights of the First Nations have been protected by the Constitution since 1982 (see chapter 2). Nonetheless, procedural limitations pertaining to the implementation of these treaties are similar to those in the U.S., though the treaties completed in Canada are reinforced by explicit constitutional protection (unlike the situation in the U.S., in which jurisdiction over treaties with Indian Nations is vested in the Federal Government but no provision is made to guarantee those rights), providing an extra layer of protection against legislative and executive encroachment. While Indigenous rights ultimately remain subject to unilateral abrogation by the Crown (the Federal Government) in the

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<sup>94</sup> For example, by the Supreme Court of Canada in *Calder v Attorney-General (British Columbia)* (1973) 34 DLR (3d) 145, *Guerin v R* (1985) 13 DLR (4th) 321, *R v Sparrow* (1990) 70 DLR (4th) 385 and *Delgamuukw v British Columbia* [1997] 3 SCR 1010, and by the courts of New Zealand in *Te Runangao Muriwhenua Inc v Attorney-General* [1990] NZLR 641, *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 and *Attorney-General v Ngati Apa* [2003] 3 NZLR 643.

<sup>95</sup> *Simon v R* [1985] 24 DLR (4th) 390 at 404.

event of a clear and plain intention to regulate or extinguish them, the level of protection provided by the combination of treaties and constitutional provisions is probably the most that can be obtained within the institutions of the state of the dominant society.

The revival of common law recognition of Indigenous rights in the cases referred to above has also established much more substantial limits on, and procedural requirements for the exercise of, powers and functions by the Canadian and New Zealand Governments affecting those rights than the common law of Australia. These include the development of principles acknowledging that the dominant position of the settler states entails a fiduciary duty in dealings with Indigenous peoples, a duty to consult and negotiate in good faith in respect of matters of particular significance to those people(s), and that the extinguishment or regulation of Indigenous rights requires a clear and plain legislative intention to effect such extinguishment. These common law rights are reinforced in Canada by a “justificatory test” (i.e. that the measure is necessary to achieve a legitimate objective, consultation has occurred, and every effort has been made to reduce the impairment of affected Indigenous rights)<sup>96</sup> and constitutional protection (which has also increased the scope for the further development of such rights). (McNeil, 2001: Syme, 2000: Lokan, 1999)

In New Zealand the level of protection provided by the common law is reinforced by an obligation on behalf of the Crown to ensure the “active protection” of Maori rights and interests in decisions of particular significance to them,<sup>97</sup> invocation of the principles of the Treaty of Waitangi in many statutes, and also by several forms of quasi-constitutional protection (such as by requiring consultation in land use planning and development decisions, and treating the Treaty of Waitangi as a relevant consideration to be taken into account by decision-makers for the purposes of administrative law).<sup>98</sup> As noted in chapter 2, New Zealand does not have a constitution in the sense of a founding document that cannot be altered by the legislature in the usual manner for enacting legislation. Perhaps for this reason, and also out of pragmatism, the jurisprudence of New Zealand pertaining to the recognition of Maori rights, at common law and stemming

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<sup>96</sup> *R v Sparrow* (1990) 70 DLR (4th) 385.

<sup>97</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

<sup>98</sup> *Wellington International Airport v Air New Zealand* [1991] 1 NZLR 623, *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

directly from the Treaty of Waitangi, has involved a unique blending of public and private law principles emphasising principles such as partnership and a duty to negotiate in good faith. (McHugh, 1999, 2004: Williams, 2004: Palmer, 2001: Durie, 2005)

Of the Anglo-Commonwealth countries, most progress towards recognising and providing secure forms of recognition space for Indigenous institutions has occurred in Canada. In *Campbell v British Columbia (Attorney General)*<sup>99</sup> the British Columbia Supreme Court held that Aboriginal title includes the right to maintain political institutions, and where provisions providing for self-government have been provided for in comprehensive settlements these are also afforded constitutional protection. (Morse 2004: Palmer & Tehan, 2006)<sup>100</sup> Although litigation of many aspects of Indigenous rights has continued in Canada, negotiation has also been a prominent feature since common law recognition of Aboriginal title: “The Canadian government might have opted for a legislative response to [the majority decision of the Supreme Court in] *Calder*, or to fight it out case-by-case in the courts. Instead, it put negotiation at the centre of its response, introducing what became known as the Comprehensive Claims policy.” (Brennan *et al*, 2005; 91) Following the constitutional amendment ‘patriating’ the Canadian Constitution and introducing a provision recognising and guaranteeing Aboriginal and treaty rights in 1982 (see chapter 2), a House of Commons Special Committee on Indian Self-Government was established by the Federal Parliament in 1983. The committee consisted of three Members of Parliament and three (non-voting) representatives of First Nations, and recommended the recognition of the institutions of Indian First Nations as a “distinct order of government in Canada”. (Armitage, 1995; 81) Following the rejection of a wide-ranging package of constitutional amendments negotiated by the Federal and Provincial Governments and Indigenous representatives (the ‘Charlottetown Accord’) by a referendum held in 1992 emphasis again turned to achieving political and legal recognition of the right to self-government and the negotiation of specific agreements. (Hylton (ed), 1999)

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<sup>99</sup> (2000) 189 DLR (4th) 333.

<sup>100</sup> The Maori right to self-government has not been directly considered by the courts in New Zealand, but some Maori institutions have been established by legislation (i.e. in the legal form of statutory authorities) and the capacity of many others have been significantly enhanced following negotiated agreements since the 1990s (see chapters 9 and 10).

A Royal Commission on Aboriginal Peoples was formed between 1991 and 1996 to inquire into and make recommendations on factors and principles underpinning comprehensive settlement negotiations and other matters of particular significance to Indigenous – non-Indigenous relations, consisting of seven commissioners (of whom four were Indigenous). The Royal Commission (1993b) stated “that as a matter of law and as a matter of proper public policy the inherent right of self-government already existed within section 35 of the Constitution, and that negotiations should be commenced immediately to implement that right.” The report described acceptance of the right of self-government as “the potential turning point in modern Aboriginal history”. (Quoted in Morse, 1999; 26) The topic of Aboriginal self-government was examined in more detail in subsequent reports: other reports examined Aboriginal peoples and the justice system, (RCAP, 1993a, 1996a) and basic principles and options for negotiations between First Nations and Federal and Provincial Governments (including several reviews of progress made in negotiations). (RCAP, 1993b, 1995a, 1995b)

In 1995 the Federal Government adopted a new policy basis with several major changes, including discontinuing the linkage of negotiations and measures pertaining to Indigenous self-government from the broader constitutional reform process, and accepting that the Aboriginal right to self-government is protected by s. 35 of the Constitution; henceforth, in the conduct of self-government negotiations the Federal Government “would acknowledge that Aboriginal peoples have the right to decide matters ‘internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationships to their land and their resources.’” (Quoted in Morse, 1999; 28) This permitted a fundamental shift in the basis and terms of negotiations, following which the “central objective of negotiations is to reach negotiated positions on [location and function specific elements of the right to] self-government” rather than await a conclusive “national, standard, abstract definition of the inherent right.” (Morse, 1999; 31) The level and nature of recognition of several sets of Indigenous rights in New Zealand and Canada is considered further in the following chapters.

## The recognition of Indigenous land rights in Australia

The influence of common law recognition of prior and concurrent Indigenous sovereignty by the U.S. Supreme Court was apparent in at least one contemporary judicial decision in Australia,<sup>101</sup> but was promptly expunged from the jurisprudence by generations of legal and political assertions and assumptions of *terra nullius*. The legal fiction of the founding of British colonies in Australia by the ‘discovery’ and ‘settlement’ of uninhabited areas was not contested in the dominant discourses until the 1970s. Consequently, in the first land rights case in Australia<sup>102</sup> Blackburn J held that the doctrine of native title could not be recognised by the common law, and stated that even if native title had been capable of such recognition it had been extinguished throughout Australia by the British assertion of sovereignty. Blackburn J further stated that even if native title could be recognised and had not been extinguished, although the evidence of the plaintiffs demonstrated an extremely sophisticated system of laws and form of social organisation the existence of distinctive proprietary rights as such had not been established. (Hookey, 1972: Bartlett, 2000)

Each of the findings and conclusions precluding the recognition of native title was overturned or distinguished by the High Court in *Mabo v Queensland (No. 2)*.<sup>103</sup> In considering the manner in which Australia was acquired by the British Crown,<sup>104</sup> Brennan J (at 36) commented that the principles of international law had been applied in the municipal law of Australia as an “enlarged notion of terra nullius”:

The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of the municipal law that territory (though inhabited) could be treated as a ‘desert uninhabited’ country. The hypothesis being that there was no local law already in existence in the territory the law of England became the law of the territory (and

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<sup>101</sup> The decision of Willis J in *R v Bon Jon, Port Phillip Gazette*, 18 September 1841, which acknowledged that until and unless otherwise provided for Aborigines were entitled to govern relations amongst themselves “as distinct, though dependent tribes”: “It seemed that Bon Jon was successfully buried in 1841, for it was never officially reported.” (Poynton, 1996: 46)

<sup>102</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

<sup>103</sup> (1992) 175 CLR 1.

<sup>104</sup> In terms of categorising the acquisition of territories by European nations as the ‘settlement’ of uninhabited or uncultivated territories, or by the conquest of or formal cession by native inhabitants: the analysis and statements of principles of De Vattel (1760) and Blackstone (1765), as influential scholars of these matters at the time, have been of particular significance to subsequent discourses in the Anglo-Commonwealth countries. (McNeil, 1989: McHugh, 1991: McRae *et al*, 1997)

not merely the personal law of the colonists [as in ‘conquered’ colonies]). Colonies of this kind were called “settled colonies”. Ex hypothesi the indigenous inhabitants of a settled colony had no recognized sovereign, else the territory could have been acquired only by conquest or cession. The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organization.

Although as in other jurisdictions the court could not review the validity of the assertion of sovereignty by the Crown, it could consider the legal principles underpinning and implications of that assertion. The High Court didn’t directly contest the legal fiction that the colonies of Australia were ‘settled’ rather than ‘conquered’, but a majority held that native title rights could subsist nonetheless. According to all members of the court except Dawson J the survival of ‘native title’ rights to land were possible in this instance as although the ‘radical title’ to all land vested in the British Crown with the assertion of sovereignty, the common law doctrine of native title provides an exception to the doctrine of Crown tenure (that all land title derives from the Crown). According to this interpretation, ‘beneficial title’ to the land and associated native title rights remained with Indigenous peoples following the assertion of sovereignty unless a “clear and plain” legislative or executive intention to extinguish those rights could be demonstrated (such as by a grant of land conferring a right to exclusive possession). The High Court therefore rejected “the notion of *terra nullius* [but] did not challenge the legitimacy or the nature of the acquisition of the traditional land of the Aboriginal people, or their sovereignty over that land.” (Bartlett, 1999; 412) Instead of reconsidering the assumption that Australia was conquered rather than settled, Brennan J (at 41) stated that “the preferable rule *equates* the Indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land”.

A majority (Mason CJ and McHugh J, Brennan J concurring,<sup>105</sup> Dawson J reaching the same conclusion on different grounds) concluded that neither Indigenous consent to nor compensation for extinguishment was necessary for such extinguishment to be valid (whether effected by legislative or executive actions and grants inconsistent

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<sup>105</sup> Although Brennan J did not address the question of compensation in detail, his Honour apparently accepted the additional statements of Mason CJ and McHugh J on the matter of compensation: compare e.g. Bartlett, 2000; McNeil, 2001.

with native title). Deane, Gaudron and Toohey JJ concluded that compensation would be required for the extinguishment of native title to be valid following the enactment of the *Racial Discrimination Act 1975* (Cth) (in accordance with the terms of that legislation prohibiting racial discrimination and s. 51(xxxi) of the Commonwealth Constitution, the latter requiring just terms compensation for the acquisition of property by the Federal Government). The recognition of native title at common law was substantively and procedurally codified in the *Native Title Act 1993* (Cth), a statutory regime providing legal principles and procedural requirements with which certain Federal and State Government land use decisions, and concurrent State-based native title regimes, must comply to be valid (pursuant to the paramount operation of Federal legislation in the event of inconsistency as provided by s. 109 of the Constitution). (See e.g. Stephenson & Ratnapala (eds), 1993: Stephenson (ed), 1995: Goot & Rowse (eds), 1994: Attwood (ed), 1996: Brennan, 1995a, 1995b: Horrigan & Young (eds), 1997)

In an analysis of developments in the jurisprudence of Canada pertaining to the legal status of the First Nations McNeil (2002, 486-87) argues that:

While their communal title obviously has a proprietary aspect, it also has social, cultural and political dimensions that are beyond the scope of standard conceptions of private property... [Aboriginal Nations] cannot be equated with natural persons or private corporations. Nor are they like municipal corporations, which are created by statute. Their legal personality, like that of the Crown itself, is both inherent and public, arising from their existence as nations, and it includes political authority.

Notwithstanding the requirement that native title must be based on and exercised in accordance with the “traditional law and custom” of each Indigenous people asserting such collective identity and rights, the High Court has not recognised the right to maintain political institutions of self-government on Indigenous territories and amongst the members of each people.<sup>106</sup> Emerging forms of Indigenous self-government in Australia (examined in chapter 9) remain constrained by the legal and organisational form and status of voluntary associations, corporations and municipal (local government)

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<sup>106</sup> *Coe v Commonwealth* (1979) 53 ALJR 403, *Coe v Commonwealth (No 2)* (1993) 118 ALR 193, *Walker v New South Wales* (1994) 182 CLR 45. (Flynn & Stanton, 1997)

councils. As Reynolds (1999, 139) states of the extremely significant but nonetheless fragile and limited recognition of native title rights by the High Court in Australia and the continuing refusal to acknowledge even a limited right of self-government: “Property law could be revised, but the question of sovereignty was too important to the whole legal system to be questioned.”

Due to the absence of treaties and civil rights all Indigenous reserves in Australia until 1966 were essentially a distinct form of Crown land reserved for a specific public purpose (the segregation and ‘protection’ of Aborigines), established, altered and revoked by executive instruments (in the NT most were established and administered pursuant to statutory powers contained in the *Aboriginals Ordinance* 1918 (NT)). The first legislation in Australia to provide for a limited set of Indigenous land rights was the *Aboriginal Lands Trust Act* 1966 (SA), creating an Aboriginal Lands Trust to hold title to and manage several small Aboriginal reserves. Although the legislation recognised Aboriginal ownership of the relevant areas, land ownership and limited powers of management were “vested in an appointed State-wide body, not the local communities”; the communities on the reserves are however managed by Aboriginal Councils with limited local government-type powers and functions. (McRae *et al*, 1997; 192; Brock, 1995) South Australia also recognised Aboriginal ownership of, and provided a comprehensive legislative regime for the management of, two large areas in the north and west of the State in 1981 and 1984.<sup>107</sup> Of the other regimes established in Australia to provide for the recognition of land rights in some way prior to and immediately following the enactment of the Native Title Act:

The remaining Aboriginal reserves formed the basis for the Aboriginal land rights legislation in New South Wales (1983), Victoria (1987), Queensland (1991), and Tasmania (1995). But the area of land remaining [as Aboriginal reserves] was very small indeed. In some recognition of the small area involved, limited provision was made for claiming additional land under the legislation of New South Wales and Queensland. (Bartlett, 1999; 411)<sup>108</sup>

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<sup>107</sup> By the *Pitjantjatjara Land Rights Act* 1981 (SA) and *Maralinga Land Rights Act* 1984 (SA).

<sup>108</sup> Other statutory land rights regimes include the *Native Title (South Australia) Act* 1994 (SA), *Aboriginal Land Rights Act* 1983 (NSW), *Aboriginal Lands Act* 1970 (Vic), *Aboriginal Land (Lake Condah and Framlingham Forest) Act* 1987 (Cth), *Aboriginal Lands Act* 1991 (Vic), *Aboriginal Land Act* 1991 (Qld) and *Aboriginal Land Act* 1995 (Tas).

## **The Land Rights Act**

The recognition of Indigenous land rights by a government of the Commonwealth of Australia based on and intended to be substantially in accordance with Aboriginal systems of law and land tenure first occurred in the NT, following the election of the Labor party to Federal Government in 1972 after over twenty years of Coalition Government. The recognition of Aboriginal land rights has been incorporated into Commonwealth laws of the NT in three primary ways: the commissioning of an inquiry into the recognition of Aboriginal land rights in the NT (Woodward, 1973, 1974) and associated requirements for implementation (resulting in the Land Rights Act, which transferred existing Aboriginal reserves to traditional Aboriginal owners and established a land claim procedure and institutions for the management of Aboriginal land); the establishment of regimes to provide for the recognition and protection of cultural heritage areas of particular significance (including the Land Rights Act, a ‘reciprocal’ regime established by the NT Government in 1979, and a concurrent Federal Government regime established in 1984); and, by the recognition of native title rights and interests by the High Court in 1992 and subsequent enactment of the Native Title Act. In addition, since the 1980s there has been a formal scheme to provide for ‘community living areas’ on pastoral leases, though this regime is not based specifically or implicitly on land tenure and rights in accordance with Aboriginal systems of law and government.<sup>109</sup>

The recommendations of the second report of the Aboriginal Land Rights Commission (Woodward, 1974) formed the structural and conceptual basis of the Land Rights Act enacted in 1976, widely considered to represent the strongest form of, and benchmark for, recognition and protection of the rights and interests of Indigenous peoples to land in Australia. (See e.g. McRae *et al*, 1997; Nettheim *et al*, 2002; Yunupingu (ed), 1997; Neate, 1995)<sup>110</sup> This is due to many factors including the large proportion of the Territory that has been restored to Aboriginal ownership pursuant to the Act, a high level of control over all major land use and development activities on

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<sup>109</sup> The term traditional owners, commonly used in the NT, is used in the thesis to refer to Aboriginal owners and custodians of specific areas according to Aboriginal law; the terms traditional Aboriginal owners or native title holders may be used when discussing the recognition and exercise of specific rights and interests pursuant to the Land Rights Act and Native Title Act.

Aboriginal land, and strong protection of the rights of traditional Aboriginal owners against legislative or executive encroachment by the NT Government and, to a lesser though still significant extent, the Federal Government.

The Act establishes the office of the Aboriginal Land Commissioner (referred to as the Commissioner in the following chapters) to conduct land claim proceedings, and a system of (pan-)regional Aboriginal Land Councils and local Land Trusts to hold title to and administer Aboriginal land. There has generally been slow but steady progress in the hearing of land claims, with several completed each year. By the time the Reeves report was completed in 1998 almost 43% of the NT had been granted to traditional Aboriginal owners under the Land Rights Act (approximately 19% consisting of former Aboriginal reserves granted in the late 1970s without the need for land claim hearings by the Commissioner). Nonetheless, although the Act had been operative for over twenty years there were still over one hundred outstanding land claims as of 1998 (affecting approximately 10% of area of the NT), mainly consisting of various forms of Crown land including beds and banks of rivers, stock routes and reserves, the inter-tidal zone and areas held by two statutory authorities ('Land Corporations') established by the NT Government.<sup>111</sup>

The large number of outstanding land claims as of 1998 was due to many factors including the large amount of work that must go into the preparation and hearing of each claim, the frequency of legal challenges to land claims, uncertainties arising from some extremely complicated (and in at least some instances unconstitutional) forms of land administration used by the NT Government, and the introduction of a 'sunset clause' by the Federal Government in 1987 (s. 50(2A)), which together with the other factors resulted in over eighty claims being lodged immediately prior to the 5 June 1997 deadline for the lodging of applications. While Woodward (1974, 136-37) recommended that

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<sup>110</sup> The rights of the traditional owners of the Pitjantjatjara and Maralinga lands in South Australia are also strongly protected compared to the level of protection available under other land rights regimes in Australia. (Tehan, 1993)

<sup>111</sup> At the time the Reeves report was completed there were 112 outstanding claims, including 49 involving marine, intertidal and aquatic areas, with many others involving lands vested in or leased to the Conservation Land Corporation and/ or Northern Territory Land Corporation (affecting 21 and 33 land claims respectively). Many of these have since been heard by the Commissioner, or removed from the land claims register by an amendment to the Land Rights Act in 2006. (Reeves, 1998; chapter 11, Appendix J. See also ALC, 1998-2002: Olney, 2002a, 2002b, 2002c, 2003a, 2003b, 2003c)

regular review and assessment of the implementation of the Act should be jointly conducted by the Federal Government and Land Councils every seven years, they have instead occurred sporadically upon the referral of a specific commission and terms of reference to a third party by the Federal Government. There have been four formal reviews of the operation of the Land Rights Act, a review by Rowland in 1980, a comprehensive review by Toohey in 1983 (released in 1984), a review by Altman of the Aboriginals Benefits Trust Account and related financial matters in 1985, and a comprehensive review by Reeves in 1998. In addition, a comprehensive analysis of the legal provisions and operation of the Act was completed by Neate in 1989. The analysis and recommendations of the various reviews are considered in more detail as relevant in the following chapters.

The Northern Land Council (NLC) and Central Land Council (CLC) have major roles in land and natural resource management in the NT, and have also been prominent participants in the politics of the NT since the conferral of self-government. Reeves (1998, 94) notes that the functions of Land Councils include “to variously ascertain and express the wishes of, protect the interests of, represent, advise, consult, supervise and assist traditional Aboriginal owners, other Aboriginal people and Aboriginal Land Trusts in relation to their interests in Aboriginal land and legislation concerning it”. Although the Land Councils are created by and ultimately subject to Commonwealth law, to the significant extent that a form of recognition space with a strong protective carapace has been established for Aboriginal land and the associated decision-making and administrative domains within which Aboriginal law and custom can operate, many powers and functions imperative to Indigenous self-determination can be exercised.

The Department of Aboriginal Affairs (itself recently established) was largely responsible for organising the first meetings of the Land Councils in 1974 and 1975; by the end of 1975 interim elections had been held by delegates from Aboriginal communities in the CLC region and the meetings had “transformed the CLC into an independent Aboriginal organisation controlled by delegates representing communities throughout the region.” (Ross, in CLC, 1994; vii: see also Peterson & Langton (eds), 1983: Wright (ed), 1998: Toohey, 1984) There was therefore already considerable progress in representation and organisation by the time the first meeting after the

commencement of the Land Rights Act was held in February 1977 to formally elect a Full Council (with almost seventy members) responsible for determining strategy and major operational decisions.<sup>112</sup> As of 1998 there were 83 members on the Full Council of the CLC and 78 on that of the NLC, each of which “normally meets three or four times a year to determine policy which directs the work of staff, and review and ratify agreements between local landowners and developers wanting to use Aboriginal land. Executive meetings are held in between Council meetings.” (CLC & NLC, 1995; 11)

In addition to elections for the Full Councils every three years: “The Central Land Council is made up of eight regions and each region elects a representative to the CLC Executive. Three other executive members – the Chairman, Deputy Chairman and one extra member – are elected from the whole of the Council.” (CLC, 1994; 8) The Executive of the NLC consists of a member from each of the seven NLC regions, and a Chairman and Deputy Chairman elected from the Full Council. The NLC and CLC have also established regional offices, and regional councils that usually meet several times a year to separately consider matters of regional significance. (NLC, 2003) There are some differences in the organisational and operational emphasis of the two larger Land Councils, and frequently “they cannot operate as a single issue lobby group because a great heterogeneity exists in their constituencies”. (Altman, 1988; 81) The Tiwi Land Council and Anindilyakwa Land Council, established in 1978 and 1991 respectively by the traditional owners of islands adjacent to the NT, are also formed pursuant to the Land Rights Act. “While the Tiwi and Anindilyakwa Land Councils have the same statutory functions, their considerably smaller land areas and populations ... means that their structure and operation differs in some ways from the Central and Northern Land Councils.” (CLC & NLC 1995; 9)

Although the Land Councils are not subject to direction by the responsible Federal Minister in the performance of their statutory functions, there are important aspects of the Land Rights Act that are subject to the discretion of the Minister, such as

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<sup>112</sup> According to s. 31 the “members of a Land Council shall be Aboriginals living in the area of the Land Council, or whose names are set out in the register maintained by the Land Council ..., chosen by Aboriginals living in the area of the Land Council in accordance with such method or methods of choice ... as is, or are, approved by the Minister”. Although there is also considerable structural and procedural flexibility as to the conduct of meetings, questions arising must be decided by majority vote.

making the final decision on land claims heard by the Commissioner, appointing the Commissioner and deciding the timing and terms of reference of reviews of the Act, and approving long-term leases on Aboriginal land. (Reeves, 1998: Rowse *et al* (eds), 1999: Toohey, 1984) As statutory authorities (as discussed in chapter 4) created by Federal legislation, all of the Land Councils are subject to the jurisdiction of the Auditor-General and the financial management and accountability provisions of the *Commonwealth Authorities and Companies Act 1997* (Cth) and must also comply with the separate administrative and reporting requirements of the Land Rights Act and Native Title Act.

While there have been frequent amendments to the Land Rights Act, the Federal Government has not generally intervened in the organisational and operational details of the Land Councils. (Neate, 1989) The rights and interests recognised by the Land Rights Act have remained as a strong carapace or “legal protective shell around Aboriginal land” (Peterson, 1999; 25) for the geographic, decision-making and administrative domains of traditional Aboriginal owners against incursion by NT and Federal Governments. (Rowse, 1992: Rowse *et al* (eds), 1999) This protection extends to all decisions affecting Aboriginal land and the policy decisions, operational management and fiscal autonomy of the Land Councils, which although subject to Ministerial discretion in some instances remains substantial: “It is particularly significant that the Act established a funding mechanism which provides land councils with substantial financial independence and a consequent high degree of political autonomy.” (Altman, 1988; 79) Nettheim, Meyers and Craig (2002, 244) also note that the Land Councils have had a significant impact both within the NT and nationally: “The NLC and CLC have become major players not just in the Northern Territory struggle for land rights but also in the national campaign... [They] have been able to challenge the decisions of both the Northern Territory and the federal governments legally and politically.”

### **Land rights and natural resource management regimes in the NT**

Notwithstanding the subsequent passage of the Self-Government Act establishing the Northern Territory of Australia as a separate polity, the Land Rights Act continues to provide the primary legal basis for land and natural resource management in many areas of the NT, directly and indirectly. Many of the administrative arrangements and methods established by the NT Government shortly after the conferral of self-government were to

greater or lesser degree a direct response to the ‘constitutional’ limitations of the Land Rights Act, and all land, natural resource and environmental regimes of the NT Government are operative on Aboriginal land held pursuant to the Act only to the extent that they are consistent with the statutory rights and interests of traditional Aboriginal owners (s. 74).<sup>113</sup> The aggressive ‘developmentalism’ of the CLP, and the strong protection the Land Right Act provides for the rights and interests of Aboriginal people over land held under that Act, “resulted in CLP governments being the natural adversary of the land rights legislation.” (Altman & Dillon, 1988; 132-33) Several years after the commencement of the Self-Government Act Perkins (in Jaensch & Loveday (eds), 1981) described the NT Government’s constant legal, political and administrative challenges to land claims as a “war of attrition” against the rights of traditional owners. By that time two land rights cases had been heard before the High Court; by 1985 five more cases had been determined by the High Court.<sup>114</sup> At times tenuous legal arguments were proffered by the NT Government in a large number of cases contesting land claims, attempting to establish principles and interpretations that would minimise the area potentially subject to claim. In a review of the Land Rights Act Fletcher (1998; viii, 4) stated:

The amount actually spent by governments to challenge land claims is a hidden component of government... The Land Councils also incur costs: for example, the Northern Land Council (NLC) estimates that the average cost of a contested land claim is around \$500,000...<sup>115</sup>

Opposition to the Act is as political as it is legal, and challenge to land claims has become normal public policy in the Northern Territory.<sup>116</sup>

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<sup>113</sup> In addition, in accordance with the judgments of Deane and Gaudron JJ in *R v Kearney; ex parte Japanangka* (1984) 158 CLR 395, NT laws and executive acts must not detract from or impair the rights and interests recognised by the Land Rights Act. This interpretation of the concurrent operation of the Land Rights Act and Self-Government Act was preferred to the much more restrictive interpretations (from the perspective of traditional owners) of Gibbs CJ and Wilson J in *Attorney-General (NT) v Hand* (1989) 25 FCR 345.

<sup>114</sup> *R v Toohey; Ex parte Attorney-General (NT)* (1980) 28 ALR 27; *R v Toohey; Ex parte Northern Land Council* (1981) 38 ALR 439; *Re Toohey; Ex parte Meneling Station Pty Ltd* (1982) 44 ALR 63; *Re Kearney; Ex parte Jurlama* (1984) 52 ALR 24; *Re Kearney; Ex parte Northern Land Council* (1984) 158 CLR 365; *Re Kearney; Ex parte Japanangka* (1984) 158 CLR 395; *Attorney-General (NT) v Kearney* (1985) 61 ALR 55. Many more cases have been heard before the Federal Court. (Edgar, 2007)

<sup>115</sup> In many cases substantially more than the market value of the area subject to claim, though they may establish or clarify a precedent of relevance to numerous claims.

<sup>116</sup> Similarly, O’Faircheallaigh (1996, 193) states: “the land councils have always faced severe resource constraints in attempting to fulfil their wide range of statutory responsibilities, and have additional burdens as a result of the Northern Territory government’s practice of appealing all land grant decisions made under

In addition to legal challenges and political campaigns, the main categories of Crown lands of the NT and their administration have been influenced considerably by the operation of the Land Rights Act and the determination of the NT Government to minimise the area available for claim. Challenges to land claims generally consisted of either of two strategies (and often both) in addition to the political campaign: contesting land claims directly in proceedings before the Commissioner and the courts, and contriving administrative and legal arrangements for NT Crown land to pre-empt or subvert the jurisdiction of the Commissioner pursuant to the Land Rights Act (involving certain types of ‘public purpose’ lands in particular – the legislative scheme intended such areas to be *prima facie* available for claim, and for the Federal Minister to determine the respective claims of the NT Government and traditional owners to such areas following an inquiry by the Commissioner).

Numerous legislative and administrative devices were used by the CLP Government in addition to presenting elaborate ‘detriment’ cases in land claim hearings and frequent legal challenges to them including: the enactment of parallel regimes (outside and unaffected by the operation of the Land Rights Act) instead of ‘complementary’ legislation for the designation of town boundaries and management of areas within those boundaries and the declaration and management of most NT parks and reserves and certain other public lands (by transferring title to these areas to two statutory ‘Land Corporations’ artificially separated from the public administration as land holding entities); administrative delays in the registration of deeds of title executed by the Governor-General in favour of traditional Aboriginal owners on at least two occasions; granting leases or otherwise changing the status of areas subject to land claim (prohibited by the Land Rights Act); refusing to process voluntary agreements for the sale or transfer of land to traditional owners on several occasions;<sup>117</sup> and, numerous irregularities in the administration of pastoral leases. (CLC, 1994: Peterson (ed), 1981)<sup>118</sup>

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the Land Rights Act and of problems in recovering legal costs subsequently awarded against the Northern Territory government.”

<sup>117</sup> This strategy has also been used by the Queensland Government. (Palmer, 1988: Coombs, 1994: Langton, 2005: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168)

<sup>118</sup> The establishment and operational management of these various devices and strategies are examined in detail in Edgar (2007).

A combination of these methods, as well as occasional (but nonetheless significant) recognition of Aboriginal ownership and negotiated agreements in particular situations, is evident in the administration of land and natural resources throughout the time the CLP formed the Government. The complicated results of these opposing forces for the protection and subversion of Aboriginal rights is a set of land and natural resource management regimes that juxtapose 'best practice' arrangements for the recognition and protection of Indigenous rights and interests in Australia in some cases with intense political campaigns and elaborate administrative arrangements intended to reduce or eliminate the constraints of the Land Rights Act on the unilateral powers of the NT Government. In 1988 the then Chief Minister (Steve Hatton, in Loveday & McNab (eds), 1988; 34) stated of the operation of the Land Rights Act: "Our government is not opposed to the principle of land rights although there are certainly many aspects of the current land rights legislation which quite particularly we object to - we have never made a secret of that." Labor has also been a strong advocate of 'developmentalism' (there were initially three portfolios in the shadow cabinet, "community development, economic development and urban and regional development": Heatley, 1981b), though usually in a manner more accommodating of Indigenous rights.

Consequently, the various land and natural resource management regimes in the NT have often been subject to the same basic forces and underlying factors in varying degrees involving the substantial protection of Aboriginal land rights by the Land Rights Act and the long campaign of the NT Government against the operation of the Act. An analysis of key features (components of the legal and administrative systems), events (decisive or influential developments in each, such as judicial decisions and major legislation or political agreements), and processes (the ongoing evolution of each and their interactions) of the regimes established pursuant to the Self-Government Act and Land Rights Act can therefore explore and attempt to explain what are otherwise apparently paradoxical features of the land and natural resource management regimes in the NT, (Wettenhall, 1995) in the sense that they often contain substantial elements of both some of the most progressive co-management arrangements in Australia based on the recognition of Indigenous rights, as well as prolonged and intense conflicts over land and resource ownership and use based on the denial or subjugation of Indigenous rights.

These underlying forces and patterns are apparent in the structure and operation of many of the regimes established by the NT Government though they have manifested in very different ways, including those providing for local government and town planning, the declaration and management of national parks and other conservation reserves, the administration of pastoral leases, the registration and management of Aboriginal cultural heritage areas and wildlife and fisheries management.

Shortly before the conferral of self-government Bob Collins (the Member for Arnhem in the Legislative Assembly) noted that: “The Labor land rights bills which were introduced in 1975 differed in one major respect from the subsequent bills introduced by the Liberal government. And that is that they ceded some authority over Aboriginal land rights to the Northern Territory Legislative Assembly”. (NTPR, 9 May 1978; 891) Authority over some of the legislative and executive functions associated with the land rights regime were delegated to the NT Government specifically by the Land Rights Act prior to the conferral of self-government,<sup>119</sup> others implicitly when executive power over land administration was conferred in 1979 (areas within ‘town’ boundaries and community living areas on pastoral leases in particular). The latter two types of land were intended to be subject to ‘needs based’ claims to be heard by the Commissioner in the bill introduced by the Labor Government in 1975, however one of the first actions of Malcolm Fraser (while still ‘caretaker’ Prime Minister) was to stop a land claim in Alice Springs that had already commenced before an interim Land Commissioner prior to the removal of these areas from the jurisdiction of the Commissioner. (CLC, 1994) These delegations of authority to the NT Government under the Land Rights Act were consolidated by the transfer of functions and powers associated with the conferral of self-government, though these regimes and those established by other NT legislation remain subject to the Land Rights Act to the extent their operation overlaps. The extent to which each regime and specific arrangements within the parameters of each regime have recognised Indigenous land and resource rights varies considerably.

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<sup>119</sup> The protection of sacred sites, entry to Aboriginal land and coastal waters adjacent to Aboriginal land (the ‘permit system’), and schemes for the protection of wildlife – these are implemented primarily pursuant to the *Northern Territory Aboriginal Sacred Sites Protection Act 1989* (NT), *Aboriginal Land Act 1978* (NT) and *Territory Parks and Wildlife Conservation Act 1977* (NT) respectively.

Neville Perkins (the Member for MacDonnell from 1977 until 1981) argued that many aspects of the package of reciprocal ('complementary') legislation introduced to the Legislative Assembly by the CLP 'Government' shortly before the conferral of self-government to establish regimes for the conduct of these functions were in conflict with rights recognised and protected by the Land Rights Act, and that:

As such, this proposed complementary legislation provides a parallel system of law rather than a complementary system and this is completely inadequate...

The provisions for the closure of seas, the protection of sites, the recognition of the rights of Aboriginal residents on a cattle station, and the mining proposals – all of these represent a fundamental restriction on and interference with the rights of Aboriginals in the Northern Territory. (NTPR, 4 May 1978; 832, 834: see also JSC, 1977)

The diversity of situations resulting from the concurrent operation of complementary and parallel systems of law within each regime is exemplified by the different provisions applying to national parks and other conservation and recreation reserves in the NT. Throughout the period of self-government arrangements for the ownership and management of parks and reserves have demonstrated the polar extremes of implacable conflict between the NT Government and Aboriginal peoples in relation to some areas (the majority of the parks and reserves established and managed by the NT Government prior to the *Parks and Reserves (Framework for the Future) Act 2003* (NT)), and widely acclaimed joint management arrangements in other parks and reserves (the result of negotiated agreements between traditional owners and either the NT or Federal Government) that far exceed the level of recognition of Indigenous rights in most comparable areas in other Australian jurisdictions.

The development of the legislative and administrative arrangements providing for NT Government parks and reserves therefore provides an example of the concurrent establishment, operation and consequences of 'complementary' and 'parallel' regimes. The inaugural annual report of the Parks and Wildlife Commission of the NT (1978, 5), a statutory authority established to protect and manage wildlife and the NT's parks and reserve system(s), noted that parks and reserves were generally available for claim under the Land Rights Act. Areas that had been "committed to the care and control of" the

Reserves Board (the Parks and Wildlife Commission's predecessor) prior to 1977 were to be vested in the Parks and Wildlife Commission (either by grant of a freehold or leasehold interest) following the conferral of self-government, but were nonetheless *prima facie* available for claim. However, a parallel and ostensibly autonomous Conservation Land Corporation was established shortly thereafter to hold legal title to all freehold and leasehold interests vested in the Parks and Wildlife Commission (which henceforth was prohibited from holding title to real property), as well as all parks and reserves subsequently established by the NT Government (unless specifically excluded). These arrangements ensured the responsible NT Minister had the pivotal role in strategic planning and the declaration and management of most parks and reserves, effectively placing many parks and reserves beyond the operation of the Land Rights Act (and in some cases all forms of legal and administrative accountability) for many years. (Edgar, 2007)

Thus despite the establishment during the 1980s of four national parks in the NT that by the 1990s were widely regarded as 'best practice' examples of joint management between Indigenous peoples and non-Indigenous governments (two jointly managed by traditional owners and the NT Government, two by traditional owners and the Federal Government – the management of each was based directly or indirectly on the Land Rights Act), Aboriginal peoples were usually entirely excluded from formal arrangements for the management of other parks and reserves declared by the NT Government. An analysis of the first ten years of joint management of Garig Gunak Barlu (formerly called Cobourg and then Gurig) National Park (Foster, 1997; 2, 5) considered the apparent anomaly of the NT Government and traditional owners entering a joint management agreement in the hostile atmosphere of the early 1980s from the perspective of the establishment and management of that park:

[The] negotiations were not easy and extended over several years. At least ten drafts of the Bill were written before it was presented to the Legislative Assembly ... The question, however, is why this settlement was achieved at all, particularly when at the time there was open disputation between Aboriginal people and the NT government. Furthermore, there were alternative arrangements that could have been made.

On the NT government's side, the answer is closely linked with its desire to demonstrate its ability to manage its own affairs as part of its ongoing campaign to achieve statehood. On the Aboriginal side, the government offer was considered to be the best option available for them to re-establish their lives on their traditional homeland.

Foster (1997, 11) further noted that, while the agreement recognised Aboriginal ownership and gave traditional owners a statutory majority on the board of management and therefore formal control over decision-making, "translating this into effective control has been difficult." This has also been the case in relation to management of the adjacent marine park (proclaimed in 1983, the principles and procedures of joint management remained the subject of protracted negotiation in 2006). In relation to NT parks and reserves generally, a major review of the joint management of national parks in Australia (Woenne-Green *et al*, 1992; 297-298) concluded that:

The apparent commitment by the Territory to formally share power with Aboriginal owners as illustrated by the Gurig precedent (and later by Nitmiluk) has not been followed through. Where the grant of NT title to the land has been employed as negotiating collateral by Government to secure a management arrangement over the land, Aboriginal owners have had to surrender control of that land to the [Parks and Wildlife Commission]...

Although joint management arrangements were negotiated for several other parks during the 1990s, the overwhelming majority of parks and reserves had no formal provision for Aboriginal involvement at all. Furthermore, as in the formative years of the arrangements for Garig Gunak Barlu National Park and the declaration and management of the adjacent marine park, cooperative arrangements that were established were frequently constrained by the hostility generated by the underlying struggle for jurisdiction between Aboriginal peoples and the NT Government. While it is still too early to be certain, the Parks and Reserves (Framework for the Future) Act may represent a decisive turning point in the management of NT parks and reserves, providing a legislative basis for the negotiation of joint management agreements in over twenty five other parks and reserves in the NT, though numerous areas vested in the Conservation Land Corporation remain outside the scope of the agreement (e.g. Litchfield National

Park). The establishment and implementation of regimes providing for community living areas on pastoral leases, the registration and protection of cultural heritage areas, and the ownership and management of wildlife and fisheries also demonstrate the diametrically opposed features and forces of conflict and cooperation affecting land and natural resource management regimes in the NT; these regimes are analysed in chapters 7 and 8.

The developments within each regime tend to confirm the hypothesis and conclusions of Foster (noted above). The attempts of the NT Government to minimise the scope of operation of the Land Rights Act have frequently led to significant distortions in the structure and operation of the legal and administrative regimes providing for land and natural resource management ownership and management. The prevalence of conflict was most pronounced during the time the CLP formed the government, and was a significant if not the predominant factor affecting the development of several regimes associated with land ownership and management. The prevailing patterns of alliances and rivalries amongst the NT (CLP) and Federal (Labor) Governments and Aboriginal organisations from 1983 to 1996 (in terms of the overall compatibility of their respective policies, objectives and management activities) shifted abruptly following the 1996 Federal election and were effectively reversed in 2001 with the election of a Labor Government in the NT, to the extent that the Land Councils and NT Government made a joint submission to the Federal Government on amendments to the Land Rights Act in 2004 (compare, for example, the submissions of the NT Government, Land Councils and ATSIC to the inquiry conducted by Reeves in 1998). In a review of the typically hostile relations between local governments and Indigenous residents and communities in Australia during the 1980s and 1990s Sanders (1996, 163) argues that: “Points of compromise need to be identified and exploited.” This would appear to be a tactic and objective that has underpinned the review and negotiation of land and natural resource management regimes by the NT Government and Land Councils since 2001.

### **The Land Rights Act and Native Title Act: Principles and procedures**

A detailed comparison of the Land Rights Act and Native Title Act is beyond the scope of the thesis, though some aspects of the concurrent operation of the Land Rights Act and Native Title Act are examined in more detail in relation to specific forms of tenure, government agencies and natural resource management regimes in chapters 7 and

8.<sup>120</sup> As noted in chapter 5, native title can be considered as a form of recognition space providing a legal basis for mutual recognition by concurrent sources and systems of law and governance pertaining to land ownership and management. In this sense the Land Rights Act establishes another form of recognition space providing a basis for mutual recognition of, and interactions between, concurrent systems of land management, applying specifically in the Northern Territory. (Rowland, 1980; 60; Neate, 1989; 92)

As noted above, the significant gains made by the Land Rights Act in addressing dispossession occurred notwithstanding the implacable opposition of the NT Government to many provisions of the Land Rights Act and individual land claims made until the change of government in 2001.<sup>121</sup> Opposition to the Land Rights Act, expressed and implemented in elaborate constitutional, legal, political and administrative campaigns, also extended to other areas of government crucial to the exercise of Indigenous self-determination (examined in subsequent chapters). Many aspects of the management of areas vested in traditional owners under the native title regime remain subject to all land and natural resource management powers of the Executive and legislature of both NT and Federal Governments, whereas Aboriginal land held pursuant to the Land Rights Act is only subject to the paramount powers of the Federal Government and there is arguably a strong political ‘convention’ against compulsory acquisition or other intervention in the management of Aboriginal land.<sup>122</sup>

In addition to a prohibition on the compulsory acquisition of Aboriginal land or the alienation of land subject to claim by the NT Government (ss. 67, 67A), other NT land and natural resource management and environmental protection regimes must be

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<sup>120</sup> For more detailed comparison of the two land rights regimes see e.g. Athanasiou, 1998; Edmunds (ed), 1994; Reeves, 1998; chapter 20; Levy, 1996; Neate, 1989, 1995; Bartlett, 2000. For a comparison of other statutory land rights regimes see e.g. McRae *et al*, 1997; Nettheim *et al*, 2002; Stephenson (ed), 1995; Neate, 1993.

<sup>121</sup> As in the NT, the State Governments in Queensland and Western Australia in particular have been extremely opposed to land rights for many years; the economies of both States are also highly dependent on primary industries, and have large areas still potentially available for claim under the Native Title Act, to a much greater degree than NSW, Victoria, and Tasmania (as noted above, in South Australia the Pitjantjara and Maralinga land rights regimes recognise Aboriginal ownership of large areas, but many other areas are also potentially subject to co-existing native title rights). (e.g. McRae *et al*, 1997; Bartlett, 2000)

<sup>122</sup> The manner in which Aboriginal land was expropriated by the granting of statutory leases over designated Aboriginal communities and ‘town camps’ to ‘the Commonwealth’ for a term of five years (pursuant to Part 4 of the *Northern Territory National Emergency Response Act 2007* (Cth)) arguably confirmed the existence of the political convention against expropriation of or imposed decision-making over Aboriginal land in the usual course of events, at the same time as the substance of that convention was nullified.

capable of operating concurrently with the Land Rights Act and the rights and interests of Aboriginal landowners thereby protected (ss. 73, 74).<sup>123</sup> Although Aboriginal land held under the Land Rights Act may be compulsorily acquired by the Federal Government pursuant to the *Lands Acquisition Act 1955* (Cth) this statutory power has never been exercised; nor has the power of the Federal Government to override an objection by traditional Aboriginal owners to mineral exploration or development (subject to disallowance by either House of the Federal Parliament: ss. 40-42) been exercised. To this extent one of the fundamental principles identified by the Aboriginal Land Rights Commission (Woodward, 1974; 2), that “these rights or interests are not further whittled away without consent, except in those cases where the national interest positively demands it - and then only on terms of just compensation”, has been respected. The relative fragility of legal protection pursuant to the Native Title Act makes the goodwill of the NT and Federal Governments, and other landholders and stakeholders, even more fundamental to achieving a measure of ‘simple justice’ (Woodward, 1974) for the Aboriginal peoples of the NT under that regime.

Under the Land Rights Act, detailed investigation and consideration of Indigenous legal, social and land tenure systems are heard by the Aboriginal Land Commissioner rather than the Federal Court; furthermore, unlike native title determinations these investigations and inquiries take place in the primary context of extant rather than historical local and regional patterns of land tenure in order to examine and comment upon the possible implications of recognition of land rights for local and regional patterns of land usage and economic development.<sup>124</sup> In order to carry out their statutory functions under the Native Title Act and Land Rights Act respectively, the Federal Court and the Commissioner undertake a detailed investigation of the Indigenous legal and social systems with substantial procedural and evidentiary flexibility, and have a broad power of discovery for documents relevant to claim areas. (See also Neate, 1989, 1993: Bartlett, 2000: Levy, 1996: Keon-Cohen (ed), 2001) The courts and

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<sup>123</sup> *Attorney-General (NT) v Hand* (1989) 25 FCR 345, *Re Kearney; Ex parte Japanangka* (1984) 158 CLR 395.

<sup>124</sup> Although the history of the claim area is usually considered in land claim hearings, this is done primarily in the context of ascertaining implications of the claim for existing patterns of land use and regional development rather than as a sequence of land tenure changes, each of which may have extinguished native title in whole or in part (discussed further below).

Commissioners have adopted flexible arrangements to the extent this is possible (though the Commissioner has generally made more use of receiving evidence on the claim area than has occurred in many native title proceedings before the Federal Court). Notwithstanding the suspension of the ‘rule of law’ while the Indigenous peoples of Australia were being murdered, dispossessed, and arbitrarily (but systematically) incarcerated, and the lengths to which the immediate and subsequent beneficiaries of dispossession went to found and perpetuate the legal myth of *terra nullius*, the requirements of and procedures for the recognition of Indigenous rights and interests under both land rights regimes are fundamentally intrusive, legalistic and exhaustive in nature.<sup>125</sup> For instance, in the case of the Land Rights Act:

Claimants often have to go to extraordinary lengths of personal and cultural disclosure, frequently under traumatic circumstances, in order to win the favour of the three decision-makers and the benefits of a land grant under the Act: the Aboriginal Land Commissioner, the Minister for Aboriginal Affairs and the Governor-General. (Anon., 1989; 18)<sup>126</sup>

In determinations such as those made in the Croker Island and Timber Creek native title applications,<sup>127</sup> the court has acknowledged the continued existence and vitality of the basis of native title rights (Indigenous law and institutions, usually referred to as ‘traditions’ and ‘customs’), but inconsistent Crown grants and regulations limit the

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<sup>125</sup> As occurred with the recognition of Aboriginal ownership of Pitjantjatjara and Maralinga lands in South Australia, former Aboriginal reserves in the NT were vested in Land Trusts on behalf of traditional Aboriginal owners without land claim hearings – some ‘consent determinations’ and Indigenous Land Use Agreements have also been completed pursuant to the Native Title Act based on the recognition of Indigenous rights without exhaustive investigation and ‘testing of the credentials’ of traditional owners according to the requirements of the Native Title Act and common law.

<sup>126</sup> Dodson (ATSIJ, 1993; 34) further notes that: “Ironically, given the need to prove the maintenance of a connection with land in accordance with traditional laws and customs, those indigenous people who have suffered the most will gain least. There is a second, more terrible irony, that the obliteration of traditional laws and customs has been the avowed policy of Australia virtually from first settlement and early attempts to ‘civilize’ the natives... Until very recently government policies have attempted to eradicate the traditional cultural basis of indigenous entitlement to land.” Rose (1994, 28) notes that the crucial role of anthropologists (as interpreters of and designated experts on Indigenous social and land tenure systems) to the recognition of legal rights of traditional owners by the courts in native title applications “opens an incredible Pandora’s box whereby we, as a group of professionals, could do immense damage to ourselves and to Aboriginal people and to the legal process”, a risk greatly increased by the adversarial context within which many native title applications occur. (See also Rose, 1996: Keon-Cohen (ed), 2001: Toussaint (ed), 2004: Langton, 2005)

<sup>127</sup> *Commonwealth v Yarmirr* (2001) 208 CLR 1 and *Griffiths v Northern Territory* [2006] FCA 903.

‘incidents’ of native title capable of legal recognition to non-exclusive usufructuary rights and interests. Thus Mantziaris and Martin (2000, 27) note of the decision of the Full Federal Court in the Croker Island native title determination (subsequently appealed to the High Court though the basis and terms of the determination of the majority of the Federal Court were not substantively altered): “It may, of course, be argued that the content of the title recognised in this case is so weak as to not commend itself as an example of native title recognition”.<sup>128</sup> There are many similarly defined determinations of native title in the other Commonwealth jurisdictions, as well as some determinations in which not just all native title rights and interests,<sup>129</sup> but also the collective identity and cultural integrity of native title applicants,<sup>130</sup> has been denied by the courts. The combination of extensive amendments to the Native Title Act in 1998 and the restrictive judicial interpretations of native title rights and interests have further reduced the level of recognition and protection of land rights available under that regime. (Tehan, 2003: Castan & Kee, 2003: Lavery, 2003: Brennan, 2004: Strelein, 2006) Nonetheless, as Mantziaris and Martin (2000, 11) suggest, although the concepts and procedures for the recognition of native title are legal phenomena:

From the perspective of the indigenous group, native title may mean much more than the recognition of a legal right. A judicial determination that native title exists marks a significant moment in a political and historical process that has both confirmed and produced the identities of the indigenous group and the individuals who comprise it. It might be viewed as an authentication of the prior ownership of land and waters, as partial redress of historical wrongs, and as a public confirmation of a distinct cultural identity hitherto denied legitimacy.

Even when substantive rights are not recognised and protected the determinations therefore provide an introduction to Indigenous institutions in different areas, and maintain pressure for greater recognition of Indigenous rights. Consequently, some native title proceedings amount to an arduous and expensive, but irrefutable and symbolically

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<sup>128</sup> The minority decision of Merkel J of the Federal Court provided a much stronger basis for the recognition of Indigenous rights in marine areas but was not endorsed by the High Court.

<sup>129</sup> *Fejo v Northern Territory* (1998) 152 ALR 477 and *Wilson v Anderson* (2002) 190 ALR 313.

<sup>130</sup> For example, in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 and *Risk v Northern Territory* [2006] FCA 404.

powerful, demonstration that “We have survived”, on their own terms as well as that of the Commonwealth ‘rule of law’, and are ready to negotiate should the Commonwealth courts or governments acknowledge the fact. Such determinations, therefore, must be considered a preliminary basis for negotiations rather than a satisfactory final result.<sup>131</sup>

## **Conclusion**

Although many individual land claims remained to be resolved, the regular referral to the courts of questions arising from the concurrent operation of the Land Rights Act and the Self-Government Act resulted in substantial clarification of the basic principles and procedures of the regime by the mid-1980s. As of 2007 (following a legislative amendment in 2006 disposing of outstanding land claims pertaining to several categories of land) only a small number of land claims remain to be heard, and the requirements of the regime have been thoroughly integrated into most of the structures and activities of the NT Government pertaining to land and natural resource management, certainly to a much greater extent than many of the land and natural resource management regimes of State Governments.

The ‘quasi-constitutional’ status and many other aspects of the basis and operation of the Land Rights Act are in substantial compliance with the principles of the Kalkaringi Statement and Declaration on the Rights of Indigenous Peoples: with a substantial proportion of the NT restored to traditional owners, a relatively stable financial base for the Land Councils, all members of the Full and Executive Councils chosen by and from Aboriginal people of the NT, and a strong legal carapace protecting Aboriginal land and decision-making within the Aboriginal domain, the Land Councils and Land Trusts are effectively owned and controlled by traditional owners. However, not all traditional Aboriginal owners have been eligible to lodge land claims under the Land Rights Act, and the reciprocal regimes of the NT Government vary considerably in the extent to which they recognise and accommodate Indigenous rights. The following chapter conducts a more detailed exploration of the differential operation of the

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<sup>131</sup> As Durie (1991, 159) argues of the subsequent abrogation of the Treaty of Waitangi in New Zealand: “Despite the legal and political opinions, the Treaty was a fact that could not be cancelled out. If neither the Queen’s Judges nor her cabinet ministers could bring themselves to uphold the solemn promises undertaken on the Queen’s behalf, then they diminished not Maori honour but their own. Every petition and every court case that failed, also succeeded in driving that point home.”

provisions of the Land Rights Act and the role of other land rights regimes as (potentially) complementary measures within the selection environment of Aboriginal groups, in terms of the significance of different types of land tenure for the recognition of Indigenous land rights, the integration of Indigenous rights and interests within the activities of specific agencies, and the operation of a cultural heritage protection regime in the NT. In addition, a preliminary evaluation and critique is made of the evolution and implementation of the two main land rights regimes of the NT, and a comparison made with the basis and operation of analogous regimes in Canada and New Zealand in order to identify possibilities for reform to increase the extent to which the regimes in Australia are in compliance with recognition of the Indigenous right of self-determination.

## **Chapter 7**

### ***Land rights regimes and natural resource management in the NT***

#### **Introduction**

Although the Land Rights Act provides the strongest protection for Indigenous land rights in Australia and many groups have received title to all or a substantial proportion of their territories under the Act, there are also many Aboriginal peoples that have not benefited from the regime, in particular in the more densely settled areas and core pastoral regions. (Neate, 1989: CLC, 1994: CLC & NLC, 1995: Reeves, 1998) Some traditional owners that have been unable to claim land under the Land Rights Act have had some degree of land rights recognised under the Native Title Act, a regime providing for applications for ‘community living areas’ (usually on pastoral leases), and several other types of tenure (including leases for ‘town camps’ in urban areas). As well as the concurrent existence of native title rights and interests on Aboriginal land owned under the Land Rights Act, of the other forms of land tenure in the NT in the late 1990s: “native title may well exist on approximately 56 per cent of Territory land (consisting of 48 per cent pastoral leases, 6 per cent statutory corporation leases (NT Parks etc) and 2 per cent Crown land within town boundaries).” (Athanasίου & Borchers, 2001; 97) The legal status and management of marine areas is another category of major significance.

#### **Land rights and the ownership and management of Crown lands**

The various types of Crown land can be categorised to a considerable extent by designation as ‘vacant’ Crown land, operational public land (vested in or managed by a government agency), and Crown land reserved for or dedicated to a specific public purpose (either as predominantly vacant or operational land). In addition, as Ramsay and Ross (1995, 180) state of public ownership and control of lands:

A distinction can be made between lands which are ‘public’, in the sense of the public’s enjoying virtually unlimited access ... and other lands which are ‘public’ merely in the sense that the land is in public ownership but used or occupied by a public agency only in order to carry out its statutory or incidental functions. (See also Mant, 1987; 301)

The pattern of Commonwealth land tenures in each area is pivotal to the extent of recognition of Indigenous land rights that can be secured pursuant to the Land Rights Act and Native Title Act, with the different principles and provisions of each regime leading to very different results in many instances. One of the reasons for this is that in native title applications all other rights and interests in land (granted or otherwise asserted by the Crown) prevail over native title rights to the extent of any inconsistency, but unless those estates or interests are such as to effect total extinguishment a determination recognising some surviving native title rights and interests can still be made; under the Land Rights Act, a proprietary estate or interest held by a person other than the Crown (unless held by or on behalf of the traditional owners) precludes the making of a land claim (ss. 3, 50).<sup>132</sup>

### ***Land within town boundaries***

Jurisdiction over land administration for areas within town boundaries was transferred to the NT Government upon the conferral of self-government. This category of Crown land consequently became a significant element of the contest between the NT Government and traditional owners for land ownership.<sup>133</sup> The NT Government's efforts to 'outflank' the Land Rights Act are evident in three aspects of the administration of areas "to be treated as a town": the massive expansion of town boundaries around Darwin, Alice Springs, Tennant Creek and Katherine in 1978 and 1979; reliance on historical designations of areas as towns that are towns on paper only to prevent land claims to those areas; and, the promulgation of a large area as a 'town' (including several islands and adjacent coastal waters) in the vicinity of Borroloola. (Gray, 1996b: Edgar, 2007) The High Court and Federal Court subsequently held several of the regulations promulgated in 1978 and 1979 to be invalid; for instance, Murphy J stated of the regulations extending the boundaries of Darwin:

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<sup>132</sup> For the types of proprietary interest sufficient to prevent a land claim to the area affected, see *Re Toohey; Ex parte Meneling Station Pty Ltd* (1982) 44 ALR 63, *Attorney-General(NT) v Hand* (1989) 25 FCR 345.

<sup>133</sup> Such areas are excluded from the categories of land available for claim by traditional owners pursuant to ss. 3 and 50 of the Land Rights Act, but may be the subject of a native title application: *Hayes v Northern Territory* (1999) 97 FCR 32, *Ngalakan People v Northern Territory* (2001) 186 ALR 124 and *Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group v Northern Territory* (2004) 207 ALR 539.

The federal Parliament contemplated a town, perhaps even a large or very large town. In modern times the word town is used fairly loosely. However, the areas prescribed for Darwin (and Alice Springs, Tennant Creek and Katherine) in Sch 3 of the Planning Regulations go far beyond what could have been in the contemplation of the federal Parliament when using the word 'town'. The area for Darwin is appropriate not to a town but to a megalopolis. It is extravagantly beyond what could reasonably be described as a town.<sup>134</sup>

Another dimension of the jurisdictional contest is the establishment of the 'community government council' scheme providing for the delegation of local government functions to small rural and regional towns. In an analysis of local government and Indigenous peoples in Australia Sanders (1996, 168) notes the mutual antagonism that built up between the Northern and Central Land Councils and the NT Government over several decades, and that controversy associated with the operation of local government schemes in the NT is a manifestation of the deeper contest for jurisdiction that: "needs to be understood in order to gain an overall appreciation of developing relations between local governments and indigenous Australians. The controversy leads back, in part, to the subject of indigenous landownership and land rights." In a related though slightly different context (the management of a mining town outside the operation of the *Local Government Act* 1993 (NT)) the relatively rapid devolution of a separate form of local government for the mining town of Jabiru in the Alligator Rivers Region was also interpreted as at least in part due to a similar contest for jurisdiction, Lea and Zehner (1986; 9) noting:

the Territory government's concern from the outset to secure a political presence and popular platform in a development region dominated by Canberra and company boardrooms in the south. Bauxite mining in the Gove Peninsula and uranium in the Alligator Rivers Region were effectively controlled by bodies external to the Territory and what little local influence there was seemed to be shifting progressively towards Aboriginal associations.

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<sup>134</sup> *R v Toohey; Ex parte Northern Land Council* (1981) 38 ALR 439 at 486. See also e.g. *R v Kearney: Ex parte Northern Land Council* (1984) 158 CLR 365, *Attorney-General (NT) v Olney* [1989] FCA 325, Douglas & Jones (1996, 409-26), Gray (2000), HRSCATSIA (1999, 134-38), Mowbray (1986), Rowse *et al* (eds) (1999), Reeves (1998, 396-410).

Rowse (1992, 69-70) provides a more detailed critique of the schemes for local government in the NT from the perspective of the underlying contests for jurisdiction, concluding:

There are two ways we can understand the relationship between the authorities founded upon the Aboriginal Land Rights Act [the Land Councils] and the Local Government Act [community government councils]. One emphasises their complementarity, the other their competition...

To argue that the complementarities characteristic of Aborigines' rituals were being reproduced in the relationship between the Land Councils and the [community government council scheme of the] Northern Territory government was not only an extremely dubious piece of anthropological reasoning (treating matters linked by ingenious analogy as if they were items in a demonstrated continuity of practice and thought), it also ignored the history of acute mutual hostility between the Territory government and the Land Councils. The alternative view – that overlapping and competing authorities are being created – better fits the facts of that history.

There are two pertinent factors in this instance, the vesting of authority in residents of community council areas without acknowledging the authority of traditional owners (hence providing for the possible usurpation of the authority of traditional owners by parallel organisational structures), and the structural and operational vulnerability of community government councils to the paramount authority of the NT Minister under the Local Government Act. In a review of the recommendations of the Reeves report (1998) a Federal parliamentary committee (HRSCATSIA, 1999; 134-35) noted that:

The operation of the Local Government Act 1993 (NT) in the Northern Territory is one area where Aboriginal groups argued that practical difficulties do occur. The major difficulty faced is the fact that the provisions of the Local Government Act do not acknowledge the rights of traditional Aboriginal owners in making decisions relating to the use of the land ...

The Committee emphasised the importance of “formal consultation and negotiation processes” between the Land Councils and NT Government to establish local government agreements, noted the commitment of the Australian Local Government

Association to develop formal consultative mechanisms with Aboriginal peoples, and further noted that: “The Northern Territory Government has invited the NLC to nominate representatives on the Regional Reference Groups in order to resolve the issue for the benefit of traditional Aboriginal owners and other residents on Aboriginal land.” (HRSCATSIA, 1999; 137-38) Several Indigenous Land Use Agreements were subsequently negotiated between the Northern Land Council, NT Government and community councils to reduce the likelihood of such disputes occurring: “These Land Use Agreements will provide certainty to local governing bodies when conducting activities that affect the land on which they operate. They will also provide protection and certainty to the traditional owners of the land.” (NLC, 1999; 47-48) The system of local government in the NT is examined in more detail in chapter 9.

#### ***Areas vested in or used or occupied by Commonwealth agencies***

This section considers two further types of Crown land in the NT as examples of the manner in which the recognition of land rights has been incorporated within (or excluded by) the ownership and management of Crown lands; military training areas occupied or used by the Australian Army (a type of ‘operational’ land – see Article 30 of the Declaration on the Rights of Indigenous Peoples) and some additional consideration of the parks and reserves systems in the NT (land dedicated to ‘conservation’ purposes, usually substantially or completely open to public access) discussed in chapter 6. Due to the strategic location of the NT the Australian military forces have a significance presence, with major facilities in the vicinity of Darwin and Katherine in particular, and also extensive training areas at Bradshaw Station and adjacent to Litchfield and Kakadu National Parks. An Indigenous Land Use Agreement (ILUA) was completed with traditional owners of Bradshaw Station following the purchase of the former pastoral station by the Department of Defence, including provisions for the protection of cultural heritage areas, concurrent access rights and compensation. (ATNS, 2008b) Extensive areas are also occupied by the military in Western Australia, Queensland and South Australia. (McRae *et al*, 1997; 259) Although the Department of Defence is “one of Australia’s largest landholders” with approximately three million hectares (Ashby, 2005) and ILUAs have been negotiated for several facilities (usually involving small areas of

land: ATNS, 2008b), as of 2005 of the numerous extensive training areas only Bradshaw Station was subject to an ILUA with traditional owners.

There are two other aspects of military activities of particular significance to the recognition and accommodation of Indigenous rights. The structure and functions of the North-West Mobile Force (NORFORCE) units within the Army are a distinctive example of co-management. Officially established in July 1981 within the Royal Australian Infantry Corps as an Army Regional Force Surveillance Unit,<sup>135</sup> in the late 1980s the unit consisted of four reconnaissance squadrons (headquartered at Darwin, Kununurra, Arnhem (Nhulunbuy) and Alice Springs, each providing logistical support for locally based patrol units) as well as a Base Squadron and Signals Troop, with a total troop strength of approximately 370 (including full-time and army reserve personnel). (Ball (ed), 1991: DoD, 2008) In addition, in 1987 a framework agreement and procedures were completed with the Northern Land Council to facilitate the granting of permits to access Aboriginal land for training and reconnaissance purposes. (Neate, 1991) There has been an Army Aboriginal Community Assistance Program since 1996 to contribute to housing, infrastructure and training programs. (DoD, 2008)

As noted in chapter 6, the parks and reserves system(s) of the NT clearly demonstrate the concurrent operation of complementary and parallel administrative regimes. Prior to the change of government in 2001 there were formal joint management arrangements for around seven parks (two with the Federal Government, four with the NT Government subject to basically similar arrangements, and one conservation area vested in the Conservation Land Corporation but with formal Aboriginal representation on a local management committee). Negotiations pursuant to the Parks and Reserves (Framework for the Future) Act have added over twenty other parks and reserves to the number subject to negotiated joint management arrangements.

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<sup>135</sup> The units to a large extent replicate reconnaissance units established by anthropologists Thomson and Stanner during World War II. The units were disbanded shortly after their formation as the threat of invasion receded. Indigenous peoples of the north had a major role in defence activities during the war; in addition to service by some in the regular military forces of the Commonwealth, they provided a crucial labour supply for major facilities and significantly reinforced the capacity and survivability of remote military installations in particular. (Hall, 1991)

Arrangements to provide for the establishment and management of parks and reserves in the NT prior to the Parks and Reserves (Framework for the Future) Act<sup>136</sup> can be broadly categorised as follows: parks and reserves to which ownership has been restored to traditional owners (these areas are usually though not always leased to the relevant Commonwealth conservation agency) and which provide traditional owners with majority representation on boards of management; parks and reserves that are vested in the Conservation Land Corporation (usually by perpetual Crown lease but probably sometimes in fee simple) and managed by the Parks and Wildlife Service, but which provide limited representation of traditional owners on local management committees; parks and reserves that are vested in the Conservation Land Corporation and that are managed exclusively by the Parks and Wildlife Service (though staff may manage such areas in accordance with the rights and interests of traditional owners to a significant extent by way of informal consultation); areas owned by traditional owners and specifically dedicated to conservation purposes, usually as an Indigenous Protected Area; and, areas held by the Conservation Land Corporation or Northern Territory Land Corporation that are, or may be, declared as parks and reserves (such areas are also usually managed by the Parks and Wildlife Service). (Edgar, 2007)

The *Territory Parks and Wildlife Conservation Act 1977* (NT) (TPWCA) provides the basis for the management of most parks and reserves in the NT. The Parks and Wildlife Service has responsibility for the administration of the TPWCA (pursuant to which most parks and reserves established by the NT Government are managed), as well as two Acts that establish jointly managed national parks subject to Aboriginal ownership, the *Cobourg Peninsula Aboriginal Land and Marine Park Sanctuary Act 1981* (NT) and *Nitmiluk (Katherine Gorge) National Park Act 1989* (NT). The structural and operational arrangements for these two parks are broadly similar to those in place in Kakadu National Park and Uluru-Katatjuta National Park, though the latter two parks are managed jointly with the Federal Government under the combined operation of the Land

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<sup>136</sup> The legislation was prompted by the majority decision of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 at 126-27 that the declarations of many parks and reserves, and therefore subsequent management arrangements, were of no legal effect.

Rights Act, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and negotiated lease agreements.

Garig Gunak Barlu, Nitmiluk, Kakadu and Uluru-Katatjuta National Parks were the first in Australia to be established on lands whose Aboriginal ownership is recognised by Commonwealth law (though in each case Aboriginal ownership was contingent upon the area involved becoming a national park), and are all managed by Boards of Management with a majority of members nominated by traditional owners. These parks are also amongst the most comprehensively analysed in the literature (e.g. Foster, 1997: Woenne-Green *et al*, 1993: Birckhead *et al* (eds), 1992: Baker *et al* (eds), 2001: Tehan, 1997: Worboys *et al* (eds), 2001: Lawrence, 2000: Press *et al*, 1995), hence the following discussion will only briefly summarise features of the arrangements for their ownership and management as an indication of the methods used to establish and operate jointly managed national parks within regimes that provide for Aboriginal ownership and effective Aboriginal control.

In the case of Garig Gunak Barlu National Park there are four nominees of traditional owners and four members appointed by the Minister, though the Chairperson must be a traditional owner and has the deciding vote in the event of a split vote. The Board of Management of Kakadu National Park provides a substantial majority membership for traditional owners (ten Aboriginal people nominated by traditional owners and four others). The Board of Management of Uluru-Katatjuta National Park consists of ten members, six of whom are appointees of the traditional owners. Importantly, both parks jointly managed with the Federal Government have lease clauses authorising traditional owners to revoke the lease if the Government attempts to impose alterations to the management arrangements that are considered detrimental to their rights and interests. The objective of the traditional owners in relation to management of Garig Gunak Barlu National Park is stated by the Board of Management: “To preserve the integrity of our estate on land and sea for use and occupation as our homeland for the spiritual, social and economic well-being of our future generations, exercising our inherent rights to control and manage our estate whilst sharing it with all people as a national park.” (Annual Report, 2001) The legislation establishing the national park was

amended in 1996 to recognise the right of traditional owners to participate in management of the adjacent marine park.

Pursuant to s. 123(2)(b) of the TPWCA the Administrator may make regulations in order to “establish a local management committee for any park, reserve, sanctuary or protected area, and make provisions as to the composition of the committee, ... its functions and powers and the manner of their performance”. In relation to parks and reserves declared and managed under the TPWCA and the subject of Aboriginal ownership, local management committees established by regulations made pursuant to s. 123 provide for joint management arrangements in a variety of forms. Majority Aboriginal membership is provided for Djukbinj National Park<sup>137</sup> and Barranyi (North Island) National Park (by the Memorandum of Lease and a Deed of Management). Prior to the Parks and Reserves (Framework for the Future) Act management arrangements for other NT parks and reserves were the subject of much more limited levels of involvement by traditional owners, with no formal joint management arrangements at all for most areas. The regulations providing for the establishment and management of Keep River National Park<sup>138</sup> are indicative of the more tenuous status of traditional owners in parks and reserves managed pursuant to local management committee regulations in the absence of recognition of Aboriginal ownership (traditional owners appointing only two of seven members of the committee).

Largely summarising the elements of existing joint management arrangements, Gillespie and Cooke (1997, 35) list an indicative set of “framework conditions for indigenous joint management and regional agreements”:

majority representation on a management structure; ... informed and resourced participation in preparation of management and planning documents; ... recognition of indigenous political structures and community needs in establishing management protocols; ... development of a research and intellectual property protocol; ... preferential employment and training opportunities; ... access to living areas within the reserve; ... ability to carry out hunting and gathering; ... protection of cultural sites; ... the ability to negotiate closures for ceremonial

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<sup>137</sup> Established by the *Djukbinj National Park Local Management Committee (Djukbinj Board) Regulations*, No. 5 of 1997, notified in the *Gazette* 3 April 1997.

<sup>138</sup> The *Keep River Park Local Management Committee Regulations*, No. 42 of 1992 notified in the *Gazette* 12 August 1992, amended by Regulation No. 2 notified 11 February 1998.

reasons; ... ability to limit visitor access to sensitive areas; ...payment of fair rental and a proportion of fees and charges.

### ***Pastoral leases***

Although different categories of land tenure and forms of land use are of major significance in each region, the practical effect of the Native Title Act for extant pastoral leases in the NT is the most extensive category of tenure for which the basic structures and procedures for coexisting rights and interests must be resolved (as noted above, pastoral leases cover almost half the Territory). A pastoral lease cannot be claimed under the Land Rights Act unless it is owned by or on behalf of the traditional owners (and a claim was lodged prior to the commencement of the sunset clause, or the Federal Government is successfully petitioned to list the land in Schedule 1); a native title application can be made to areas covered by a pastoral lease, subject to the rights of the lessee and all other statutory rights or other interests granted by the Crown. However, if the lease is held by or on behalf of the traditional owners, recognition of Aboriginal ownership under the Land Rights Act results in a much stronger carapace for their rights and interests. While numerous pastoral leases in the NT have been purchased by traditional owners, the comments of Woodward (1974, 32) remain relevant:

Pastoral leases, commonly referred to as cattle stations, cover a large part of the Northern Territory. They vary greatly in size and value. There are some in the centre which barely support one man and his family. There are others, for example several in the Gulf District, where little effort has so far been made to develop the holding. Other stations are expertly managed, carrying huge herds of cattle and represent[ing] vast corporate or private investments. (See also Rawling, 1987)

The possibility of coexisting native title rights and interests on areas subject to pastoral leases in the NT has been acknowledged in several cases heard before the Federal Court and High Court.<sup>139</sup> The nature and extent of partial extinguishment on pastoral leases, including the right of native title holders to make decisions about land use not inconsistent with the right of a pastoral lessee to manage pastoral activities, was

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<sup>139</sup> *Western Australia v Ward* (2002) 191 ALR 1 and *Hayes v Northern Territory* (1999) 97 FCR 32.

reconsidered by the Federal Court in 2004.<sup>140</sup> As in the earlier cases, the determination involved historical rather than current pastoral leases, though the principles and provisions involved (and therefore the extent of extinguishment that has occurred) are basically the same. After reviewing the preceding determinations in the NT and determinations raising similar questions in other Australian jurisdictions, Mansfield J (at 595, 597) stated of the recognition of native title by the courts in accordance with the Native Title Act:

Extinguishment may be total or partial, depending upon whether the inconsistent rights and interests taken individually in relation to each of the native title rights and interests are totally inconsistent with, or only partially inconsistent with, the native title rights and interests. To determine inconsistency, and so to determine whether all or any of the native title rights and interests have survived, the court should apply the inconsistency of incidents test as explained [by the majority decision of the High Court] in *Ward* ... If the right or rights granted legislatively or executively are inconsistent with native title rights and interests, there will be extinguishment to the extent of the inconsistency...

Inconsistency is resolved as a matter of law by comparing the legal nature and incidents of the existing native title right or interest and of the right or interest which has been granted legislatively or executively...

Partial extinguishment of native title occurs when some, but not all, of the rights and interests which together make up native title are extinguished by the creation of inconsistent rights by laws or executive acts.

Mansfield J (at 604) concluded that although the rights granted by the pastoral leases extinguished native title rights and interests to the extent of inconsistency, some “native title rights could and do co-exist with the rights of pastoral leases”. The extent of extinguishment must be resolved by examining the terms of the lease and legislation and the native title rights and interests: “an objective inquiry which requires identification of and comparison between the two sets of rights. Reference to activities on land or how land has been used is relevant only to the extent that it focuses attention upon the right

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<sup>140</sup> *Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group v Northern Territory* (2004) 207 ALR 539.

pursuant to which the land is used.” (Mansfield J at 604, quoting the majority decision of the High Court in *Western Australia v Ward*). His Honour (at 607-09) further stated that:

the rights granted to the pastoral lessees were not rights granted to all persons, and pastoral lessees were obliged to exercise their rights for the purpose of the lease ... [and subject to all statutory reservations and rights and lease conditions.] I do not consider that it is inconsistent with such rights that the native title right to control access to the land should survive to exclude persons who might wish to enter the land to do things unrelated to the pastoral lease or without some other reserved or statutory rights...

I have reached the view that the native title rights to control access to the claim area and to make decisions about its use are not so inconsistent with rights under the pastoral leases as to lead to their total extinguishment. In my judgment, the right to make such decisions is extinguished only to the extent that it is inconsistent with the rights of a pastoral lessee to make decisions concerning those matters...

The determination therefore suggests that significant native title rights and interests may continue to exist on extant pastoral leases at common law. This relatively expansive recognition of native title rights and interests was however reduced by the Full Federal Court upon appeal in several respects.<sup>141</sup> Although the Full Federal Court concurred that the statutory right to access and remain upon pastoral leases may include a right to reside permanently on the leased area (subject in all ways and at all times to the rights of the lessee), the court also held that the right to protect places of significance does not include a right to control activities in the vicinity of such areas, and that the right to control access to the area for certain purposes not relevant to the pastoral enterprise (as described by Mansfield J) could not be upheld in the absence of a right to exclusive possession.

In addition to the purchase of around a dozen pastoral leases by traditional owners since the 1970s (there are approximately 200 pastoral leases in total), the respective rights and duties of lessees, traditional owners and government agencies pursuant to the Native Title Act have been agreed in substantial detail in respect of numerous leases (a

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<sup>141</sup> In *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442.

considerable proportion of leases compared to other jurisdictions), including at least fifteen pastoral leases where Indigenous Land Use Agreements have been completed since 2003 recognising title to community living areas (CLAs). (NNTT, 2007) In addition to the setting aside of CLAs and provision for the purchase of pastoral leases by traditional owners, Woodward (1974) recommended the strengthening of the legal right of traditional owners to access and remain upon such leases (and also the review of arrangements and progress in their implementation by the Commissioner in annual reports). The CLA regime on pastoral leases is implemented primarily pursuant to the *Pastoral Land Act* 1992 (NT): rather than claims and mediation being dealt with primarily by the Aboriginal Land Commissioner (as recommended by Woodward), responsibility for establishing the regime was transferred to the NT Government following the conferral of self-government.<sup>142</sup>

The regime was the subject of regular review and at times determined intervention by the Federal Minister for Aboriginal Affairs between 1983 and 1989. In addition, a Federal parliamentary committee was established in 1985 to inquire into: “The social and economic circumstances of Aboriginal people living in homeland centres or outstations, and the development of policies and programs to meet their future needs.” (Blanchard *et al*, 1987; xxxi) The inquiry concluded that: “The most fundamental request to establish a homeland centre equipped with facilities and services is secure land tenure.” (Blanchard *et al*, 1987; 163-64) The report further argued that community living areas should be viewed as a part of the homeland movement, and that: “The question of secure tenure over land for these groups needs to be addressed as a first priority.” (See also Altman & Taylor, 1987) In 1989 a Memorandum of Understanding was concluded between the Federal and NT Governments resulting in the restoration of over twenty contested areas in pastoral regions to Aboriginal ownership and the enactment of a statutory regime for the processing of applications: although some of the key concerns of the Land Councils

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<sup>142</sup> A Community Living Areas Tribunal has been established to consider applications for CLAs, which may also be processed by the Minister directly (ss. 101, 102). The Chairman was initially (from 1989) appointed by the Minister upon nomination by the Chief Justice of the Supreme Court, but following a legislative amendment in 1994 is appointed by the Administrator (as directed by the Minister), being a person who has been enrolled as a legal practitioner of the High Court or a Supreme Court for at least ten years. The Tribunal is established pursuant to s. 93 and for the purpose of considering an application consists of the Chairman (or a Deputy Chairman), and two other members appointed by the Minister from a panel of three nominees of the relevant Land Council and pastoral association (ss. 93, 106(1A)).

were not addressed and progress in processing applications remained slow (and ceased entirely between 1998 and 2002), Federal involvement and review decreased substantially during the 1990s. (Edgar, 2007)

Applications for CLAs cannot be made on the basis of traditional ownership unless the pastoral lease holder consents (eligibility is based primarily on historical or current residence on the relevant pastoral lease: Pastoral Land Act, s. 92), though many applicants are traditional owners, and as noted above some CLA applications have been completed as ILUAs since 2003. The areas granted under the CLA regime usually involve very small areas, but nonetheless provide important bases from which connections with country can be maintained in areas where native title rights and interests may exist at common law, but due to distance and the degradation and depletion of natural resources can be extremely difficult for many people to exercise.

### **Land use decisions and natural resource management on Aboriginal land**

As noted above and in chapter 6, all land use planning and development decisions and natural resource management regimes of the NT Government are operative on Aboriginal land held pursuant to the Land Rights Act only to the extent that they are capable of concurrent operation (i.e. do not detract from or impair the rights and interests of traditional Aboriginal owners). A determination that native title is recognised at common law may provide the basis for what amounts to ‘inalienable fee simple’ title to an area (the right to exclusive possession), a limited set of rights in relation to access for ‘traditional’ purposes and a right to be consulted by decision-makers as to land use where partial extinguishment has occurred, or formal recognition as traditional owners that provides only a very limited set of usufructuary rights.

In areas where a determination recognises native title as a right to exclusive possession (and areas subject to native title applications that have been registered with the NNTT but not finally determined), the ‘right to negotiate’ or ‘opportunity to comment’ provisions for ‘future acts’ contained in Part 2 Division 3 provide an elaborate but limited set of procedural rights requiring that native title holders be consulted over or notified of certain land use decisions (and not others). The complicated set of differentiated and contingent substantive and procedural rights of native title holders is described by Wootten (1994) as a labyrinth of legislative provisions. Unlike the Land

Rights Act, the right to negotiate does not include a right to ‘veto’ development projects and is subject to other strict procedural limits. Many major types of development, including infrastructure projects, can be excluded from the right to negotiate provisions by the relevant government, and offshore areas are excluded from the right to negotiate provisions entirely.

The statutory rights under the Native Title Act in relation to the concurrent operation of other land use and natural resource management regimes are also significantly less than those under the Land Rights Act. Rather than the right of traditional Aboriginal owners under the Land Rights Act to control access to Aboriginal land (by way of a permit system contained in the Aboriginal Land Act and administered by the Land Councils and traditional owners) and exercise control over all major land use and natural resource management decisions,<sup>143</sup> the Native Title Act provides a convoluted set of differentiated (but always limited) procedural rights for a wide variety of types of land use decisions on land or waters covered by a native title determination or application. As Heerey, Drummond and Emmett JJ state of the future acts provisions of Part 2 Division 3 (subdivisions G-J) of the Native Title Act: “Though the native title holders cannot prevent the doing of these future acts, they are, in general, entitled to compensation for such acts in accordance with Div 5 and they have certain procedural rights to which effect must be given before the act can be validly done.”<sup>144</sup> Their Honours (at 72) noted that similar procedural and substantive limitations pertain to the mining provisions and the ‘right to negotiate’.

The extremely limited nature of these procedural rights in many instances is demonstrated by the court’s analysis of the future act provisions of s. 24HA (applying to the grant of a lease, licence, permit or other authority relating to the management or regulation of surface or subterranean water or aquatic biological resources). The court (at 71) noted that the section provides a right to be notified of and an “opportunity to comment on the act or class of acts” rather than a right to negotiate, stating:

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<sup>143</sup> The statutory obligations of the Land Councils include consulting with and obtaining the consent of traditional Aboriginal owners ‘as a group’ for land management decisions; in *Alderson v Northern Land Council* (1983) 1 N.T.R. 20 the NT Supreme Court held that this requires consent by a ‘substantial majority’ of traditional Aboriginal owners in the affected area(s).

<sup>144</sup> In *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60 at 68.

The opportunity ‘to comment’ on a proposed act provided for by s 24HA(7)(b) ... [is] a right to proffer information and argument to the decision-maker that it can make such use of as it considers appropriate. The subsection does not confer any greater right on the native title interests. It is not a right to participate in the decision whether to issue the permit or a right that entitles the recipients to seek information from the decision-maker necessary to satisfy those interests about matters of concern to them.

Their Honours (at 64) further commented that the requirement to notify native title holders under these provisions does not include a right to information on the details of permit applications: “The majority of the notices provide little more than a blanket description of [the basic categories of applications and] areas specifying whole zones in a Section [of the Great Barrier Reef Marine Park] or Sections themselves.” Nonetheless, the court (at 72) held that this was more information than was required by the legislation and regulations: “it is not necessary for the Authority to give notice to the registered native title claimants that it is proposing to grant each specific permit of a class of permit proposed to be granted.” Furthermore, unless conceded by the relevant government a ‘future act’ (defined in s. 233) must be demonstrated to the satisfaction of the court to significantly ‘affect’ native title (defined in s. 227 to mean an act that extinguishes or is otherwise wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title rights or interests). It is not sufficient that an act may affect native title: “for the purposes of the NTA, a future act is an act that *affects* native title and not an act that *might* affect native title.”<sup>145</sup>

In addition to the much weaker right to negotiate or opportunity to comment provisions (from the perspective of traditional owners), unlike the Land Rights Act there is no ‘statutory royalty’ for mining operations on Aboriginal land under the Native Title Act.<sup>146</sup> Although governments are under a statutory obligation to conduct negotiations ‘in

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<sup>145</sup> *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (2001) 185 ALR 513, per Merkel J at 535.

<sup>146</sup> The statutory royalty (provided for by ss. 35, 63 and 64) applies to all mining projects on Aboriginal land and is in addition to specific agreements negotiated between traditional owners and developers, providing a significant and autonomous source of funding for Aboriginal organisations, allocated amongst the Land Councils, Aboriginal organisations from the ‘affected area’, and the Aboriginals Benefit Reserve (which considers applications for the disbursement of funds to Aboriginal organisations). (Reeves, 1998:

good faith’,<sup>147</sup> this only applies to negotiations pursuant to the ‘future act’ provisions rather than as a (quasi-)constitutional obligation on all dealings with Indigenous peoples as in Canada and New Zealand. In areas where partial extinguishment has occurred alternative State and Territory regimes may apply in accordance with s. 43A of the Native Title Act:

The alternative provisions apply to future acts relating to land that is an *alternative provision area*. This is defined to include land that is, or historically was, the subject of pastoral leases or other tenures, and land that has been reserved or dedicated for public purposes...

Land speculation during the last century has had the effect that a substantial proportion of the vacant crown land in Australia has, at some time, been subject to a pastoral lease or some other tenure. Around the turn of the century, over 93% of the Northern Territory was the subject of pastoral leases... (Athanasίου & Borchers, 2001; 96)

The procedural and substantive rights of native title holders are even less substantial under the NT’s alternative regime (under the *Validation of Titles and Actions Act* 1994 (NT) and *Validation (Native Title) Act* 1998 (NT)). Pursuant to this regime the Lands and Mining Tribunal is responsible for hearing claims for compensation where partial or total extinguishment has occurred since the commencement of the *Racial Discrimination Act* 1975 (Cth).<sup>148</sup> (Athanasίου & Borchers, 2001)

In addition to their responsibilities under the Land Rights Act, the NLC and CLC are Representative Bodies under the Native Title Act (s. 203). The Land Councils must be involved in land claims or negotiations with traditional Aboriginal owners holding title under the Land Rights Act; native title applicants and native title corporations (‘Prescribed Bodies Corporate’, PBCs) may request assistance from the relevant Land

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Rowse *et al* (eds), 1999) A method adopted by the *Aboriginal Land Rights Act* 1983 (NSW) was to provide for 7.5 % of land tax revenue to be allocated to Aboriginal Land Councils in the State for fifteen years. (McRae *et al*, 1997; 194) Similar arrangements in a variety of forms have been adopted in Canadian agreements. (Hylton (ed), 1999: Nettheim *et al*, 2002: Langton *et al* (eds), 2006)

<sup>147</sup> *Walley v Western Australia* (1996) 137 ALR 561.

<sup>148</sup> The Tribunal is established by the *Lands and Mining Tribunal Act* 1998 (NT): although not subject to direction by the Minister in the performance of its functions (s. 8), the person comprising the Tribunal is appointed by the Administrator (as directed by the Minister), the only procedural and substantive requirement being that the member(s) be enrolled as a legal practitioner of the High Court or a Supreme Court for at least five years (s. 28).

Council but this is not a statutory obligation for either PBCs or Land Councils. Nonetheless, as of 30 June 2004 the NLC had 152 active native title applications on file, as well as facilitating associated negotiations. (NLC, 2004) Although the basic roles and duties of Native Title Representative Bodies (NTRBs) and PBCs with respect to consultations with and on behalf of native title holders essentially replicate the Land Rights Act provisions in some respects (Bartlett, 2000: Mantziaris & Martin, 2000: McRae *et al*, 1997), there are also some important differences, such as the very different procedural rights under the right to negotiate or opportunity to comment provisions of the Native Title Act (discussed above). Other differences are that PBCs are required to be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and are therefore potentially subject to greater administrative intervention by Commonwealth officers (as argued in chapter 9), and PBCs are separately responsible for maintaining a register of native title holders; they may seek the advice of the Land Councils (as NTRBs) in relation to negotiations and the making of land management decisions, but this is not mandatory as in the case of Land Trusts, which are ‘passive’ land-holding entities (usually with between 4 and 6 members) with no active role in negotiations and land management decisions. (Toohey, 1984: Neate, 1989: Reeves, 1998)

The variable nature and extent of legal recognition under the Native Title Act is a crucial point of distinction between the two forms of recognition of Aboriginal rights and interests in land and waters; if a land claim is successful the Land Rights Act provides for a grant of title to the relevant area in a standardised form prescribed by the Act (described as ‘inalienable fee simple’ as the form of title is at least as secure as freehold and such lands cannot be sold to third parties, they can only be leased subject to strict conditions or surrendered to the Crown: Neate, 1989). The form of land tenure, together with the requirement that laws of the NT must be capable of operating concurrently with the Land Rights Act (ss. 73 and 74), provides a significant level of control over all subsequent land use and natural resource management decisions. The level of legal control over land use and natural resource management decisions possible on Indigenous land owned pursuant to the Native Title Act is extremely variable, though in the event of disagreement with Commonwealth governments even when the right to ‘exclusive possession’ of an area is recognised the legal rights of Aboriginal peoples under the Native Title Act are always

less than under the Land Rights Act in terms of the respective rights of traditional owners, Commonwealth governments and other stakeholders in relation to major development projects and many other land use and resource management decisions.

### **Cultural heritage protection regimes in the NT**

As with Indigenous Affairs, land administration, natural resource management and environmental protection regimes, the States (and to a lesser though still significant extent the Territories) have primary responsibility for Indigenous cultural heritage protection regimes. (Renwick, 1990: Neate, 1989) The importance of this function is apparent in the Kalkaringi Statement, which stipulates: “That a Northern Territory Constitution must provide for Aboriginal control in relation to, and the effective protection of, Aboriginal sacred sites and significant areas”. The Aboriginal Areas Protection Authority (AAPA), a statutory authority established by the NT Government in 1979, is a bicultural mechanism that has specific responsibilities for the protection of registered Aboriginal cultural heritage areas whether on land, internal waters or coastal waters (within territorial limits i.e. within 3 nautical miles of the baseline).

As with other land and natural resource management regimes, the protection of Aboriginal cultural heritage areas has also been the subject of dispute with the NT Government, in this instance including the NT Government, AAPA, Northern and Central Land Councils and other Aboriginal organisations and groups as the main protagonists, resulting in the apparent contradiction of a regime for the protection of heritage areas that is in some respects much more progressive than elsewhere in Australia yet still the subject of bitter contention over specific aspects of its operation for much of the period of self-government. Thus the concerns of the Land Councils and ATSIC noted by Reeves (1998, chapter 13) were at least in part attributable to the overall authority and specific functions of the AAPA remaining subject to the paramount powers of the NT Government, and that to this extent the regime does not comply with the degree of protection of cultural heritage areas envisaged by and contained in the Land Rights Act. As Ditton (1998, 279) explains, the regime has achieved many successes, “But sometimes the *Northern Territory Aboriginal Sacred Sites Act 1979* isn’t strong enough.”

There was considerable political controversy over sacred site protection during the 1970s and 1980s, another dimension of the jurisdictional disputes noted in chapter 6.

Bell (in Peterson & Langton (eds), 1983; 291) states of the politics of protection of heritage areas under the NT legislation from the perspective of an industrial development proposal in Alice Springs in the early 1980s: “The strands of the fabric woven by the moves and countermoves of [the NT] government, Aboriginal organisations, and the traditional owners themselves form an intricate pattern.” Although subject to the requirements provided by the Land Rights Act, following a decision by the AAPA to register several areas in Alice Springs the subject of the development proposal the NT Government determined to transfer the functions of the authority for areas within town boundaries to the Cabinet, Bell (in Peterson & Langton (eds), 1983; 291) suggesting that: “the valley has become a test case in the Northern Territory Government’s attempts to free itself of Federal constraints.”

Several structural and operational changes were made to the regime when the legislation was revised in 1989 some of which again proved controversial, notably the powers of the NT Government to overrule decisions of the Board not to grant an authority certificate and the dismissal of the Director (which had been an objective of the NT Government for several years but had not been possible under the earlier statutory provisions). (Adlide, 1989; Maddock, 1989; Ritchie, 1989; Heatley & Trollope, 1994; Wootten, 1993) Nonetheless, by the 1990s the legislation and role of the AAPA had become a significant if not quite integral feature of the planning and development processes of the NT. (CLC, 1994; JSC, 1977; Finlayson & Jackson-Nakano (eds), 1996; Evatt, 1996; PJCNTATSILF, 1998; Sutherland, 1997; 138) Clearance certificates are usually obtained as a matter of course for major development projects but are not mandatory for all land use and development proposals.

The Federal Government’s Indigenous cultural heritage protection regime, established by the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), was initially introduced as an interim measure and intended as a measure of last resort. The Federal heritage protection regime has generally been of limited direct effect in the NT, but has been used by traditional owners on at least two occasions to contest decisions by the NT Minister to approve development projects against their strong objections. The determination of the NT Government to construct a dam on a section of the Todd River of major significance to Indigenous custodians during the 1980s and early

1990s illustrates the confrontational approach often employed by the NT Government in Indigenous Affairs; in this instance, the Minister administering the Federal cultural heritage regime ordered an inquiry into the NT Government's decision to permit construction of the dam. (Wootten, 1993) Although the area of Coronation Hill the subject of a mining proposal during the early 1990s was registered as sacred site by the AAPA, this was also subject to the power of the NT Minister to grant a clearance certificate. (Renwick, 1990) Consequently, the Federal Minister appointed an inquiry into the development proposal under the cultural heritage regime, in this case also referring the matter to the Resource Assessment Commission to conduct a comprehensive environmental and social impact assessment. (RAC, 1991)

As in the States (most of which established some type of Indigenous heritage protection regime in the 1960s or 1970s), the first cultural heritage regime in the NT (the *Native and Historical Objects and Areas Preservation Ordinance 1955* (NT)) was premised on Indigenous heritage defined as historical relics rather than the subject of continuing laws, traditions and beliefs. (Janke, 1998: Renwick, 1990) The regime recognised Aboriginal archaeological objects, sites and remains, though very few resources were provided for implementation. The Land Rights Act requires the NT Government to provide for the recognition and protection of sacred sites in accordance with the principles and provisions of that Act (in particular ss. 69, 73 and 74). The Board of the Aboriginal Sacred Sites Protection Authority established by the 1978 legislation was required to have a statutory Aboriginal majority, transforming the conventional basis for the recognition, management and protection of Indigenous cultural heritage areas in Australia. The Authority board consisted of twelve members, a Chairman and eleven others, at least seven of whom were Aborigines appointed upon nomination by the Land Councils (*Aboriginal Sacred Sites Ordinance 1978* (NT), s. 5).

As with the Land Rights Act, in some respects the regime continues to provide a benchmark for the protection of areas of particular significance to Indigenous people in Australia, such as the composition and significant degree of operational autonomy of the Board, and the application of the regime to all land and waters of the NT. Established by the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), the Board of the AAPA consists of twelve members appointed by the Administrator, ten of whom are Aboriginal

custodians of sacred sites “appointed in equal number from a panel of 10 male custodians and 10 female custodians nominated by the Land Councils” (s. 6). The NT Government appoints the other two members. The Board is authorised to employ staff, but the Chief Executive Officer (CEO) is appointed by the Administrator (as directed by the Minister) – there is no requirement for the approval of, or even consultation with, the Aboriginal Board members on the appointments of the CEO and the two other Board members. The AAPA is a prescribed statutory corporation for the purposes of the Financial Management Act but not the Public Sector Employment and Management Act (see chapter 4): the AAPA must complete an annual report on the administration of the Act in much the same format as “agencies”, is managed in accordance with the human resource management principles of the NT public sector, and the terms and conditions of employment must be approved by the Commissioner for Public Employment (AAPA, 2001)

The functions of the AAPA (ss. 10, 20) include: to carry out research on and maintain archives and a register of sacred sites; to evaluate applications for clearance certificates from persons proposing “to use or carry out work on land”; to consult all relevant custodians in relation to applications for clearance certificates, facilitate discussions between custodians and applicants, and decide whether or not to issue a clearance certificate and the terms and conditions of certificates granted; and, to enforce the protection and offence provisions of the Act.<sup>149</sup> The Board may form executive or regional committees to assist in the performance of these functions (s. 10). Due to the relatively strong protection of heritage areas located on Aboriginal land and the requirement for at least some information on the location and nature of heritage areas to be contained on the register and therefore in the public domain, most of the areas registered with the AAPA are located in areas not restored to Indigenous ownership.

The Authority is subject to the direction of the Minister other than in the conduct of certain functions. Functions quarantined from ministerial intervention include the employment of staff, and administration and enforcement of the sacred site protection procedures (the processing and evaluation of applications from land developers for

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<sup>149</sup> Some functions of the Authority are also delegated under the *Heritage Conservation Act* 1991 (NT). (AAPA, 2001)

clearance certificates or from Indigenous custodians to have areas registered as sacred sites, and enforcing the prohibitions on entry onto or work on sacred sites without a clearance certificate and the terms and conditions of clearance certificates: ss. 5, 17, 43, 51 and Parts III and IV). The CEO is appointed by the Minister, but is also “charged with carrying out the decisions of the Authority” (s. 15). The Minister may direct the Authority to review a decision not to issue a clearance certificate and, after receiving a copy of the report and recommendations of the Authority, either uphold the decision or issue a clearance certificate (in which case the Minister must give notice of and the reason for granting the certificate in the Legislative Assembly). If a certificate issued by the Minister “is in conflict with an Authority Certificate the Authority Certificate, to the extent of that inconsistency, has no force or effect” (ss. 30-32).

If the principles of the Kalkaringi Statement are to be respected a more appropriate arrangement would be to refer such disputes to a bicultural (or other agreed) dispute resolution procedure. In addition, the power to appoint a CEO and the presence on the Board of members that the Aboriginal Board members may not have been consulted about may have an inhibiting effect on proceedings, particularly during times of tension with the NT Government. A strong argument can be made for at least requiring the vetting of these executives by the Aboriginal members of the Board (as the Minister may screen the appointment of Aboriginal members of the Board), or for making all such appointments solely on the basis of nominations from the Land Councils (and Board members in the case of the CEO) to secure this Indigenous domain, of central importance to the protection and maintenance of cultural heritage and self-determination.<sup>150</sup> As Wettenhall (1983, 50) argues of the operational autonomy of statutory authorities generally:

it is advisable to distinguish, within the structure of the SA, between the policy board and executive management, so that the former can, among other things, operate as a ‘buffer’ or ‘filter’ between the political pressures and day-to-day management. Wherever these two levels exist, it is in my view vitally important that the managing director or chief executive be appointed by and responsible to the SA board and not by and to the government or minister.

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<sup>150</sup> Under the 1978 Act the Director of the Authority was appointed by the Board (s. 16).

If this appointment is by and responsible to the minister, then all sense of integrity of the SA is lost...

Obtaining a clearance certificate is not a requirement for all land developers; though standard practice for development proposals assessed under the *Environmental Assessment Act* 1982 (NT), clearance certificates are not required for applications under the *Planning Act* 1999 (NT). Reeves (1998, 281) disagreed with a recommendation of the 1984 review of the Land Rights Act (Toohey, 1984; 136) that “NT planning laws require notice to be given to the ... [AAPA] and to the relevant Land Council where development of land is proposed” (a recommendation not implemented by the NT Government), arguing that a requirement for all development works to obtain a clearance certificate “would place an impossible burden upon the Aboriginal custodians of sacred sites in the Northern Territory to check hundreds, if not thousands, of proposals per week relating to developments on land”, as well as significant costs and delays for developers. Instead Reeves (1998, 294) recommended that a clearance certificate should be required only for development projects involving sub-divisions of land within town boundaries.

While this would be an improvement on the existing situation, the recommendation of the earlier review that notice of applications by land developers under the Planning Act be cross-referenced to the AAPA and Land Councils deserves further consideration, as does a similar suggestion that environmental impact assessment and native title negotiation processes be coordinated or integrated to some extent. (Lane & Yarrow, 1998) Although the administrative resources required by the AAPA, Land Councils and traditional owners would be considerable if all applications under the Planning Act (and Environmental Assessment Act and comparable Federal legislation) required a clearance certificate, this is a task that would generally be welcomed by traditional owners (‘custodians’) given the importance of the function, as the submissions of the Land Councils and ATSIC to the review conducted by Reeves clearly state. Furthermore, the ‘burden’ is considerably overstated by Reeves: there are usually around 1000 applications processed under the Planning Act each year, around 200 of these also processed under the Environmental Assessment Act (DLPE, 1998); a considerable number, but hardly an impossible burden and one that may not add substantially to the

time or cost of existing planning and environmental laws for applicants in many cases if the application procedures are co-ordinated (administrative costs would generally be borne by the AAPA and Land Councils).

### **The resolution of Indigenous land claims in Australia, Canada and New Zealand**

The Kalkaringi Statement stipulates that the Land Rights Act must remain as Federal legislation and that effective constitutional protection must be provided for common law and statutory ownership rights to land and waters (see chapter 5 - the possibility of constitutional protection is considered in chapter 10). The Land Rights Act has been a relatively successful regime for the recognition of Indigenous land rights, and there have been some successfully concluded determinations (most often in the form of negotiated agreements) under the Native Title Act notwithstanding the legal fragility of native title rights and interests and that it is still in a preliminary stage of implementation overall. (Langton & Palmer, 2003) Nonetheless, a crucial aspect (and it is submitted a major deficiency) is that neither regime is comparable to the fundamentally bicultural procedures of the Waitangi Tribunal or the Canadian Royal Commission on Aboriginal Peoples and subsequent comprehensive land and self-government agreements.

Durie (1993) notes several features of the Waitangi Tribunal as a major component of the attempt to address Maori 'claims' against the Crown. The jurisdiction of the Tribunal includes but is not limited to the consideration of land rights claims - unlike the land rights regimes in Australia, the Tribunal may examine the exercise of all public powers by the Crown that may affect Maori rights according to the provisions and principles of the Treaty of Waitangi. Following the completion of an inquiry the Tribunal makes recommendations to the New Zealand Government (to this extent the function of the Tribunal is similar to the powers and functions of the Aboriginal Land Commissioner, essentially an administrative rather than judicial process).<sup>151</sup> Such inquiries may involve specific land or resource claims, or claims pertaining to a specific statute, policy or

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<sup>151</sup> "Like that of the ... [Aboriginal Land] Commissioner, the Tribunal's power is simply one of recommendation. The Ministers of the Crown who receive the Tribunal's recommendations are free to accept, qualify or reject the advice given them on the principles of the Treaty of Waitangi". (McHugh, 1991; 309-10)

decision of the Crown.<sup>152</sup> The Tribunal has also developed statements of general principles in relation to categories of natural resources or other matters of relevance to many claims. (McHugh, 2004: Bennion, 2001: Durie, 2005)

Furthermore, the Waitangi Tribunal: “seeks to achieve those ends through a bicultural composition, acknowledging that no one party has a monopoly on truth. Also it is not assumed that lawyers know it all. It is a mixture of legal and lay personnel. Most importantly the Tribunal’s process is bicultural.” (Durie, 1993; 71) The Waitangi Tribunal had three members when it was established in 1975, the Chief Judge of the Maori Land Court (also serving as Chairperson of the Tribunal) and two other members appointed by the Minister of Justice (including at least one Maori). The 1985 amendment increased the number of members to seven (four of whom must be Maori) and extended the jurisdiction of the Tribunal to include claims pertaining to breaches of the Treaty prior to 1976. Together with the increasing judicial and political recognition of the principles of the Treaty of Waitangi since the 1980s,<sup>153</sup> the reports of the Waitangi Tribunal have had a major influence on the acceptance of the Treaty of Waitangi within the ‘constitutional’ fabric and political culture of New Zealand, including the principles underpinning Maori-Pakeha relations and the conduct of specific negotiations between them.

In the case of specific land claims, as noted above the Land Rights Act involves a similar extra-legal analysis of the implications of specific land claims for land owners, other stakeholders and the regional patterns of land use and development. In this respect the role of the National Native Title Tribunal (NNTT) is limited to mediation amongst stakeholders of each area subject to a native title application, facilitating negotiations for consent determinations and ILUAs in accordance with and subject to the principles and provisions of the Native Title Act.<sup>154</sup> Taking place in a context in which all existing

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<sup>152</sup> Pursuant to s. 6 of the *Treaty of Waitangi Act* 1975 (NZ), as amended in 1985, where a Maori or Maoris claim that they are, or are likely to be, prejudicially affected by an Act, regulation, Order in Council, policy, practice, or act (decision) by or on behalf of the Crown, and that such a measure is inconsistent with the principles of the Treaty of Waitangi, they may submit a claim to the Tribunal.

<sup>153</sup> As discussed in chapter 6, the jurisprudence from *Wi Parata* until the mid-1980s was in effect based on a similar “enlarged notion of terra nullius” as that applying in Australia until 1992.

<sup>154</sup> The Registrar is established pursuant to Part 8, the NNTT by Part 6 (the Tribunal includes a President and may include a Deputy President(s) and other members); all are formally appointed by the Governor-General. Functions of the Tribunal include to conduct mediation and arbitration and provide assistance to native title applicants and individuals or groups affected by native title applications; the Registrar is

estates, interests and licences from the Crown prevail over native title rights and interests in the event of, and to the extent of, inconsistency, the regime for mediation is based principally on addressing stakeholder interests rather than recognising Indigenous rights in a consistent and comprehensive manner: “The statutory native title regime has not been established by Parliament ... to advance their wider social, economic and political goals [within the context of negotiated agreements in accordance with the right of self-determination], but rather to integrate the management of native title into the general land and resource management system”. (Martin, 2004; 73)

Canada has taken a very different approach to both New Zealand and Australia in identifying and attempting to resolve competing Indigenous and non-Indigenous claims. Underpinned by increasing levels of constitutional and political recognition of Indigenous rights, many comprehensive regional agreements have been negotiated in Canada; during the 1970s and 1980s most emphasis was placed on resolving land claims and the co-management of natural resources in the area to be covered by each agreement, though some agreements also established distinct arrangements for Indigenous self-government. Following acceptance by the Federal Government of the Indigenous right of self-government in 1995 agreements have consolidated associated powers and functions, including “a comprehensive land claims settlement and self-government agreement” between the Nisga’a Nation, British Columbia and Federal Governments in 1998 that set new benchmarks in the transition towards recognition of the right of Indigenous peoples to self-determination in the Anglo-Commonwealth countries (examined further in chapter 10). (Edmunds (ed), 1999; Hylton (ed), 1999; Bartlett, 2001; Morse, 2004; Langton *et al* (eds), 2006) There is also a distinctive form of self-government in the North-West Territories of Canada, where Indigenous inhabitants comprise a majority of the population. (Loveday *et al*, 1989; Palmer & Tehan, 2006a; Jull, 1991, 2003)

Due to extensive legal and procedural limitations, many aspects of the recognition of Indigenous land rights in Australia must be considered deficient compared to the bicultural procedures emphasising negotiated agreements in Canada and New Zealand: although some legal rights and authority are conferred upon a variety of Indigenous

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responsible for maintaining the register of native title applications and determinations (as well as making the preliminary decision as to whether an application satisfies the statutory requirements for registration).

organisations if claims are successful and negotiations have often occurred, the mechanisms for processing land claims are fundamentally monocultural, and an inevitable result of the principles and requirements on which the regimes are premised is the partial, substantial or complete extinguishment and regulation of Indigenous rights in many instances.<sup>155</sup> Woodward's (1985, 414) comments on the establishment of Aboriginal reserves are also of relevance to most land claims and native title applications (and extends to the inadequate level of protection provided to Indigenous land rights by the Native Title Act even if the right to exclusive possession is recognised):

[By the mid-1950s Aboriginal reserves] were substantial in area in the Northern Territory, Western Australia, Queensland and South Australia; but it was generally true to say that the land concerned was either quite unsuitable for European settlement or at least not then required for the purpose. There was no sacrifice on the part of the white community in creating such reserves and, when a need arose to use all or part of a reserve for other purposes, it was a comparatively simple matter to revoke the reservation or excise part of it...

Woodward (1974, 2) emphasised the importance of providing an adequate land base for all Indigenous peoples "as a first essential step" to addressing dispossession and marginalisation (and to this effect also recommended that 'needs' based claims should be permitted), rather than putting most emphasis in the resolution of land rights on legal principles and procedures that have extremely variable results for Indigenous peoples in different areas: "A useful first step – whatever the final outcome – would be to ensure that each major tribal group has control of a substantial area of land." (Woodward, 1974; 43) In the most densely settled areas of Australia the entire territories of Indigenous peoples located in those areas prior to the British assertion of sovereignty have been 'alienated', allocated or reserved for specific purposes by the Crown, and in many other areas the combination of historical and current total and partial legal extinguishment mean that few areas will be available to Indigenous peoples in the form of 'inalienable fee simple' ownership.<sup>156</sup>

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<sup>155</sup> Although functioning within subordinate operating environments, the AAPA and Community Living Areas Tribunal demonstrate such bicultural mechanisms are possible in Australia.

<sup>156</sup> For example, in the Warumungu Land Claim the Commissioner (Maurice, 1988; viii) stated: "In the resolution of the many issues to which this claim gives rise, the problem for the Warumungu is that they

To be more in accordance with the Declaration on the Rights of Indigenous Peoples and Kalkaringi Statement therefore, the mechanisms of the land rights regimes could continue to operate for specific areas (to prevent further disruption or delay of claims completed or under way) but in the context of the objective of reaching comprehensive local and regional agreements on restoring an Indigenous land base for each people. The negotiation of land rights agreements between traditional owners and Commonwealth Governments could be conducted on the basis that every effort will be made to provide an adequate land base, and to include to the greatest extent possible areas preferred by traditional owners rather than being limited to areas that remain as vacant Crown lands (whether by potentially including areas from all types of ‘Crown’ and ‘public’ land, or by purchase). The many regional agreements in Canada demonstrate the feasibility and potential advantages of such an approach. The role of the Indigenous Land Corporation (to purchase land on behalf of Indigenous peoples) may continue to be an important complementary element of moving towards social justice, but is of itself completely inadequate as the only alternative to the existing land rights regimes given the continued extensive dispossession of many peoples under those regimes, and the systemic tendency for areas that remain potentially available for ‘claim’ to be the most remote and arid areas of the continent.

The potential advantages of negotiated agreements compared to contested native title application are apparent in the results of the Timber Creek native title application,<sup>157</sup> an application contested by the NT Government (amongst others), and a consent determination and ILUA negotiated by the NT Government and traditional owners covering native title rights and interests in Tennant Creek.<sup>158</sup> In the proceedings of the Timber Creek native title application the applicants demonstrated to the satisfaction of the court that they are the traditional owners of the area, but as the right to exclusive possession could not be demonstrated (the area is vacant Crown land adjacent to the town of Timber Creek but is frequently traversed by town residents and others) the court only

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start from a position of near hopeless compromise already. The areas to which they are relegated to claiming are not the areas of their choice; on the contrary. Their claims are seen as being opportunistic - which, of course, they are: they have no alternatives, except to remain landless.”

<sup>157</sup> *Griffiths v Northern Territory of Australia* [2006] FCA 903.

<sup>158</sup> *Patta Warumungu People v Northern Territory of Australia* [2007] FCA 1386, and the Tennant Creek Indigenous Land Use Agreement. (ATNS, 2008a)

recognised non-exclusive usufructuary rights, and none of the land (or other land in the immediate area) was restored to Aboriginal ownership.

Following the Tennant Creek consent determination, a negotiated agreement was reached as to the amount and location of areas to be restored to the ownership of traditional owners (in this instance there had also been intermittent but at times extensive negotiations between traditional owners, the NT Government and the Tennant Creek Town Council on basically the same topic since the Warumungu Land Claim). By relying on negotiations rather than strict conformity with the requirements of the Native Title Act the agreement goes beyond recognising ownership rights over vacant Crown lands not otherwise reserved for or dedicated to a public purpose and providing for non-exclusive usufructuary rights (and perhaps also an ‘opportunity to comment’) in areas where ‘partial’ extinguishment has occurred, to negotiating an adequate land base in the context of Indigenous needs, objectives and priorities and all potentially available land in the area. As in Canada, such negotiations could also include the establishment of measures for the protection of areas of cultural significance and co-management of natural resources in areas not restored to the ownership of Indigenous people.<sup>159</sup>

Furthermore, once negotiated arrangements for the restoration of Indigenous land ownership have been made, it is submitted that the basic principles of the Land Rights Act rather than the provisions of the Native Title Act should apply to all subsequent land use decisions. In this respect a further condition for Aboriginal consent to a Constitution for the NT in accordance with the Kalkaringi Statement is:

That the free and informed consent of relevant Aboriginal peoples according to Aboriginal laws be obtained prior to the approval of any project affecting their lands, territories, waters and other resources. Pursuant to such agreement, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

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<sup>159</sup> Although progress in the negotiation of comprehensive agreements in Canada varies considerably, as Bartlett (2001, 362) argues: “The policy and practice in Canada is dramatically different from that in Australia. The Canadian policy of reaching settlements by agreement has worked and is working ... Moreover, such objectives are being achieved without the gross denial of equality, or the ludicrously wasteful expenditure of the processes of the NTA.”

Woodward commented in some detail on this aspect of land rights, arguing that:

I believe that to deny the Aborigines the right to prevent mining on their land is to deny the reality of their land rights. I find it quite impossible to inspect developments on Groote Eylandt or the Gove Peninsula or proposed works on uranium deposits in Arnhem land and to say that such developments, without consent, could be consistent with traditional land rights for Aborigines.

The key words here, of course, are ‘without consent’. I think it is likely, particularly in the longer term, that consent will generally be given. But this should be for the Aborigines to decide – with the one qualification that their views could be overridden if the government of the day were to resolve that the national interest required it. In this context I use the word ‘required’ deliberately so that such an issue would not be determined on a mere balance of convenience or desirability but only as a matter of necessity. (Woodward, 1974; 108)<sup>160</sup>

## **Conclusion**

The Land Rights Act and associated requirements for ‘complementary’ land use and natural resource management regimes provide a relatively secure Aboriginal domain and land and resource base compared to other jurisdictions in Australia. In some important respects, such as the total area restored to Aboriginal ownership and the security of Aboriginal domains that has been achieved, the regime also compares very favourably with those of Canada and New Zealand. In terms of the land rights regimes in Australia, the Land Rights Act demonstrates that even without treaties or constitutional protection (though as argued in chapters 1 and 6 the Land Rights Act is in effect a ‘quasi-constitutional’ law for the NT Government) the land rights of Indigenous peoples can be accommodated by the system of government (and derivative property and natural resource management regimes) in a manner that provides a significant degree of protection against expropriation or coercion by governments of the Commonwealth of Australia in the making of land use decisions. The regime is therefore an example of ‘best practice’ arrangements in Australia, a regime that in many respects in substantial compliance with recognition of land rights in accordance with the Indigenous right of self-determination. Nonetheless, in some cases the conditions precedent of both land

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<sup>160</sup> To be most effective (within the existing system of government) this principle must extend to all possible forms of statutory or Executive expropriation of land or imposed forms of land use.

rights regimes for a right to exclusive possession to be established and enforced may result in judicial ‘verification’ of continued cultural survival, but in terms that simply validate (and purport to legitimise) continued dispossession.

As with the different provisions applying to different forms of land tenure, the implementation of the principles and provisions of the Land Rights Act in natural resource management regimes has been accomplished in a variety of ways; although in these contexts also the basic structures and principles of each regime are usually at least as advanced as comparable regimes in the States (e.g. for cultural heritage protection, and the recognition of Indigenous rights in areas covered by pastoral leases), providing a relatively strong basis for the recognition of Indigenous rights, the extent to which these structures and principles have been integrated throughout the machinery of government, within specific agencies, and in different parts of the NT varies considerably. The integration of land rights within wildlife and marine area and resource management regimes in the NT is the subject of the following chapter.

## **Chapter 8**

### ***Wildlife 'ownership' and management in the NT***

#### **Introduction**

As with other land and natural resource management regimes, wildlife and fisheries management regimes of the NT are simultaneously the subject of some of the most progressive arrangements in Australia and some of the most prolonged and fiercely contested disputes. Where land has been restored to traditional owners pursuant to the Land Rights Act this provides a strong legal basis for direct involvement in and control over all aspects of the management of wildlife. The practical results of native title determinations for traditional owners in terms of establishing a legal right to control or participate in wildlife management are much more variable. In relation to coastal waters, although sea closure applications (provided for by the Aboriginal Land Act) and native title determinations have not generally had a major impact in terms of increasing the substantive rights of traditional owners, they can be of importance symbolically as continuing refutations of the concept of *mare nullius* and may provide a limited set of procedural rights in relation to the management of marine areas and resources. There are many ways in which co-management can be extended into other areas of concern to traditional owners, both geographically and in terms of the range of matters subject to joint management arrangements in each area.

The implications of the many different types of land tenure for the extent of recognition of Indigenous land rights under the Land Rights Act and Native Title Act are significant factors in ascertaining the boundaries of wildlife ownership and whether there is a legal basis and practical opportunities for active participation in the formulation and implementation of wildlife management regimes. Provisions of the Kalkaringi Statement relevant to wildlife and fisheries management include:

That, subject to Aboriginal law, effective constitutional protection be provided to protect the total environment of the lands, air, waters, flora and fauna and other resources which Aboriginal people traditionally own, occupy or use...

That constitutional recognition be given to the full ownership, control and protection of Aboriginal cultural and intellectual property. This shall include Aboriginal rights to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts...

### **The legal boundaries of wildlife ‘ownership’**

In most cases the recognition of rights in relation to wildlife under statutory regimes and at common law is usually limited to ‘traditional’ (non-commercial) cultural uses and purposes. The right of Aboriginal peoples of the NT to access various types of Crown land and take wildlife and other resources for ‘traditional’ purposes is guaranteed in relation to parks and reserves (s. 122 of the Territory Parks and Wildlife Conservation Act (TPWCA)), and on pastoral leases (by s. 38 of the Pastoral Land Act and the terms of the leases). (Dawson, 1996) The ‘traditional’ use of marine areas and resources is protected by s. 53 of the *Fisheries Act* 1988 (NT); such activities are exempted from legislative, judicial and administrative instruments unless an instrument is specifically directed to restricting traditional use and activities. In addition, Fisheries Regulations 183-191 provide for ‘Aboriginal coastal licences’ to be granted to members of coastal Aboriginal communities that hold title to land under the Land Rights Act, which permit the licence holders to fish and sell fish within specified areas for the benefit of the community.<sup>161</sup> These provisions of NT regimes protecting ‘traditional’ uses of wildlife have been reinforced by s. 211 of the Native Title Act.

The taking of wildlife for traditional purposes in accordance with Indigenous law but without a licence or permit has been considered in a number of cases in Australia.<sup>162</sup> In all of these cases the court accepted that native title rights and interests recognised at common law can include a right to take wildlife for non-commercial purposes. The first case in which the High Court considered the effect of a regulatory regime for wildlife on

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<sup>161</sup> These licences are subject to restrictions such as only being permitted to use amateur fishing gear, not simultaneously holding a commercial licence, and not selling fish outside the community. Nonetheless: “The Director shall, in determining the conditions, if any, to be placed on an Aboriginal Coastal licence, take into consideration suggestions made by members of the community or group of Aboriginals of which the applicant is a member who are resident on the relevant land” (reg. 190).

<sup>162</sup> Including *Mason v Tritton* (1994) 34 NSWLR 572, *Sutton v Dershaw* (1995) A Crim R 318, and *Wilkes v Johnson* (1999) 21 WAR 269.

native title rights to take wildlife (in this instance two saltwater crocodiles, *Crocodylus porosus*) in accordance with the native title rights protected by s. 211 of the Native Title Act (including hunting, fishing, gathering, and cultural and spiritual activities) is *Yanner v Eaton*.<sup>163</sup> The defendant was charged with taking the crocodiles without a permit as required by the *Fauna Conservation Act* 1974 (Qld). The majority (Gleeson CJ, Gaudron, Kirby, Hayne and Gummow JJ, the latter delivering a separate judgment, McHugh and Callinan JJ dissenting) held that s. 7(1) of the Act regulated rather than extinguished the appellant's native title rights, and that s. 7(1) is subject s. 211 of the Native Title Act. The majority noted that fauna is not generally subject to ownership at common law unless killed or captured, and held (at 267-68) that the relevant provisions of the legislation did not vest absolute (full legal and beneficial) ownership in the Crown:

The 'property' which the Fauna Act and its predecessors vested in the Crown was ... no more than the aggregate of the various rights of control by the Executive that the legislation created... [, a set of rights] limit[ing] what fauna might be taken and how it might be taken ... Those rights are less than the rights of full beneficial, or absolute, ownership. Taken as a whole the effect of the Fauna Act was to establish a regime forbidding the taking or keeping of fauna except pursuant to licence granted by or under the Act.

The majority (at 269-70) further stated of the regulatory regime:

*regulating* the way in which rights and interests may be exercised is not inconsistent with their continued existence. Indeed, regulating the way in which a right may be exercised presupposes that the right exists. No doubt, of course, regulation may shade into prohibition and the line between the two may be difficult to discern...

[Section 211 of the Native Title Act] necessarily assumes that a conditional prohibition of the kind described does not affect the existence of the native title rights and interests in relation to which the activity is pursued.

Gummow J (at 288-90) also held that the native title right asserted had been proven and had not been extinguished by the relevant legislative schemes, and that the

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<sup>163</sup> (1999) 166 ALR 258.

inconsistency between the regulatory regime and the native title right to hunt and fish protected by s. 211 must be resolved in favour of the latter. As Olney J noted in the Croker Island native title determination however (see chapter 7), a regulatory regime may override the right recognised by s. 211 if it is explicitly directed to the exercise of native title rights.<sup>164</sup>

The general principles relating to the recognition of Indigenous rights and interests with respect to land use decisions and wildlife management in the NT were considered in two cases heard before the Federal Court in 1998 (both subsequently appealed to the Full Federal Court and High Court), although on the evidence presented and in their interpretations of the relevant legal principles the courts have reached different conclusions in some important respects. The Federal Court reviewed the interaction of regulatory regimes for wildlife in the NT and Western Australia and native title rights and interests in *Ward v State of Western Australia*,<sup>165</sup> the determination of native title by Lee J (at 639-40) at first instance providing recognition of a broad range of rights stemming from the right to exclusive possession in certain areas including the rights: “to trade in resources ...; to receive a portion of any resources taken by others ...; [and] to maintain, protect, and prevent the misuse of cultural knowledge of the common law holders associated with the ‘determination area’.”

The decision was appealed to the Full Federal Court,<sup>166</sup> the majority judgment of Beaumont and von Doussa JJ (at 345, 349) adopting a narrower interpretation based on the conception of native title as a ‘bundle of rights’, such bundle being reduced in the event of an inconsistent grant of an estate or interest by the Crown to the extent of the inconsistency (by ‘partial extinguishment’) or by regulation. The majority (at 483) set aside the orders and determination of Lee J, stating:

To the extent that legislation (in the case of nature reserves, minerals and petroleum) or executive action (in the case of pastoral and other kinds of leases) have created rights in the Crown or third parties that are inconsistent with the continued enjoyment of native title rights

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<sup>164</sup> There is no “justificatory test” as established by *R v Sparrow* [1990] 1 S.C.R. 1075 in Canada.

<sup>165</sup> (1998) 159 ALR 483.

<sup>166</sup> *Western Australia v Ward* (2000) 99 FCR 316.

and interests, native title rights and interests yield to the extent of the inconsistency and are extinguished.

All native title rights remain “subject to regulation, control, curtailment or restriction by valid laws of Australia.” (Beaumont and von Doussa JJ, at 543) Although according to both interpretations native title rights and interests remain subject to extinguishment or regulation by Commonwealth governments, according to the latter interpretation native title rights and interests in relation to wildlife (and other natural resources) are more susceptible to permanent extinguishment rather than regulation (potentially temporary suspension or restriction). Upon appeal to the High Court the majority decision was based primarily upon consideration of the degree of additional extinguishment effected by the *Native Title Amendment Act 1998* (Cth) in relation to the land and waters within the determination area, and did not reconsider the nature of native title rights and interests in relation to wildlife management regimes in detail (though the terms of the determination as stated by the majority of the Full Federal Court were preferred to the potentially more expansive determination of Lee J).<sup>167</sup>

In *Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group v Northern Territory*<sup>168</sup> the decision of Mansfield J (at 584-85) was similar in some respects to that of Lee J, his Honour stating of native title rights and interests in wildlife:

[The applicants] have the right to share, exchange or trade subsistence and other traditional resources obtained from or on the land and waters constituting the claim area. Of course, I draw a distinction between asserting the right to take flora and fauna from the claim area, and the right to ‘own’ the flora and fauna of the claim area. There can be no finding that the applicants have ‘property’ in the fauna in the claim area ...

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<sup>167</sup> *Western Australia v Ward* (2002) 191 ALR 1. The other native title determination(s) considering wildlife management regimes in the NT is the native title application to coastal waters adjacent to Croker Island (referred to below), the various determinations stated by the court (other than the minority decision of Merkel J of the Full Federal Court) similar to the narrower interpretation of native title rights.

<sup>168</sup> (2004) 207 ALR 539.

The Full Federal Court overruled this aspect of the determination,<sup>169</sup> the court stating that while a right to trade in natural resources could be included in the determination the court did not consider the evidence included by Mansfield J in the formal report of the proceedings established such a right.<sup>170</sup> Unlike fauna, at common law the ‘ownership’ of flora is included in land ownership in the case of fee simple title;<sup>171</sup> (Dawson, 1996) while there have been many legislative amendments over time, this was also the case pursuant to the TPWCA as in force prior to the substantial revision of the scheme in 2000 (the revised scheme does not address the matter directly). According to the definitions of the TPWCA and *Crown Lands Act 1992* (NT) pastoral leases were deemed to be a type of Crown land for this purpose (and therefore royalties from licences would accrue to the NT Government), but the permission of the owner or occupier of the lease is nonetheless required for access (TPWCA, s. 60).<sup>172</sup> Since the recognition of native title the ‘owner or occupier’ may include the lessee and traditional owners, depending on the terms of the native title determination or Indigenous Land Use Agreement. Nonetheless, the rights of landholders stemming from ownership of plants at common law and the right to take animals located on one’s property (other than some protected species) and refuse access to others to enter land for such purposes does not entail a right to commercially exploit native species, as a licence from the Director of the Parks and Wildlife Service is required to take, keep and trade wildlife for commercial purposes (the relevant provisions are examined below).

In addition to native title rights being subject to regulation, curtailment, or partial or total extinguishment by inconsistent statutory regimes or grants from the Crown, the courts have been reluctant to extend recognition of native title rights and interests to the right to protect “cultural and intellectual property”. (Daes, 1997: Janke, 1998, 2000: Hardie, 1998: Grossman, 2004: Johnston *et al* (eds), 1997, 2008) In this respect, another

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<sup>169</sup> *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442.

<sup>170</sup> Notwithstanding that courts are usually very reluctant to overrule decisions based on findings of fact; compare e.g. the decisions of the court in the Croker Island determination (see below).

<sup>171</sup> Certain marine species may be exceptions to the common law principle in relation to fauna, as Mansfield J noted in *Arnhemland Aboriginal Land Trust v Director of Fisheries* (NT) (2000) 170 ALR 1 at 22: “There may be some species of aquatic life which have such a close connection to the solum that they form part of the solum, and so fall within the ownership of the proprietor of that solum.”

<sup>172</sup> Since 2000 the payment of royalties is subject to the proviso that the relevant wildlife is ‘owned’ by the Territory (TPWCA, ss. 57(4) and 116).

aspect of the decision of the Full Federal Court in *Western Australia v Ward*<sup>173</sup> that involves a less expansive interpretation of native title rights and interests than the decision of Lee J at first instance is that the right to safeguard many aspects of cultural knowledge was held to be beyond the scope of the types of rights that could be recognised under the Native Title Act (as they were held not to be rights in relation to land or waters as such). Beaumont and von Doussa JJ stated (at 483-84) in this respect:

Although the relationship of Aboriginal people to their land has a religious or spiritual dimension, we do not think that a right to maintain, protect, and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title. The right to maintain ... cultural knowledge is not a burden on the radical title of the Crown, and is not a right that can be extinguished by legislation or executive act... The right to maintain, protect and prevent the misuse of cultural knowledge is a personal right residing in the custodians of the cultural knowledge, independent of the rights which can be the subject of a determination.

In relation to the right to protect knowledge subject to restrictions on disclosure pursuant to Indigenous law, Mansfield J held that the terms of the native title application asserting such a right were more specifically directed to be within s. 223 than those considered by most members of the courts to be beyond the operation of the Native Title Act in *Western Australia v Ward* (noted above) and *De Rose v South Australia*<sup>174</sup> and therefore that:

As expressed, the proposed right first relates only to the spiritual beliefs which concern particular locations in the claim area. And second, it seeks to ‘control’ the disclosure of those beliefs and the material objects and other ‘paraphernalia’ associated with them. It is not directed to controlling the use of some intellectual property, but to controlling its acquisition... As expressed, I do not consider the right is ‘something approaching an incorporeal right akin to a new species of intellectual property’...<sup>175</sup>

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<sup>173</sup> (2000) 99 FCR 316.

<sup>174</sup> (2003) 133 FCR 325.

<sup>175</sup> In *Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group v Northern Territory* (2004) 207 ALR 539 at 620. The right to control the disclosure of information was not acknowledged by the Full Federal Court: *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442.

The development of a separate corpus of law pertaining to common law recognition of certain individual and collective rights of traditional owners may protect some aspects of Indigenous cultural heritage analogous to intellectual property rights, but is similarly subject to regulation or restriction by inconsistent provisions and requirements of Commonwealth intellectual property regimes.<sup>176</sup> Due to the narrow basis of the terms of native title determinations such recognition must be pursued by separate legal proceedings and is therefore subject to significant additional time, expense and uncertainty (unless agreements can be negotiated with specific stakeholders in each instance). (Neuenfeldt (ed), 1997: Janke, 1998: Loveday & Cooke (eds), 1983: Review Committee, 1989)

### **Institutional boundaries of wildlife co-management regimes**

As the primary contact points with and administrative resource centres for traditional owners under the Land Rights Act and Native Title Act, the Land Councils have major roles in many aspects of land use decisions, land and natural resource planning and management programs and activities, and facilitating negotiations between traditional owners and Commonwealth governments, companies and individuals. In addition to their direct roles in land and natural resource management, the Land Councils provide administrative support and professional advice to other Aboriginal organisations active in land and natural resource management (including incorporated associations and the boards of management of jointly managed national parks and fisheries consultative committees). Many of the functions of the Land Councils (and to a lesser extent many other Indigenous organisations) are analogous to the functions of the natural resource, primary industry, environmental protection and regional development agencies of the NT Government, and since the 1980s have been co-ordinated with them in an increasing number of instances in terms of both policy development and operational management.

The diversification and deepening of functions of the Land Councils as they became established and the amount of Aboriginal land increased led to the commissioning by the Central Land Council of an independent review of the structural

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<sup>176</sup> (*Deceased Applicant*) v *Indofurn* (1994) 30 IPR 209; *John Bulun Bulun v R & T Textiles Pty Ltd* [1998] FCA 1082.

organisation of the CLC (completed in 1983), resulting in the establishment of a land management advisory service that now includes functions such as “land resource assessment, environmental management, business development and the pastoral industry, as well as community development.” (CLC, 1994; 42) A holding company for Indigenous investments, Centrecorp Aboriginal Investment Corporation, was established following an agreement between the CLC, Tangantyerre Council and Central Australian Aboriginal Congress in 1985 to invest in commercial ventures including resource development and tourism on Aboriginal land; investments include an equity stake in a natural gas project and pipeline, and several tourist resorts operated as joint ventures. Investment corporations were also established by the NLC and Tiwi Land Council around the same time. (CLC, 1994)

The NLC also provides similar professional and administrative services to those of the CLC, including a Caring for Country Unit to focus on environmental management policy and activities, and a pastoral land and enterprise management strategy. In addition to substantial involvement in the pastoral industry following the purchase of pastoral leases by traditional owners since the early 1970s, there has been a rapid expansion in Aboriginal involvement in tourism and horticulture industries during the 1980s and 1990s including resort developments, aquaculture leases, and safari, fishing and other tourism enterprises on Aboriginal land. (Altman, 1988: Palmer, 2000: NLC, 2003) A large number of incorporated Indigenous organisations also have a significant role in land and natural resource management activities, including the operation of commercial ventures, the development of local environmental protection strategies and providing administrative support for Ranger programs and other activities.

As noted in chapter 7, the most widespread tenures in the Territory are pastoral leases (held pursuant to the Pastoral Land Act and covering approximately half of the land mass) and Aboriginal land (most of which is held pursuant to the Land Rights Act). Other areas of Aboriginal land include community living areas on pastoral leases, and town camps (usually vested in the form of perpetual Crown leases from the NT Government). Four national parks have been owned by traditional owners since the 1980s and jointly managed by traditional owners and government conservation agencies under distinct co-management regimes, and many others have been established since the 1990s

and are managed under similar arrangements. Other forms of tenure in the NT include leases granted pursuant to the Crown Lands and Special Purposes Leases Acts (term and perpetual leases), Crown land of various descriptions (including areas within town boundaries, and areas held by an assortment of Federal and Territory agencies), and private freehold land.

Where Indigenous land ownership is recognised in the form of a right to exclusive possession ('inalienable fee simple'), all applications for licences or permits to take wildlife from that land are forwarded to traditional owners by the Director of the Parks and Wildlife Service in accordance with s. 60 of the TPWCA (see Diagram 6). The boards of management of the jointly managed national parks may also grant licences and permits for commercial or scientific purposes, and also share responsibility for the preparation of plans of management with the relevant conservation agency(s) and make other decisions about operational management (see chapter 7), as well as having a significant direct role in operational management in many areas including by way of the employment of Rangers nominated by traditional owners.

Under the Land Rights Act traditional owners in effect have a right of veto over the issuing of a commercial licence or research permit if access to their land is required to take wildlife.<sup>177</sup> However, the operation of the wildlife access regime has an inherent administrative and commercial incentive for applicants to access wildlife from Crown land wherever possible, as there is then no requirement to obtain further approval from other owners or occupiers of land and negotiate separate terms of access. Nonetheless, in some cases this may be outweighed by the incentive to negotiate prior informed consent with traditional owners (whether by e.g. public research institutes, companies or individual brokers and researchers, in order to comply with government or institutional policy or professional guidelines and standards or secure potential marketing advantage). Under the Native Title Act, depending on whether the rights and interests have been established to the satisfaction of the court and the extent to which partial extinguishment has occurred, as noted above and in chapter 7 there may be a requirement to obtain the permission of native title holders to enter relevant land or a right to be notified about

licence and permit applications for access to wildlife. Provisions covering access to wildlife may also be included in specific Indigenous Land Use Agreements.

The Parks and Wildlife Commission was established as a statutory authority in 1977 to replace the Reserves Board of the Federal Government's NT administration, responsible for the management of parks and reserves and wildlife. The Department of Natural Resources, Environment and the Arts (DNRETA), formed on 1 July 2005, has been allocated administrative responsibility for the environmental, heritage, conservation and wildlife management functions of the NT Government. Since that time, the management of NT parks and reserves and wildlife continue to be managed primarily by the Parks and Wildlife Service as an administrative unit within the Department. The Parks and Wildlife Commission was excised from the *Parks and Wildlife Commission Act* 1995 (NT), the legislation providing instead for a statutory Advisory Council. Although frequently amended, the provisions providing for the Board of the Parks and Wildlife Commission stipulated that the Board must include several Aboriginal members from 1977 to 1995. (Edgar, 2007) There is no such requirement for the membership of the Parks and Wildlife Advisory Council, though as of 2007 it had several Aboriginal members. (DNRETA, 2007)

The Parks and Wildlife Service has responsibility for the administration of NT parks and reserves and wildlife management pursuant to TPWCA, the *Bushfires Act* 1980 (NT) (which also establishes the Bushfires Council to exercise specific powers and functions relating to fire management),<sup>178</sup> and the two separate Acts establishing jointly managed national parks under Aboriginal ownership (see chapter 7). The legislative and administrative amendments in 2005 formally transferred the functions of the Board of the Parks and Wildlife Commission to the Minister, the Chief Executive Officer of DNRETA and the Advisory Council.<sup>179</sup>

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<sup>177</sup> As noted above, since the revision of the TPWCA in 2000 the ownership of plants is not specified in the legislation; nonetheless, as with mining and access to Aboriginal land for most other purposes, irrespective of ownership permission to enter the land and take resources is required.

<sup>178</sup> The regime established by this Act and the need for arrangements that can accommodate and incorporate Aboriginal law and land management practices has been reviewed by Hughes (1995), Hughes & Head (1996) and Langton (1998).

<sup>179</sup> Several advisory committees have also been established by administrative arrangement to advise on the establishment and management of marine parks. (PWCNT, 1998)

Central tasks of the Parks and Wildlife Service include management of the formal parks and reserves system of the NT Government (as well as all other areas vested in the Conservation Land Corporation and other types of Crown land upon request from the relevant agency or Minister), the preparation and implementation of management plans for individual parks and reserves and a Territory-wide planning strategy, and responsibility for wildlife management. The Department of Natural Resources, Environment and the Arts also provides administrative and professional support to the Feral Animals Committee, Bushfires Council and Heritage Advisory Council.

The Parks and Wildlife Commission adopted a 'Strategic Plan' in October 1985 to direct its activities, replaced by a 'Masterplan' for Territory parks and reserves late in 1997, to be supplemented by four regional plans – for 'Top End' Region Parks, Katherine Region Parks, Central Australian Region Parks, and Barkly Region Parks, guided by the National Reserves System. (PWCNT, 1998; 15) A marketing arrangement for tourism was completed with the Northern Territory Tourist Commission (NTTC) in 1998 (there is no statutory provision for Aboriginal membership on the Board of the NTTC), and a 'Tourism Development Masterplan' was prepared by the NTTC in conjunction with the parks and reserves plan; these consolidated earlier documents prepared by the NTTC, the Tourism Development Masterplan (1994) and Top End Regional Tourism Development Plan (1996). The Masterplan for parks and reserves was the subject of a major review process commenced in 2002 in which the NLC and CLC in particular have had a much more active role. (NLC, 2003)

Following a legislative amendment in 1985, mineral exploration, extraction and processing may take place in a park or reserve subject to the plan of management (ss. 17, 18 of the TPWCA and ss. 176, 178 of the *Mining Act* 1982 (NT)). There is a Memorandum of Understanding between the (former) Department of Mines and Energy and the Parks and Wildlife Commission covering Exploration and Mining in NT parks and reserves, and areas can only be reserved from such activities under the Mining Act and *Petroleum Act* 1984 (NT). Administrative procedures were also established by the (former) Department of Primary Industry and Fisheries and the Parks and Wildlife Commission in the 1990s to provide for the management of Marine, Estuarine and Freshwater Protected Areas. (PWCNT, 1998)

As noted above, other than in jointly managed national parks (in which the board of management is usually the main decision-making centre for planning and operational management) and on Federal land, the Director of the Parks and Wildlife Service administers the permit system for access to wildlife, whether for commercial, conservation or scientific purposes. The provisions of the TPWCA applying to the ownership of wildlife and the granting, variation and cancellation of permits have been amended frequently and were substantially revised in 2000. The Director retains discretion as to whether and subject to what conditions such permits will be issued (subject to approval by the Minister for Conservation and, if access to other types of Crown land is required, the Minister for Lands); notwithstanding the requirements of s. 73 of the Land Rights Act, there is no formal provision for participation by or consultation with Aboriginal peoples or groups in the overall management regime or for individual application processes unless the permit holder requires access to Aboriginal land, in which case the consent of traditional Aboriginal owners is required.

A report on the sustainable utilisation of wildlife was completed by the Parks and Wildlife Commission (1995a) and approved by the NT Government in November 1997. The objectives of the strategy include: to develop, test and implement management programs incorporating sustainable use; to gather information relevant to the establishment, implementation and improvement of management programs; to “ensure that Aboriginal people can maintain traditional uses and have the option to develop commercial uses on a sustainable basis”; to enhance the role of all landholders in wildlife management through co-operative management agreements (formal agreements are provided for by ss. 73, 74 of the TPWCA); and, to make information publicly available on conservation and management programs. (PWCNT, 1997; 1) Management strategies for species with significant commercial potential have been devised (e.g. a management strategy for crocodiles has been in place since 1992, with management plans subsequently developed for cycads and red-tailed black cockatoos: PWCNT, 1995b, 1995c, 1997a), and also for threatened species (e.g. a management strategy was devised for the Greater Bilby in the late 1990s and is being implemented in cooperation with traditional Aboriginal owners: 1997b). There has also been extensive cooperation in marine turtle research and management in some areas of the NT since the 1990s.

(Kennett *et al* (eds), 1997) The involvement of traditional owners in the formulation and implementation of wildlife management strategies therefore varies considerably.

The potential for differential application, in that some applicants for access to wildlife may be required to obtain prior informed consent (if the relevant wildlife can only be collected on Aboriginal land) and others may not (if the species can also be collected from Crown land or other areas), could be removed by requiring all applications for licences and permits to be forwarded to the relevant Land Council, or other nominated Indigenous institutions in each area (relevant bioregion). Initially the costs and time involved in consideration of specific applications for access to wildlife may far outweigh potential benefits in some or many cases, but as Indigenous institutions for land rights and self-government are consolidated this may change. Similar considerations may often be relevant to the development of species and area management plans (as forms of policy development), boards of management (in terms of regional policy development and operational management), and researchers, authorised wildlife officers and Ranger programs (operational managers responsible for implementation and law enforcement), examined further below. Although bicultural licence and permit application procedures requiring the informed consent of Indigenous peoples would provide an opportunity for involvement in decision-making at the only common nodal point of regimes affecting wildlife-based industries, specific industries operate within very different regulatory regimes and corporate and market structures that require different mechanisms and strategies for effective participation. (Posey & Dutfield, 1996: Dutfield, 2000: Fourmile, 1996, 1998: Blakeney, 1997: Cunningham, 1996: Williams, 1998: Balick *et al* (eds), 1996: Greaves (ed), 1994: Shiva, 2000: Balick *et al* (eds), 1996: SRRATRC, 1998: Oddie, 1998)

### **Marine area and resource management regimes**

Under the Land Rights Act Aboriginal land adjacent to the coast extends to the low water mark. (Neate, 1989) The bed of estuaries and rivers surrounded by Aboriginal land is also usually included in the transfer of title; if Aboriginal land adjoins one side of a watercourse the boundary may be along the middle of the watercourse or along either the near or far bank. (Toohey, 1979a, 1982a: Gray, 1994, 1996b: Olney, 2002a, 2003a) Native title applications may also be made to coastal waters, but the extent of recognition

of Indigenous rights potentially available is limited to ‘traditional’ and non-exclusive rights and interests. (Robinson & Mercer, 2000)<sup>180</sup> There are many basic similarities in the regimes providing for the management of terrestrial and marine areas and wildlife (see Diagram 6). The functions and powers of the Director of the Parks and Wildlife Service and associated administrative arrangements are in many respects similar to those of the Director of Fisheries and Fisheries Division of the Department of Primary Industry, Fisheries and Mines. The Director of Fisheries has primary responsibility for the preparation of specific plans of management for different areas and species, as well as administration of the licensing system. There are also several associated advisory committees. The Fisheries Act provides the primary basis for fisheries management in territorial waters (though several fisheries are also managed by the Federal Government, primarily by the Australian Fisheries Management Authority pursuant to the *Fisheries Management Act 1991* (Cth)).

The Fisheries Act provides for the appointment and functions of the Director of Fisheries, responsible for the administration of the Act (subject to direction by the Minister, s. 5). The Act also establishes the procedures for the granting, cancellation and suspension of licences and permits by the Director for recreational and commercial fisheries, access to marine and aquatic species (e.g. by biotechnology industries) and the declaration and management of protected areas, the registration of commercial fishing vessels and transport and processing facilities (Part II), and for the monitoring and enforcement of those conditions (Part IV). Crown leases may be granted in accordance with s. 55 (and the Crown Lands Act and Land Rights Act) for the purpose of aquaculture. Part III and Schedule 2 of the Fisheries Act provide the basis for the establishment and implementation of Fishery Management Plans (whether in relation to a certain area or fishery), and the operation of fishery management advisory committees.

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<sup>180</sup> Statutory provisions recognising specific Indigenous rights in marine areas include those noted above, and the Northern Territory Aboriginal Sacred Sites Act. Important cases on the operation of the Land Rights Act and Native Title Act include *Commonwealth v Yarmirr* (2001) 184 ALR 113, *Gumana v Northern Territory* (2005) 141 FCR 457, *Risk v Northern Territory* (2002) 188 ALR 376, *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust* (2001) 185 ALR 649, *Gumana v Northern Territory* [2007] FCAFC 23 and *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29. Detailed analysis of these cases is beyond the scope of the thesis; although legal recognition of Indigenous rights and interests in marine areas can significantly increase the ‘leverage’ of traditional owners, effective realisation of these rights continues to depend on the regimes and policies of the NT and Federal Governments.

The Minister may declare a ‘fishery management area’ or a ‘managed fishery’ by notice in the *Government Gazette* (s. 22). The Director has primary responsibility for preparing a proposed management plan for the area or fishery involved “as soon as practicable after the declaration” (s. 23).<sup>181</sup>

The Minister may establish and, “having due regard to the users of an area or fishery”, appoint members to a fishery management advisory committee for a particular management area or fishery “as the Minister thinks fit” (each committee “may include members representing commercial, processing, wholesaling, retailing, recreational, consumer, or other interests”: s. 24(2)), such committees having the role of “assisting the Director in preparing proposed plans and giving advice in relation to operative plans” for a ‘managed area’ or ‘managed fishery’ (s. 24). Management plans prepared with the assistance of the advisory committees may include matters listed in Schedule 2 to the Act “as the Director considers applicable”, and following their preparation such plans must be approved by the Minister (s. 25).

Advisory committees were established during the 1990s to assist and advise the Director on management plans for the major commercial species, usually consisting of industry and agency representatives. For example, the Barramundi Fishery Advisory Committee was established in 1990 comprising “representatives from the commercial, recreational, and retail sectors, as well as the Police Marine and Fisheries Enforcement Unit and the Department of Business, Industry and Resource Development, Fisheries Group”, and a management plan (prepared under Part III) has been in force since 1991. (Fisheries Division, 2002; 17) In addition, there are seven regional consultative committees that provide a formal opportunity for input by traditional owners into marine area and resource management decisions, and an Aboriginal liaison officer has been appointed within the Fisheries Division to enhance communication between the committees and government personnel (the Northern, Tiwi and Anindilyakwa Land Councils also provide financial, administrative and professional assistance to the consultative committees).

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<sup>181</sup> A ‘fishery’ may be “one or more stocks or parts of stocks of one or more species, habitats, or locations of fish or aquatic life that can be treated as a unit for the purposes of conservation or management”, and may be identified by a description of fish or aquatic life, an area of waters or seabed, a method of fishing, a kind or class of vessel, a purpose of activities, or a combination of these (s. 4).

The attitudes of the NT Government and the peak representative bodies for recreational and commercial fishers (the Amateur Fishermen's Association of the Northern Territory and the Northern Territory Seafood Council) to Indigenous rights in relation to marine areas have been ambivalent. Direct negotiations with traditional owners have occurred to achieve mutual or consistent objectives in many instances, but they have also actively opposed the legal recognition of Indigenous rights and interests in numerous land claims and native title applications and have not explicitly committed to managing all marine and aquatic areas and resources in accordance with the Indigenous right of self-determination. (Olney, 2002c; Gray, 1996b<sup>182</sup>)

The large number of topics involved and stakeholders affected by management of these areas is likely to be the reason for the suggestion of the Aboriginal Land Commissioner (Olney, 2002a; 60) that land claims involving rivers and the intertidal zone along the Gulf of Carpentaria be addressed on a regional or Territory-wide basis, although this would be difficult other than for the establishment of basic principles for further negotiation in each instance, perhaps in a similar manner to the framework agreement concluded under the Parks and Reserves (Framework for the Future) Act (by establishing basic principles for the negotiation of more detailed arrangements in relation to specific areas and resources - see chapters 6 and 7). The recommendations of formal and informal reviews of the Land Rights Act (Woodward, 1974; JSC, 1977; Toohey, 1984; NTU, 1993; RAC, 1993; Reeves, 1998) as well as those of the Commissioner in several land claim reports completed during 2002 and 2003 (Olney, 2002a, 2002b, 2002c, 2003a, 2003b, 2003c), the joint management arrangements for bicultural boards of management for many national parks (already extended to include a substantial marine area in the case of Garig Gunak Barlu National Park) and Ranger programs, and numerous co-management and commercial fisheries agreements in New Zealand and North America provide many examples of how these matters can be addressed and resolved. (See e.g. Sweeney, 1993; Bartlett & Meyers (eds), 1994; Durie, 2005; Nettheim *et al*, 2002; Langton *et al* (eds), 2006; Sutherland, 2000; Heremaia, 2000; Smyth, 2000; Ross, 1999; Durette, 2007)

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<sup>182</sup> See also *Griffiths v Northern Territory of Australia* [2006] FCA 903 and *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29.

The regional Aboriginal consultative committees are established under Part III of the Fisheries Act. As noted above, the Minister may declare a 'fishery management area' or a 'managed fishery' and establish and appoint members to an advisory committee, though the Director has primary responsibility for preparing a proposed management plan for the area or fishery involved in consultation with such committees as are formed. The membership of the regional Aboriginal consultative committees established for areas adjacent to Aboriginal land has been determined by the traditional owners of the relevant areas, and other representatives attending a particular meeting of each committee may include employees of the Fisheries Division, NT Police Marine and Fisheries Enforcement Unit and other government agencies, the Amateur Fishermen's Association of the NT, NT Seafood Council and the relevant Land Council, depending on matters being considered. As of 2005 there were seven such committees providing an institutional opportunity for input by Aboriginal peoples of each designated region into fisheries and other aspects of marine area management. (DPIFM, 2006) These committees are an extremely important and innovative development in coastal and marine management in Australia, as acknowledged by both the Reeves report and the subsequent review of the report by the Federal parliamentary committee. (HRSCATSIA, 1999; 122; Olney, 2002a; 55-56; Fisheries Division, 2004; Baker *et al* (eds), 2001; Morrison, 2007)

While many aspects of the management of particular activities and areas have been decided following negotiations between these committees and relevant stakeholders, they do not as yet provide as comprehensive a basis for regional co-management as occurs in jointly managed national parks, managed by traditional owners and conservation agency employees (and other 'authorised officers') in accordance with plans of management, licences and permits approved by boards of management with a formal Aboriginal majority. While several meetings are usually held each year the consultative committees have tended to operate by way of consultation on an *ad hoc* basis rather than by formal plans of and procedures for management as occurs in the jointly managed national parks, and the committees (and other commercial sector fisheries management advisory committees) primarily liaise with and report to the Director of Fisheries (who in turn reports to the Chief Executive Officer of the Department of Primary Industry,

Fisheries and Mines).<sup>183</sup> Nonetheless, in areas covered by the committees the extent of divergence or parallel operation amongst management regimes and objectives has been substantially reduced.

Another crucial aspect of the management of fisheries and coastal waters is environmental management and monitoring and enforcement of regulations (and, given the location, border security); in remote areas in particular, the involvement of traditional owners is essential if management plans and regulations are to be implemented effectively. (RAC, 1993: Palmer, 2001; 26-30: Altman & Hinkson (eds), 2007) As in jointly managed national parks where many Rangers and other authorised wildlife officers have been employed from amongst traditional owners (compared to other national parks), a marine Rangers program provides a vital basis for active and ongoing operational management by traditional owners. Marine Ranger programs have been established and consolidated since the early 1990s, providing traditional owners with a significant role in operational management and the implementation and enforcement of environmental protection programs (by the provision of resources and the appointment of officers with authority to ensure compliance with, for instance, fishing regulations and permits to enter Aboriginal land).

The NT Government, several Federal Government agencies, Land Councils and other Aboriginal organisations have been involved in negotiations to extend the marine Ranger program to give traditional owners authority to monitor the permit system to enter Aboriginal waters, or confer delegated authority under fisheries, environmental and customs regulations, though the precise basis and extent of that authority continues to evolve. Notwithstanding some unresolved concerns of the respective parties as to their respective rights and interests, the marine Ranger program has expanded considerably since the 1990s, operating in conjunction with the regional Aboriginal consultative committees, the Fisheries Division of the Department of Primary Industry, Fisheries and Mines (and officers appointed under Part IV of the Fisheries Act), and the Police Marine and Fisheries Enforcement Unit, and including in some cases agreements with the

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<sup>183</sup> The Ministerial Committee on NT Fisheries Development Opportunities, NT Fishing Industry Research and Development Advisory Council, Ministerial Advisory Committee on Recreational Fishing and Territory Aquaculture Development Advisory Committee report directly to the Minister.

Australian Quarantine Inspection Service and Customs, including marine Ranger patrols based at the Tiwi Islands, Borroloola, Port Keats, and Maningrida.

The vital role of Indigenous peoples in the military, civil and ecological defence of Australia cannot be seriously disputed. (Langtry & Ball (eds), 1986: Ball (ed), 1991: Low, 2001: Altman & Hinkson (eds), 2007) Particularly in remote and rural areas of the NT the active involvement Aboriginal communities and outstations is crucial to the maintenance of biological diversity and the ecological integrity of ecosystems, pest and weed control and border security; in these areas Aboriginal communities and outstations are not just on the front line, they are the front line. As Morrison (2007, 256) argues of the Ranger programs: “Surely the best approach to policy making is to take note of and build on the programs that have been demonstrated to work on country – an approach the government appears to have taken in the recent past, but more recently to have abandoned.” As of 2007 there were over 400 people employed in thirty-six community based Ranger projects throughout the NT. The number and types of agreements between traditional owners, government agencies, companies and individuals has increased substantially since the early 1990s, and it is not unreasonable to expect such co-management arrangements to increase if not proliferate to become a permanent feature and major element of land and wildlife management, environmental protection and border security.

The regional Aboriginal consultative committees are a significant step towards providing traditional owners with a substantive role in decision-making along the lines sought in the land claims in some areas and marine Ranger programs enhance involvement in operational management, however crucial aspects of marine area and resource planning and management remain under the exclusive control of the Director of Fisheries and the Minister (or other Commonwealth agencies). The declaration and management of each ‘fishery’, licensing schemes and the preparation of plans of management are the primary responsibility of the Minister and the Director. Though the consultative committees have the legislative authority under s. 24 and Schedule 2 to establish measures in relation to many aspects of management (subject to approval by the Director and Minister) and substantial progress has been made on many topics of mutual interest to the Government, traditional owners and other stakeholders, the committees

lack the resources and authority necessary for effective ongoing participation in the preparation and implementation of management plans and regulations. Existing management plans and licensing schemes for the main commercial species are effectively fundamental parameters within which the committees must operate. Licensed fishing tour operators also operate extensively in waters adjacent to Aboriginal land, sometimes with the consent or involvement of traditional owners, sometimes not. Aboriginal involvement in fishing tour operations is increasing steadily, and varies from community ownership and management of enterprises to the payment of fees or royalties by non-Indigenous operators. (Palmer, 2001; 19-36, 70: NLC, 2003) Nonetheless, the consultative committees are considerably further advanced in many respects than most State and Federal marine management regimes.

As noted above, there are many other ways to involve traditional owners in licensing schemes and commercial operations, such as the types of arrangements for jointly managed national parks where boards of management usually are actively involved in the drafting of and must approve the plan of management and decide, to some extent at least, the number and types of tourism facilities and infrastructure, the designation of zones including prohibited areas (for cultural or ecological reasons), the granting of commercial and research licences and permits, and the appointment of Rangers. In terms of commercial fisheries, if the management plans and licensing regimes were subject to review by the regional committees to consider their operation in the context of the development of detailed regional planning and management regimes (this already occurs to some extent), licence fees were shared between the NT Government and Aboriginal people of the areas in which licence holders operate, and measures were introduced to encourage direct Indigenous participation in commercial fisheries (such as by encouraging joint ventures with existing operators and giving Aboriginal peoples first option over the purchase of existing licences if they are sold, and possibly a voluntary buyback scheme), over time many of the concerns of traditional owners in relation to commercial fisheries could perhaps be met without adversely affecting the rights and interests of those holding existing licences or other stakeholders.

## **Conclusion**

Although the geographic and administrative boundaries of co-management vary considerably, the wildlife and fisheries management regimes of the NT have made considerable progress towards the recognition and integration of Indigenous rights and interests. There are many distinctive types of bicultural mechanisms and other co-management arrangements including boards of management of jointly managed national parks, regional Aboriginal consultative committees involved in the management of marine areas and resources, and terrestrial and marine Ranger programs, reinforced in many areas by the requirement to obtain the permission of traditional Aboriginal owners to enter Aboriginal land held pursuant to the Land Rights Act.

The main regimes in the NT providing for the recognition of Indigenous rights and different aspects of co-management of land use, natural resource management, cultural heritage and environmental protection and marine area and resource management provide more effective protection of Indigenous rights and are at a more advanced stage of implementation than many analogous regimes in the States. Nonetheless, considerable scope remains for the extension of such bicultural mechanisms and co-management regimes throughout all relevant areas and components and activities of the NT and Federal systems of government. Given the relatively early stage of implementation of many regimes, and the possibility of major and fundamental changes whether within specific regimes or the system of government more generally (in particular the status and functions of Indigenous institutions, discussed in the following chapter, and the NT's campaign for Statehood, discussed in chapter 10), the specific options explored in the preceding chapters might be considered to be possible interim measures as Indigenous institutions further develop and build their powers of and capacity for self-government and a long-term basis for mutual recognition and co-management is established.

As in the case of intergovernmental relations amongst governments of the Commonwealth of Australia, over time appropriate levels and regularity of arrangements for policy development and review and operational management will continue to evolve for different geographical and institutional areas for the coordination or co-management of concurrent functions and powers. The establishment and evolution of the Federal and NT regimes providing legal recognition of Indigenous institutions are examined in the

following chapter. Other aspects of more fundamental systemic reform (including constitutional reform, the negotiation of treaties, and increasing the extent to which Indigenous rights and interests are accommodated within all relevant components of the system of government at the Federal level) are examined further in chapter 10.

## **Chapter 9**

### ***Legal recognition of Indigenous institutions in the NT***

#### **Introduction**

As noted in chapter 6, several decisions of the High Court have refused to extend recognition of land rights to recognition of concurrent Indigenous sovereignty and systems of government (as ‘domestic dependent nations’). Unlike the U.S., Canada and (arguably) New Zealand, no progress at all has been made in Australia towards establishing constitutional recognition of and protection for Indigenous political, legal, economic, social and cultural institutions (as stated by the Declaration on the Rights of Indigenous Peoples) and constitutions (“systems of Aboriginal law and Aboriginal structures of law and governance” as per the Kalkaringi Statement) on a basis of equality, co-existence and mutual respect. Consequently, in addition to the statutory authorities and sub-bodies and non-statutory bodies discussed in the preceding chapters, Indigenous institutions have taken their place in the institutional environment of the Commonwealth primarily in the form of ‘voluntary associations’, corporations, and local governments or community councils. Although the status of and carapace protecting Indigenous institutions remains extremely limited in Australia, the regimes available to Aboriginal groups and peoples in the NT to attain legal capacity provide some diversity within the selection environment, each regime having distinct advantages and disadvantages that can be evaluated in accordance with the requisite functions and objectives.

#### **Indigenous institutions and Commonwealth regimes in Australia**

Many obstacles to the recognition of Indigenous institutions in accordance with the Indigenous right of self-determination (and the similar though more restricted principles of the Marshall doctrine) remain in Australia, including significant and in some cases insurmountable constitutional, common law, political, conceptual and practical barriers within the dominant paradigms and systems of government. As Tully (1995, 192-93) notes of developments in North America, the language of Western political thought: “took the size and institutional formation of European societies as the norm and held that representative government, aggregate majority rule, the concentration of sovereignty and

compulsory obedience are essential features of a modern constitution.” (Tully, 1995; 192-93) The misconceptions and prejudices resulting from these and associated assumptions (in particular those pertaining to European forms of land ownership and use) have underpinned the denial and limited scope of subsequent recognition of Indigenous institutions by Commonwealth governments and courts, with the basis and operation of regimes providing legal recognition and capacity for Indigenous institutions resulting in heavily regulated and vulnerable forms of Indigenous self-government. They are also apparent in the complete absence of negotiated treaties by the Crown during the British colonisation of Australia, and the subsequent repudiation of the treaties negotiated with Indigenous peoples in Canada and New Zealand by governments and courts until (at least) the 1970s. Nonetheless, many developments have occurred within each jurisdiction permitting a significant degree of self-government by Indigenous peoples and organisations in relation to specific areas and functions; the establishment of a secure carapace for Indigenous institutions is most advanced in Canada (where many Indigenous institutions are recognised as a distinct ‘third order’ of government within the federal system) and remains most limited in Australia.

Detailed examination of the different regimes providing a basis for the legal recognition of Indigenous institutions is beyond the scope of the thesis; the objective is simply to identify and compare the core legal, structural and procedural features of each regime in terms of the functions, powers, autonomy and level of security of the Indigenous domains provided for, and the nature and extent of accountability to and ‘regulation’ by Commonwealth institutions. Although many factors affect the extent to which the concurrent requirements and objectives of Aboriginal and Commonwealth institutions can be met in each instance, the vulnerability of Aboriginal organisations (as incorporated entities) to regulation is a significant factor (and potentially crucial) in ascertaining the extent to which such institutions amount to forms of self-government by Indigenous people, rather than limited instruments of municipal or administrative ‘self-management’ (in the sense described in chapter 5 – i.e. based on recognition of an entitlement long suppressed rather than the conferral of a privilege that may be unilaterally revised or revoked). As McHugh (1991, 203) argues of the emerging principles and mechanisms providing for the recognition of Maori institutions in New

Zealand in the early 1990s: “Whilst it is straining any concept of the term to call the present arrangements ‘self-government’, the existing structures at least contemplate some resemblant right.”

The number and types of Indigenous organisations in Australia and the diversity of activities undertaken by them has increased rapidly since the 1960s, as the legal and political consequences of the 1967 referendum and the removal of most of the other formal restrictions on the exercise of civil rights by Indigenous persons created legal capacity and practical opportunities for individuals and groups to pursue their own objectives. (Rowley, 1971a, 1971b; Woodward, 1974; Hetzel & Frith (eds), 1978; Jones (ed), 1980; Wolfe (ed), 1989; Altman & Cochrane, 2002; Fogarty & Ryan, 2007; Meehan & Jones, 1991) In addition to the roles of Land Councils, the main ways in which Indigenous domains have been established in the NT (in terms of institutions recognised by Commonwealth governments and courts) are by the formation of incorporated associations pursuant to several incorporation regimes, ‘community government councils’ established within the local government system of the NT, and (between 1990 and 2005) the Regional Council and national Board of the Aboriginal and Torres Strait Islander Commission (ATSIC) – the basic elements of these regimes are depicted in Diagram 7. Although detailed discussion is beyond the scope of the thesis, some aspects of the functions and objectives of ATSIC (as a distinct form of Indigenous representation and participation in administration within the institutions of the state) are considered in the following chapter.

### **Land rights and Indigenous self-government**

Shortly after the Land Councils were established Peterson (1981, 4-5) noted that the National Aboriginal Conference was an advisory committee with no autonomous research or administrative capacity or land holding or management functions, and the Aboriginal Lands Trust of South Australia was at the time a land holding entity with minimal land holdings, funding and active land management functions; both were therefore significant developments but very limited in terms of recognising and providing a secure basis for and instruments of Indigenous self-government:

By contrast the Land Councils of the Northern Territory, even as land managing rather than land holding bodies, are much more significant primarily because they are independently and substantially financed... While the Northern Territory Land Councils do not restore anything vaguely approaching sovereignty they do have the possibilities of independent political action, ... and at the time of writing are unmatched in this respect [in Australia] ...

The Full Councils of the Land Councils have significant powers and in some aspects of their functions comprise Aboriginal ‘legislatures’ or assemblies (in addition, decisions and administrative activities relating to land use in specific areas must be in accordance with the informed consent of the traditional Aboriginal owners of ‘affected areas’), but they are also subject to major statutory and practical limitations on their jurisdiction – decisions and activities must pertain to land management and protecting and promoting associated rights and interests of Aboriginal people of the NT in some way.<sup>184</sup> The functions and powers of the boards of management of jointly managed national parks, in some cases in the form of statutory authorities, in others as statutory sub-bodies or the result of specific lease and management agreements, provide similar capacity (and operate subject to similar constraints) in relation to discrete areas (see chapters 7 and 8). Due to their relatively strong statutory powers, functions and operational autonomy in relation to ‘claiming’ and managing Aboriginal land and representing the interests of Aboriginal people of the NT in general, Altman (1988, 73) has described the Land Councils as ‘para-governmental organisations’ that are in important respects “an intermediate form of Aboriginal government”, and several years later Heatley (1991) commented that due to the electoral dominance of the CLP in NT politics the two major Land Councils were in effect the *de facto* opposition to the NT Government for many years. Nonetheless:

Self-government is a question of degree. The control over access to and management of Aboriginal land by Aboriginal people, through land councils, creates a substantial degree of

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<sup>184</sup> In addition to specific land management duties, statutory powers and functions include “to ascertain and express the wishes and the opinion of the Aboriginals living in the area of the Land Council as to the management of Aboriginal land in that area and as to appropriate legislation affecting that land”, and “to protect the interests of Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council” (s. 23(1)(a), (b)).

autonomy. However, the concurrent operation of the laws of the Commonwealth ... [has] resulted in a land ownership and land management regime, not a system of self-government, for Aboriginal people on Aboriginal land. (Laws of Australia, 1997; v.1, [578])

Although there is arguably an underlying trend towards greater recognition of the Indigenous right to self-government since the early 1970s and significant gains have been made, the forms of Commonwealth recognition and incorporation remain contingent, substantially or completely subordinate to the powers and functions of governments and officers of the Commonwealth, and fragmented to comply with the requirements of different Commonwealth regimes rather than to reflect the diversity of and conform with Indigenous societies and systems of government. Consequently, the forms of Aboriginal organisations that have developed in the NT comprise:

a complex mosaic of territorially-based and functional groups operating over a full range of activities and participating extensively, if unevenly, in political and administrative arenas. Levels of autonomy, access and resources vary widely but together they provide an increasingly influential infrastructure for communication between community and government, and an avenue for developing leadership and political craft. (Heatley, 1991; 18)

Between 1978 and 2001 the severe under-representation of Aborigines in the Legislative Assembly (and continued lack of representation in all other Commonwealth Parliaments), the susceptibility of the Legislative Assembly to dominance by the Executive, and the parliamentary dominance of a political party in the NT extremely hostile to many aspects of Indigenous self-determination ensured the essential role of, and frequently a difficult operating environment for, all Aboriginal organisations in articulating and realising the interests and objectives of Aboriginal peoples in dealings with organisations or individuals of the dominant society. (Heatley, 1991; Jaensch & Loveday (eds), 1981; Altman & Dillon, 1988; Rowse *et al* (eds), 1999) As argued above, the Full Council and Executive of each Land Council and their responsibility to their constituents (all Aboriginal people within each Land Council area) effectively displace most aspects of the usual representative and operational management roles and functions of the Federal Parliament and Ministers: while representative functions or significant

operational autonomy are common features of many statutory authorities (see chapter 4), the election of the members of the Full Councils and Executives by Aboriginal people of the NT rather than appointment by the Government or Governor-General, the nature of the statutory functions and degree of operational autonomy conferred, the strong guarantee of rights relating to Aboriginal land and a relatively secure financial base distinguish the Land Councils from other statutory authorities and Indigenous organisations.

### **Regimes for the incorporation of Indigenous organisations**

A large number of incorporated Indigenous organisations have been formed to exercise powers and functions such as local government-type functions, the provision of housing, infrastructure and other essential services, commercial enterprises, and many other activities essential to Indigenous self-government. Incorporated associations include local, regional and pan-regional organisations formed for the conduct of cultural heritage protection and promotion, representative, administrative, managerial, infrastructure provision and maintenance, health, education, land-holding, natural resource management and entrepreneurial functions, such as the Central Australian Aboriginal Congress, North and Central Australian Aboriginal Legal Aid Services, local Aboriginal Community Controlled Health Organisations, the Aboriginal Medical Services Alliance Northern Territory and National Aboriginal Community Controlled Health Organisation, North Australian Indigenous Land and Sea Management Alliance, Centre for Appropriate Technology, community councils and outstation resource centres. Most have been formed under Federal, Territory or State legislation for incorporated associations (in the NT the main regimes are the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and *Associations Act 2003* (NT)), though some Indigenous organisations have been formed under Corporations Law or other regimes. In addition to these regimes, a scheme for the establishment of community government councils for regional and remote communities was introduced by the NT Government in the *Local Government Act 1979* (NT).

Though there may be many others in particular situations, two sets of contradictions are imbued in the operating environment of Indigenous institutions in Australia; those of the demands and requirements of ‘internal’ and ‘external’

accountability on Indigenous organisations incorporated under Commonwealth law (internal accountability to members and the constitutional objectives of the organisation, external accountability to non-Indigenous institutions); and, simultaneous pressures for localism (providing space for distinct representation and the devolution and decentralisation of powers and functions within Indigenous communities/ peoples) and centralisation to achieve institutional capacity as well as for collective action by Indigenous organisations.

The potential incompatibility of many of the objectives and requirements of internal and external lines and forms of accountability must be addressed by all Indigenous institutions seeking formal recognition from and legal capacity in dealings with Commonwealth institutions. For instance, Ivanitz (2000) notes of the lines of accountability of the major components of ATSIC that the representative arms (Regional Councils and the Board of Commissioners) were accountable to the Federal Minister of Indigenous Affairs as well as Indigenous constituents, the administrative arm was accountable to the Federal Government (the Minister and the Auditor-General) and the ATSIC Board. The basis of the arrangements within the main regimes providing for the establishment and regulation of Indigenous organisations in the NT also demonstrate split and potentially conflicting lines of accountability for governing committees and public officers, one to members of incorporated associations and another to statutory regulators (in the case of community council governments to residents and the Minister directly). The level and objectives of external accountability are crucial aspects of the strength of the carapace surrounding Indigenous domains. The following sections consider the basic features of the regimes providing for the formation and operation of incorporated Indigenous organisations in the NT and key mechanisms within them; the legislative framework, the types of structures and functions permitted or required by each regime (in particular the various provisions pertaining to the basis, membership, structure and decision-making procedures of Indigenous organisations), and the manner in which they are accountable to and 'regulated' by Commonwealth institutions.

### ***The Associations Act***

The NT legislation providing for incorporated associations (until 2003 the *Associations Incorporation Act 1963 (NT)*) was the main regime for incorporation

available to Aboriginal groups prior to the introduction of the Federal regime in 1976. As well as the standard provisions for incorporation by voluntary associations for non-commercial purposes, the legislation provided for the formation of trading associations by Aboriginal groups following an amendment introduced to the Act in the late 1970s: “Clubs, societies and community organisations are registered under the Associations Incorporation Act and amendments will now allow Aboriginal trading associations to also incorporate.” (DL, 1978; 26) The regime was initially administered by the Registrar appointed under the *Companies Ordinance* 1963 (NT). While the subsequent enactment of concurrent legislation by the Federal Government has led to some functional overlap with the NT regime (though the Federal regime applies specifically to Indigenous organisations), the NT regime continues to provide an alternative method for Aboriginal groups to establish distinct forms of legal and operational capacity recognised by the governments and courts of the Commonwealth system that for political, legal or administrative reasons may be considered preferable.

The NT regime was substantially revised by the *Associations Act* 2003 (NT), which introduced a ‘tiered’ system of provisions applying following registration (principally determined by the level of financial revenues and assets of each organisation). The role of the Registrar has been transferred to the Commissioner of Consumer Affairs by way of another statutory ‘seconding arrangement’. Part 4 provides the basis for the constitutions and governance structures of organisations formed pursuant to the Act. Section 21 states that the Constitution of an organisation must provide for the qualifications of members, the appointment and structure of the Managing Committee of the association and the procedure for appointing public officers, the procedure(s) for the settling of disputes between members, the powers and functions of the Management Committee and the conduct of meetings, procedures for financial and asset management and auditing, and the method of amending or rescinding the Constitution of the association. In addition, the Constitution “may make provision, not contrary to law, in relation to a matter not referred to” and “may be based on the customs and traditions of the ethnic community to which the members of the association belong”. Certain provisions of the Local Government Act may also apply to associations performing local government functions.

The standard structures and procedures provided for (i.e. unless specifically exempted by the Commissioner) include that each association must appoint a Management Committee (s. 29) and a public officer (the applicant or another person appointed by the Committee), maintain a register of members, and hold an Annual General Meeting (including for the presentation of audited financial statements for the previous financial year) in addition to other meetings that may be held (s. 36). The Constitution may also provide for decision-making by special resolution (passed by at least three quarters of the members voting at a meeting) for specific purposes (s. 37). The provisions regulating financial and asset management and auditing (Part 5) establish three tiers of association determined primarily by the value of financial revenue or assets (there are also prescribed entities for this purpose, e.g. an organisation that holds title to certain types of land). Other than the smallest associations (Tier 1), accounts must be audited by a qualified accountant and a copy of the auditor's report be available to members, presented at the Annual General Meeting, and filed with the Commissioner (including further details if there are findings of possible legal or financial irregularity: ss. 46-48).

The Commissioner has substantial administrative and regulatory discretion over many aspects of the basis, structure and activities of incorporated associations including to “exempt the association or an officer of the association from the obligation to comply with a provision of this Act or the Regulations”, and the stipulation of conditions for such exemptions (s. 5). The Commissioner may refuse an application for incorporation if not satisfied that the submitted constitution is reasonable or fair, is in compliance with the requirements and objectives of s. 21, or “on another ground the Commissioner considers appropriate” (ss. 9, 10). In such cases the Commissioner must notify the (proposed) committee members of the reasons for not issuing a certificate of incorporation and ‘invite’ them to consider changes to the application for incorporation or proposed constitution. The Commissioner may also refuse to accept an alteration to a Constitution (and must provide written notice to the applicants of the reasons for the decision: s. 24) and make a range of other orders or recommendations as to the basis, structure or activities of an organisation in certain situations (e.g. s. 63). The Commissioner is also responsible for the instigation of proceedings for the external management or winding up of an organisation, including powers to administer an association directly (Part 8),

appoint a statutory manager (Part 9) or file a certificate with the Supreme Court for the winding up of an association.

The Act prescribes procedures for the dissolution of an association (Part 8) if “the Commissioner has reasonable cause to believe that an incorporated association is not carrying out its objects or is not in operation”; persons affected may apply to the Local Court for an order that the dissolution is void (s. 71), in which case the Commissioner administers the association until a final decision is made. The Commissioner may conduct or arrange for an investigation of an association if of the opinion the association has contravened a provision of the Act, Regulations or its Constitution, or that such an appointment is otherwise in the public interest (Part 10). The Supreme Court may order the winding up of an association upon receipt of a certificate from the Commissioner recommending such an order be made (Part 9). In such cases the Commissioner may appoint a liquidator to wind up, or a statutory manager to exercise the powers of the Managing Committee of, an association. In addition to the investigative and regulatory powers of the Commissioner, under s. 109 a member of an association (or other interested persons) may apply to the Local or Supreme Court for a court order stating that the association’s affairs have been conducted in an oppressive or unreasonable manner and requiring specific action to be taken. There is also a right of appeal to the Local Court by persons disqualified by the Commissioner (s. 114) or others aggrieved by a decision of the Commissioner (s. 115), in which case the court may vary, reverse or uphold the decision.

The Commissioner of Consumer Affairs is appointed by the Minister pursuant to Part 2 of the *Consumer Affairs and Fair Trading Act* 1990 (NT). As with the Registrar of the Federal regime (discussed below), the office of the Commissioner has a statutory basis but does not have explicit structural and operational autonomy analogous to that of some independent parliamentary agencies (e.g. the Electoral Commission and Auditor-General) or some other statutory officers (e.g. the Director of Public Prosecutions). There is no statutory restriction on or requirement of notification of directions by the Minister to the Commissioner in relation to the performance of functions generally or the exercise of specific powers, and there are no procedural requirements or guidelines for the appointment process (s. 6). Under s. 7(1)(k) of the enabling statute, the Commissioner

may “perform such other functions as are conferred on the Commissioner by or under this or any other Act”; the specific functions and powers of the Commissioner in relation to incorporated associations are provided for by the Associations Act. There is no statutory council or other procedure in the Associations Act comparable to that of the Consumer Affairs Council,<sup>185</sup> established by the Consumer Affairs and Fair Trading Act (ss. 13-17) as a ministerial advisory council with relatively comprehensive statutory powers and functions including to cooperate and consult with relevant individuals and groups, establish committees for specific purposes, and conduct inquiries and make recommendations on specific matters (whether at its own instigation or at the request of the Minister).

### ***The Corporations (Aboriginal and Torres Strait Islander) Act***

The Aboriginal Councils and Associations Act provided “a means of incorporation for Indigenous communities, groups and organisations to support self-management” throughout the Commonwealth of Australia. (ATSIC, 2001) The Act was repealed and replaced by the Corporations (Aboriginal and Torres Strait Islander) Act (CATSIA) in 2006. The functions of Indigenous organisations formed pursuant to the regime range “from land-holding, service-delivery (for example, the provision of health, medical, legal and housing services and the administration of employment and training programs), the promotion of arts, sport and culture, to the pursuit of business, political representation and native title litigation.” (Mantziaris, quoted in Nettheim *et al*, 2002; 329) In 1981 there were around 100 Indigenous associations incorporated under the Federal regime, by 1995 there were over 2,600 (and in 1999 approximately 3,000). “Within the same period, the *ACA Act* has evolved from a simple system for incorporation and regulation of Indigenous groups to a more complex system modelled on the Corporations Law.” (Mantziaris, 1997a; 10)

The primary principle and objective of the Federal incorporation regime (to establish a secure legal carapace and administrative domain with a substantial degree of procedural and operational flexibility - see chapter 5) has been substantially eroded by

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<sup>185</sup> Consisting of between six and ten members, including not less than four members employed “wholly or primarily in commerce or industry”, and not more than two members employed “in commerce or the manufacture of goods or the business of advertising”.

incremental sets of legislative and administrative reforms to the regime. These amendments have occurred in the context of broader public sector reforms based on the principles and objectives associated with the emerging contract state and ‘new managerialism’ (see chapter 4), increased reliance on the concepts and provisions of corporations law, and also specific demands for greater (external) accountability of Indigenous organisations for ‘public’ funding.<sup>186</sup> Major changes to the administration (regulation) of Indigenous organisations in this sense include a significantly increased level of prescription of organisational structures and procedures, external reporting requirements and accountability, and the extension of the powers of the Registrar. (Nettheim *et al*, 2002; 328-40; AIATSIS, 1996; AILR, 2005b; SLCAC, 2006)

Woodward (1974) recommended simple and flexible procedures with significant scope for all aspects of the operations of Indigenous organisations to enable their conduct to be in accordance with Indigenous law and custom, local conditions and functional objectives; as noted above, this was identified as a primary objective when the regime was established, an objective that has been subordinated to other priorities as the regime has developed. As Martin (2004, 74) argues, there remain “compelling arguments for establishing Indigenous corporations that leave as much social and political process as possible within the informal Indigenous realm, and do not attempt to codify it within formal corporate governance mechanisms.” In terms of the level of regulation and external accountability there have been numerous suggestions for a tiered system of registration and regulation to the effect that: “the spectrum of incorporation needs would be subdivided into categories within which corporations would be subject to accountability appropriate to their social, political and financial composition.” (Mantziaris, 1997b; 12) This strategy has been adopted in both the NT (since 2003) and Federal (since 2006) regimes to some extent, involving different sets of provisions applying to some of the activities of small, medium and large organisations (though the differentiation is based primarily on financial scale rather than by function, and has to do mainly with the level and detail of financial management, auditing and external reporting requirements).

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<sup>186</sup> For instance, Indigenous health organisations “may have reporting obligations to 20 or 30 State and federal government agencies”. (Brennan *et al*, 2005; 31)

The CATSIA regime introduced in 2006 contains some improvements over the situation that had developed during the 1980s and 1990s (e.g. introducing a ‘tiered’ system of regulation, provisions specifically permitting different categories of members, and a right of appeal to the Administrative Appeals Tribunal in some instances), but the regime remains heavily prescriptive and continues to emphasise the operation and regulation of Indigenous organisations in accordance with Commonwealth political and organisational concepts and principles rather than the recognition of Indigenous organisations established and defined on their own terms.<sup>187</sup> Although many of the provisions pertaining to the establishment and governance structures and procedures of Indigenous organisations are ‘replaceable’ rather than mandatory the Act operates with a systemic preference for principles and procedures of representative democracy and corporate governance models of the dominant society, including the basic structure and function of the Governing Committee and the powers, functions, and obligations of the directors (members of the committee) and public officers, the functions, powers and procedures for general meetings, and the respective roles of each in the various activities of the organisation. Alternative constitutions and governance structures may vary from the standard form but such variations (and other exemptions from detailed regulatory requirements) require the favourable exercise of administrative discretion by the Registrar in each instance. (SLCAC, 2006: AILR, 2005b)

As noted in chapter 7, although the basic functions and duties of consultation and land management under the Native Title Act are based on the provisions of the Land Rights Act the administrative arrangements and statutory obligations of managers are very different. Unlike the roles of Land Councils and Land Trusts, ‘prescribed bodies corporate’ (PBCs, also referred to as Registered Native Title Bodies Corporate, RNTBCs) established to hold title to and manage land pursuant to native title determinations must be incorporated under the CATSIA and be structured and function in accordance with the provisions of that Act and the native title determination, as well as the Prescribed Bodies Corporate Regulations of the Native Title Act. (Mantziaris &

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<sup>187</sup> The CATSIA also formally removed the possibility of incorporation of Aboriginal ‘councils’; several applications were made under these provisions of the ACAA but they were never processed. (Dalry, 1988)

Martin, 2000: 92-106)<sup>188</sup> As a result of the overlapping requirements for PBCs (which also derive in part from corporations law and associated common law principles of corporate governance) there are “three – potentially conflicting – sets of legal relations between the corporation holding or managing the native title and the members of the native title group: those deriving from the various corporate law relationships ...; those deriving from the statutory trust or agency relationship ...; and those arising from the statutory ‘consent and consultation’ requirements...” (Martin, 2004, 70)

As a result of the complicated, fragmented and heavily regulated management arrangements, as well as the absence of an autonomous funding base, Martin (2004; 76) argues that: “The scheme under the Native Title Act essentially collapses the functions of the Land Trusts and the Land Councils into the one body in each case, a Prescribed Body Corporate that is in all likelihood poorly resourced, without appropriate expertise, and may also be riven with factional politicking”. In this sense disagreements amongst members are not produced by incorporation *per se*, but may be exacerbated by unfamiliar and inappropriate structural, decision-making and accountability requirements. Furthermore, unless they are in areas affected by a major mining or other development project subject to negotiated agreement PBCs often have very limited resources and capacity. (Mantziaris & Martin, 2000: Sutton, 2001: ATSIJ, 2005a) In terms of relations with Commonwealth institutions therefore they can still be characterised as essentially policy and program recipients and strictly regulated entities, fragmented administrative arrangements within the dominant system rather than an opportunity for and instrument of self-government in a comprehensive sense.

Although the functions and powers of the Registrar pursuant to the CATSIA regime are described in terms of providing advice and assistance to Indigenous organisations (Part 16), many of the functions and powers are distinctly regulatory and based primarily on maintaining external compliance and accountability. As Mantziaris (1997a, 13) states of the two other main legislative and administrative regimes providing for the establishment and regulation of Indigenous organisations in the mid-1990s, either

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<sup>188</sup> Some Indigenous groups have made use of corporations law regimes to establish land-holding entities (e.g. Simpson & Jackson, 2000), however this is not possible in the case of land held under either of the main land rights regimes.

as non-profit associations (under State and Territory incorporated associations regimes) or corporations (pursuant to Corporations Law):

Under both systems of incorporation, the regulator has power over the process of incorporation and may intervene at critical junctures in the corporation's life: eg the alteration of the corporate constitution ('Rules', Memorandum of Association and Articles), insolvency, administration and winding up. The regulators' powers differ across the State and Territory systems.

This appraisal remains equally pertinent to the roles of the Commissioner in the NT regime and the Registrar in the Federal regime. In addition, the *Northern Territory National Emergency Response Act 2007* (Cth) confers extra-ordinary powers upon the Minister for Indigenous Affairs over all Indigenous organisations active in designated 'Business Management Areas' (over seventy Aboriginal communities) in the NT, increasing the potential scope for external regulation of Indigenous organisations in these areas to an unprecedented level since the removal of restrictions on civil rights in the 1960s and 1970s. Part 5 of the Act authorises the Minister to intervene in the activities of all Indigenous organisations (Aboriginal 'entities', defined to include most if not all Indigenous organisations formed under Commonwealth regimes including incorporated associations, corporations formed by Aboriginal people under the CATSIA or Corporations Law and community government councils) active in Business Management Areas. The Minister may exercise the powers of the relevant statutory regulators (Federal or Territory), appoint officers to attend meetings and monitor other activities of Indigenous organisations (reinforced by a provision that failure to notify such officers of a meeting is an offence), suspend managing committees and appoint statutory managers or otherwise intervene directly in funding, services or asset management activities if the Minister is satisfied that such activities are, *or could be*, conducted with funding provided by either the NT or Federal Government. No other statutory limits or procedural requirements are stipulated for the exercise of these powers. (CLC, 2007: Altman & Hinkson (eds), 2007)

## **Local government**

The third main regime that provides for a degree of self-government in many Aboriginal communities in the NT (community government councils) is provided for by the Local Government Act. There is considerable constitutional and organisational flexibility for community government councils formed under the Act in terms of defining their powers and functions and establishing governance structures and procedures, arguably to a greater degree than the incorporation regimes overall (though this depends on the manner in which the various administrative discretions of the regulators are used in each instance). As with the NT regime for incorporated associations, the regime is not directed exclusively to Aboriginal councils but has become a major basis for the establishment of Indigenous organisations. The Local Government Act also establishes several relatively independent statutory authorities rather than the essentially departmental arrangements for the statutory officers of the incorporation regimes, though there are also more substantial and direct ministerial powers and discretion pertaining to the administration and regulation of local councils. Young (1991, 70) states of the basis and nature of Aboriginal communities in the NT:

Rural Aboriginal communities, which contain 70 per cent of the Northern Territory Aboriginal population, can be classified into four main categories: Aboriginal ‘towns’ (the former mission or government settlements); communities on Aboriginal-owned cattle stations; communities on non-Aboriginal-owned cattle stations; and communities in ‘outstations’ or ‘homeland centres’. (See also e.g. Woodward, 1974; Wolfe (ed), 1989)

In addition, there are many small ‘mixed’ rural and remote communities with a substantial minority of Aboriginal residents and significant numbers of Aboriginal residents in other regional centres with predominantly non-Aboriginal populations. In the latter cases and the larger “Aboriginal ‘towns’” in particular, the distinct local requirements and objectives of forms of Aboriginal self-government are further complicated by the large numbers of Aboriginal residents in addition to traditional owners, emphasising the need for distinct but co-ordinated regimes for the recognition of land rights and self-government in at least some cases (as noted in chapter 7). (See e.g. Kearney, 1988a)

Community government councils may be established by the residents of regional and remote communities. Community government councils are formed if, upon receiving an application from ten or more residents in an area and following the completion of a draft constitution and statutory consultation process, the Minister is satisfied that a substantial majority of residents in the area favour forming the new council. There is considerable flexibility in the matters that may be included in the constitution of a community government council (primarily provided for by Part 5 of the Act), such as the composition and decision-making structures and procedures of the council (including the frequency and conduct of council meetings: s. 15), and the manner in which elections for council members are held. The Constitution may provide for the establishment of other committees in addition to the committee consisting of the elected members of the council (s. 97), and the council may establish standing committees (consisting of members of the council) or other management or advisory committees for specific purposes (ss. 134-36).

The Constitution may specify different council functions, powers and procedures to those identified in the Act (subject to approval by the Minister).<sup>189</sup> The council also appoints the chief executive officer (who must either hold prescribed qualifications or be approved by the Minister: s. 142) and may employ other staff. In the performance of their statutory and constitutional duties councils are “charged with the peace, order and good government” of the area within each council’s jurisdiction (s. 120), and may make community government schemes and by-laws dealing with certain matters or otherwise approved by the Minister (Part 7), impose rates or charges on residents and grant licences or permits for certain purposes (Part 6). A council may also appoint authorised officers to enforce by-laws (ss. 191, 204-6), and make agreements with relevant Ministers to administer and enforce other regulations in the council area (s. 203). Councils must provide audited financial statements and annual reports on council activities for the preceding year to the Minister and develop a three year business plan (Part 6, Divisions 9 and 10). Audits may be conducted by the Auditor-General or others registered as company auditors for the purposes of the *Corporations Act* 2001 (NT). As noted above, incorporated associations performing similar functions to community government

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<sup>189</sup> Section 122(2) states that: “A community government council, in the exercise of its powers and the performance of its functions under this Act, is subject to any provision to the contrary in its constitution.”

councils may also be recognised by the Minister under the Local Government Act for certain purposes, and therefore concurrently empowered and regulated under this Act and the NT incorporation regime.

Community government councils are members of the Local Government Association of the Northern Territory (LGANT), established pursuant to s. 224 to represent the interests of and provide professional advice to local governments. Two other statutory authorities are established by the Act to conduct specific functions. Part 10 of the Act provides for the establishment of Local Government Tribunals consisting of the local Magistrate in each instance (the Registrar of the Local Court also serves as Registrar of the Tribunal - the Chief Magistrate is the President of the Tribunal: s. 225), which may hear and determine applications on matters such as disputes about council membership or specific activities and decisions of the council. The Tribunal may uphold, vary or request reconsideration of specific decisions (s. 63(8)); decisions of the Tribunal may be appealed to the Supreme Court on questions of law (s. 240).

A Local Government Grants Commission is established by the *Local Government Grants Commission Act* 1986 (NT) to make recommendations on the distribution of financial assistance to councils (primarily funds allocated to the NT pursuant to the *Local Government (Financial Assistance) Act* 1995 (Cth)), but may also consider other financial matters relevant to local governments upon reference by the Minister. The Grants Commission consists of four members, one appointed by the Minister, the Chief Executive Officer of the relevant department (as of 2005 the Department of Local Government, Housing and Sport), and the LGANT nominates two of the members (the Minister chooses from two lists of three nominees provided by the Association to represent the interests of municipal councils and community government councils respectively).

Although Local Government Tribunals may consider complaints against councils and determine remedial action to be taken, and local government funding provided by the Federal Government is allocated amongst local governments by another relatively independent statutory authority, the regulatory powers of the Minister over community government councils are substantial. The Minister may appoint an Inspector to inquire into the activities of a council and report on matters the subject of investigation (Part 11);

if the Inspector concludes that “a matter of dishonesty, an irregularity or a breach of a law in force in the Territory” has occurred and recommends ‘remedial action’ the council must consider the report at the next meeting and notify the Minister of remedial action to be taken.<sup>190</sup> The Minister may “direct the council to take such remedial action as the Minister considers appropriate” if not satisfied that the measures taken to implement the Inspector’s recommendations are adequate (s. 243A).

The Minister may also appoint a Commissioner to conduct an inquiry into the activities of a council or other matters (Part 12); in such cases, following the inquiry the Minister may make recommendations to the relevant council as to appropriate measures to be taken, and require a response as to the implementation of such measures or the reason for not implementing them (s. 263). The Minister may direct the Administrator to provide notification of the suspension of a council in the *Government Gazette*, and appoint a manager to investigate and/ or manage the activities of the council and make recommendations on action to be taken (Part 13); council members have a statutory right of reply to such recommendations. If a council is dismissed the Minister must notify and state reasons to the Legislative Assembly (s. 264A) and another election must be held within twelve months subject to consultation with residents, but there is no statutory right of appeal against decisions of the Minister.

A major review of the Local Government Act commenced in 2006, with major amendments to the system of community government councils introduced by the *Local Government Act 2008* (NT). The review was conducted by the Department of Local Government and Housing, a Local Government Advisory Board appointed for the task and Shire Transitional Committees for each area (including representatives from community government councils and other appointed members). (DLGH, 2008: LGANT, 2008) The Act commenced on 1 July 2008, replacing the existing community government councils with eight new Shire Councils (following the commencement of the Act there are 5 municipal councils and 11 shire councils – in addition to the municipal councils three other existing councils were retained).<sup>191</sup> The Shire Councils exercise

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<sup>190</sup> There is a limited right of appeal to the Local Government Tribunal, if the Inspector orders a person to pay a surcharge for a service provided by the council (s. 246).

<sup>191</sup> Prior to the reforms there were 61 ‘local governing bodies’ for the purposes of the operation of the Local Government (Financial Assistance) Act - 6 municipal councils, 51 community government councils, 3

similar powers of local government (though expanded in some aspects, e.g. the jurisdiction of the new councils includes large areas between former community government council boundaries); the extensive powers of the Minister (including for the conduct of general or specific inquiries, ‘Compliance Reviews and Investigations’ and the designation and management of ‘Defaulting Councils’) and the absence of statutory provision for administrative or judicial review of the exercise of those powers remain (e.g. Chapters 15, 16 and 17 of the Act).

### **Summation of emerging forms of Indigenous self-government**

Subject to the exercise of administrative discretion by Commonwealth officers in each instance, the regime of the Local Government Act appears to offer more scope for residents to determine the basis, structure and procedures of each organisation (e.g. there is a general provision authorising constitutions and governance structures and procedures to vary from the statutory formula rather than a series of limited exemptions from specific provisions, and explicit provision for additional committees to be formed to deal with specific matters rather than the emphasis in the incorporation regimes on a single managing committee). In addition, community government councils are authorised to promulgate by-laws and planning and regulatory regimes (‘community government council schemes’), albeit subject to approval by the Minister, similar in some respects to the planning and regulation-making powers of other local governments and the boards of management of jointly managed national parks. There is also a statutory mechanism to enable ‘intergovernmental’ agreements for the devolution or decentralisation of functions and powers of specific agencies.

In addition to the potentially more expansive range of powers and functions there is a substantially independent tribunal to consider disputes or complaints against councils and partially representative statutory authorities to represent the interests of local governments and decide the allocation of Federal Government funding (at least potentially - Aboriginal membership on the Local Government Grants Commission and LGANT is discretionary rather than mandatory as there is not a specific requirement to

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incorporated associations (under the Federal regime) and Jabiru Town Council (established by the *Jabiru Town Development Act 1995*). (LGANT, 2008)

provide for the appointment of members nominated by Indigenous organisations).<sup>192</sup> Nonetheless, the functions and powers of the Minister remain substantial and were a source of significant tension between Indigenous organisations and the NT Government for many years (including dependence on highly variable and discretionary government funding beyond that allocated by the Federal Government, arguably used to ‘encourage’ incorporated Indigenous organisations to register under the scheme in the 1980s and 1990s: Mowbray, 1986, 1999),<sup>193</sup> though a more cooperative approach developed in some areas in the late 1990s with the negotiation of ILUAs clarifying the respective powers of community councils and traditional Aboriginal owners (see chapter 7).

The manner in which the extensive powers of the Minister are exercised, including the powers to dismiss councils, approve or refuse specific systems of government and local planning and regulatory schemes and by-laws or to intervene directly in the composition and operational management of councils, is crucial to the extent to which the potential powers and functions of self-government are realised in each instance – in this sense they remain a completely subordinate level of municipal government rather than a distinct and autonomous third order of government. The first annual report of the Aboriginal Torres Strait Islander Social Justice Commissioner (ATSISJC, 1993; 59, 63) noted that the basic functions of community councils could contribute to the establishment of more substantial systems of Indigenous self-government: “The same principles and practical justifications as underpin the exercise of self-determination and marginal forms of self government at a local community level can apply regionally and encompass much fuller terms of self-government”. This argument is explored further in chapter 10.

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<sup>192</sup> As provided for in the case of the nomination and appointment procedures of the Aboriginal Areas Protection Authority (AAPA) and Community Living Area Tribunal (CLAT). Another potentially important factor is that, unlike the appointment of members nominated by local governments to local divisions of the Development Consent Authority, the Minister retains discretion over the final selection of members of the AAPA, CLAT and LGANT from amongst respective lists of nominees. Each division of the Development Consent Authority consists of a Chairman (appointed by the Minister) and four other members (ss. 88-89); the relevant local government provides nominations to the Minister for two of those members (the 1979 Act had provided for four local government nominees, the 1993 Act for three), the other two members are appointed by the Minister.

<sup>193</sup> A similar ploy was used by the Federal Government following the introduction of head lease provisions for Aboriginal communities in the NT, with funding for essential infrastructure and services withheld from at least one organisation as the members refused to accept the condition that they sign a 99 year lease. (Altman & Hinkson (eds), 2007)

The regimes for incorporated associations also provide considerable flexibility in terms of ascertaining membership and providing for the constitution, functions, objectives and governance structure of each Indigenous organisation, but this flexibility is contingent upon approval by the relevant regulator and they also remain subject to extensive non-Indigenous procedural and accountability requirements and regulatory powers. The vulnerability of Indigenous organisations is most apparent in the introduction in 2007 of extensive ministerial powers to intervene in the activities of all Indigenous organisations in Business Management Areas (noted above).

The powers and functions of the Commissioner and the Minister under the NT incorporation regime and the ambiguous nature of the ambit of and limits on their respective roles are similar to those of the Registrar and Minister under the Federal regime. There is nothing in either regime comparable to the relatively independent statutory authorities exercising regulatory, advisory or appeals functions of the local government regime or the separate legislation that establishes the office of the Commissioner of the NT regime (the Local Government Grants Commission, Local Government Tribunal, LGANT or Consumer Affairs Council), though as noted above under the NT regime decisions of the Commissioner can be appealed to the Local or Supreme Court and some decisions of regulators under the Federal regime may be appealed to the Administrative Appeals Tribunal.

Although each of the matters and regimes involved is extremely complex and the structures and procedures of the regimes may permit, or at least not prevent, the utilisation of Indigenous decision-making and dispute resolution procedures, the incorporation regimes remain heavily regulatory in nature and there is arguably a systemic preference for a standard form of model constitution and governance system based on Western liberal democratic and corporate governance concepts and models rather than providing several ‘prototypes’ and alternatives that can be modified or changed completely by the members of each organisation. Although significant regulatory discretion exists the possibility of other arrangements should be emphasised rather than being contingent on the favourable exercise of administrative discretion in each instance. This might be substantially achieved by introducing a provision stating that there is a presumption that the constitutions and governance structures and

procedures submitted will be approved unless there is a specific concern that basic administrative or financial regularity cannot be achieved.

This is not to suggest that such organisations should not be subject to administrative and financial accountability, but that lines of accountability should be directed first and foremost to the proximate community and members of each organisation, and that regulatory functions and external accountability to Commonwealth institutions should be based on a strictly advisory and support basis. Where public service- or corporate-type accountability to Commonwealth officers is considered necessary this would preferably occur primarily on the basis of providing advice and assistance to ensure basic financial and administrative regularity (subject to the specific functions and arrangements of each organisation), and would be more appropriately exercised by the Auditor-General or an office(r) with comparable and explicit statutory autonomy from political interference. In particular, the cultural appropriateness and security of the Indigenous domain could be significantly enhanced if regulatory functions, dispute resolution and other appeals were conducted by bicultural (or entirely Indigenous) tribunals or other mechanisms.

Possible roles of such mechanisms include to consult with Indigenous organisations and conduct regular reviews of the regimes providing for the establishment and regulation of Indigenous organisations and the extent to which they provide a basis for 'culturally appropriate' and administratively practical arrangements, to hear appeals against specific decisions of the regulators in the exercise of their powers and functions or exercise those powers directly, and to provide additional training and assistance with the development of financial management, auditing and administrative capacity. Locating the Office of the Registrar of Aboriginal Corporations in ATSIC was a preliminary step in the direction of extending Indigenous self-government to include regulation of Indigenous organisations and external accountability, but remained essentially a non-Indigenous mechanism within a non-Indigenous regime. The potential for conflict between the disparate lines of allegiance and accountability may be ameliorated or even eliminated as Indigenous systems of government are consolidated; although explicit statutory or constitutional recognition and protection within Commonwealth regimes could reduce the vulnerability of Indigenous organisations, the establishment of entirely

Indigenous institutions and accountability systems provides the best long-term objective to secure the Indigenous domain.

### **Indigenous institutions in Canada and New Zealand**

Assumptions and tensions similar to those constraining the capacity and eroding the security of Indigenous domains in Australia have been a feature of the denial and recognition of Indigenous self-government in New Zealand and Canada, though much more progress has been made in transcending the colonial paradigm and systems of government in both jurisdictions since the 1970s. As in the U.S., Indigenous forms of self-government comprise a distinct “third order of government” in Canada (subject to the conclusion of regional agreements – see chapter 6). Although some type of Indigenous institutional capacity capable of interacting with the institutions of the state at the national level is useful if not essential, the most successful measures to establish secure Indigenous institutions of self-government (other than some function-specific Indigenous ‘agencies’) have usually occurred at local and regional levels following extensive negotiations based on recognition of that right and the collective identity and authority of each people. While this thesis argues that many existing arrangements remain within the colonial paradigm in varying degrees, reform processes must also tread a fine line to avoid imposing rather than facilitating national and regional representative and governance structures. (McHugh, 1991, 2004; McNeil, 2000; Ward & Hayward, 1999; Durie, 1998, 2005)

Of the ‘Anglo-Commonwealth’ countries, the regional self-government agreements negotiated in Canada have been the most comprehensive: although those negotiated during the 1980s remained in many respects ‘municipal-type’ arrangements (i.e. similar to the subordinate status and limited powers of local governments within the federal system), since the mid-1990s agreements have typically included the establishment of autonomous systems of ‘Aboriginal federalism’ to which the protection of s. 35 of the Canadian Constitution apply, the allocation of legislative and executive powers and functions amongst Provincial, Federal and Indigenous Governments and provision for the concurrent operation of their respective laws and powers, and distinct appeals tribunals and alternative dispute resolution procedures. Sources of funding for Indigenous Governments include resource revenue sharing and substantial base funding

for the establishment or consolidation of Indigenous institutions. Where land is not restored to Indigenous ownership agreements often provide for the co-management of natural resources (which may include an effective veto over resource development decisions). (Hodgins *et al* (eds), 1989; Hylton (ed), 1999; Langton *et al* (eds), 2006)<sup>194</sup>

As in Canada, most progress towards establishing Indigenous institutions with legal capacity in dealings with officers and agencies of ‘the state’ and others in New Zealand with a substantial level of autonomy and Indigenous acceptance has been made by way of regionally negotiated agreements. (McHugh, 2004; Williams, 2004; O’Regan *et al*, 2006) The negotiation of agreements in many areas of New Zealand has not always directly addressed self-government arrangements but each nonetheless reinforces the autonomy and capacity of Maori institutions. Although the specific arrangements of each regime vary considerably, the basic types of mechanisms used are similar to those in Australia and include statutory authorities, statutory sub-bodies and several incorporation regimes. These include regimes specifically designed to provide legal recognition and capacity for Maori institutions (*sui generis* legislation, Maori Trust Boards and trusts established pursuant to the *Te Ture Whenua Maori Act* 1993 (NZ)) as well as the formation of legal entities pursuant to other regimes (the *Incorporated Societies Act* 1908 (NZ), *Companies Act* 1993 (NZ), *Charitable Trusts Act* 1957 (NZ) and *Trustee Act* 1956 (NZ)) providing distinct sets of arrangements “into which an explicitly Maori element could be woven subject to the overarching statutory framework”. (McHugh, 2004; 517)

Unlike Australia however, these measures are reinforced by the considerable influence of the Treaty of Waitangi on the dominant constitutional and political cultures, as well as a significant Maori presence in the national Parliament (surpassed by the proportion of Aboriginal Members of the Legislative Assembly since 2005, but much more significant than the level of Indigenous representation in the other Australian Parliaments). In addition, the *Local Government Amendment Act* 2002 (NZ) introduced a section authorising municipal councils to provide for distinct Maori representation by the establishment of “principles and mechanisms to facilitate participation by Maori in local authority decision-making” (s. 4), and there is an increasing number of agreements and

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<sup>194</sup> The *Indian Act* 1985 (Can) continues to apply to many Indigenous institutions not established by or recognised as signatories to regional agreements or treaties. (Alfred, 1999; 149-50; McHugh, 2004)

protocols between Maori and local authorities to facilitate the coordination and implementation of land use planning and resource management decisions. (Hewison, 2000; McHugh, 2004; Durie, 2005; 228)

## **Conclusion**

The legal recognition and capacity of Indigenous institutions within the main extant (as of 2007) Commonwealth regimes applying in the NT has been attained primarily pursuant to the methods of incorporation provided by the Associations Act and the Local Government Act of the NT, or the CATSIA or Corporations Law of the Federal Government. Different regimes may be preferred by different Indigenous groups seeking legal recognition and capacity. However, while the first Federal regime establishing a basis for incorporation by Indigenous institutions was strongly premised upon providing a secure domain within which Indigenous law and practices could operate, this objective has been incrementally eroded by increasingly detailed regulatory requirements and powers of intervention by regulators, and no progress has been made towards acknowledging Indigenous institutions as an autonomous third order of government or domestic dependent nations within (or perhaps more accurately alongside) the Constitution and federal system of the Commonwealth. Several options for enhancing the security of these Indigenous domains have been explored in this chapter in terms of modifications to the basic components of existing regimes, perhaps the most important of which is the establishment of a bicultural mechanism or set of arrangements within each regime to perform ‘regulatory’ and advisory functions.

The following chapter summarises the arguments, recommendations and conclusions of this thesis in terms of institutional changes within the extant system of government, and explores possibilities for further extending and deepening mutual recognition, bicultural mechanisms and other co-management arrangements throughout the levels and components of the system of government of particular significance to the Indigenous right of self-determination (primarily in the context of the Federal polity). The final chapter also considers a variety of arrangements that could be used to pursue the long-term objectives of constitutional recognition and protection of Indigenous rights and/ or the negotiation of a treaty(s), and argues that the consolidation of regional Indigenous institutions and negotiated agreements may be the most appropriate level for

systems of mutual recognition and co-management to be developed in many instances.

## **Chapter 10**

### ***Land rights, self-government and the Indigenous right of self-determination within the state***

#### **Introduction**

The thesis has examined the genesis and development of the major concepts, principles and components of the Westminster system of government, from which the systems of government of the polities of the Commonwealth of Australia are derived. Chapter 2 examines the theoretical concepts, institutions and processes of institutional change associated with the gradual erosion of the descending sovereignty of the Crown and the emergence of ascending popular sovereignty based on the consent and participation of citizens within the state. The consolidation of the Westminster system of representative democracy and responsible government and associated features of the constitutional/ political and administrative institutions of the system of government during the nineteenth century are of particular significance. Chapter 2 also examines the substantial influence of these developments and features of the U.S. and Canadian Constitutions on the foundation and evolution of the systems of government of the Commonwealth of Australia. Chapter 3 examines the systems of government of the Federal polity and the NT in more detail, in particular the pivotal role of the Parliament, the principles and conventions of responsible government underpinning both operational management by, and the review and accountability of, the Executive, the roles of parliamentary committees and independent parliamentary agencies, and the development of a distinctly bipartisan political culture. The nature and extent of Indigenous participation in key mechanisms of operational management and review and accountability of the Federal Government and Parliament in matters of major significance to them is discussed further below.

Chapter 4 considers the distinctive basis and development of the system and machinery of government of the Northern Territory since the British assertion of sovereignty, with the period since the conferral of self-government in 1978 examined in most detail. The analysis of key factors affecting and features of the constitution, political

institutions and system of public administration provides a basis for exploring the major types of institutional change that have accompanied the recognition of Indigenous rights in specific regimes, as well as for considering how these regimes may evolve in future. Chapter 5 provides the conceptual and methodological basis for the analysis of processes of institutional change associated with the denial and subsequent recognition of Indigenous rights in the NT, including the nature and timing of distinctive phases of government policies towards Indigenous peoples and contemporaneous developments in the establishment and consolidation of British colonial settlement, and the central concept of the Indigenous right of self-determination within the state. The manner in which the Indigenous right of self-determination has been incorporated within specific regimes is considered in terms of the analytical categories of land rights (including cultural heritage protection and natural resource management) and self-government as subsets of associated rights.

Chapters 6 and 7 argue that the protection of Indigenous land restored to traditional owners under the land rights regimes against encroachment should be strengthened (particularly the provisions of the Native Title Act), and that much more emphasis must be placed on regionally co-ordinated land and resource agreements rather than fragmented legal proceedings. Negotiated agreements have proliferated rapidly since the 1990s, but within regimes that tend to fragment the negotiation of local and regional priorities and work in favour of Commonwealth institutions in case of disagreement. Chapter 7 also identifies several measures that could strengthen the NT regime for the protection of Aboriginal cultural heritage areas, including increasing the extent to which the regime is cross-referenced with land use planning regimes and removing or reducing the power of the Minister to override decisions of the AAPA Board (e.g. by reserving such decisions to the Parliament or a bicultural mediation/ arbitration panel).

Chapter 8 examines the manner in which Aboriginal rights and interests have been accommodated within the main wildlife and fisheries regimes of the NT, including the distinctive roles of the boards of management of jointly managed national parks, the establishment of Aboriginal regional consultative committees to provide a forum for traditional owners to discuss marine area and resource management with relevant government agencies and interest groups, and the expansion of terrestrial and marine

Ranger programs to increase the facilities and resources available to traditional owners to carry out land management (and many other) activities. Chapter 9 considers the manner in which the legal recognition and capacity of Indigenous institutions has been accomplished, arguing that although the regimes may not inhibit the operation of Indigenous law and systems of government, Indigenous organisations incorporated under these regimes are vulnerable to intrusive or inappropriate regulation by Commonwealth institutions and officers. There is much less security for the constitutional, legal and operational domains of Indigenous institutions than is provided in New Zealand (largely indirectly by the significance of the Treaty of Waitangi to the constitutional and political culture, as most of the specific methods by which Maori institutions are incorporated are basically similar to those available in Australia) and Canada, where there is constitutional recognition and protection for treaties and other land and self-government agreements between First Nations and the Federal Government as well as rights stemming from common law Aboriginal title.

This chapter reiterates the fundamental role of the negotiation of treaties by the Crown with the Indigenous peoples of Canada and New Zealand in providing an embryonic basis within the dominant political and legal cultures as well as an appropriate method for the recognition and protection of Indigenous rights that has occurred since the 1970s, and major aspects of the manner in which that recognition has manifested. The chapter then explores how a similar *grundnorm* might be established within the institutions of the Commonwealth of Australia to provide a more secure basis for the Indigenous right of self-determination based on mutual recognition of concurrent systems of government and law, intergovernmental arrangements for the co-management of areas of government of particular significance to both, and bicultural mechanisms for dispute resolution (see Diagram 8). The chapter also discusses the establishment and consolidation of regional institutions of Indigenous self-government as a likely fulcrum for negotiations with Commonwealth institutions and the exercise of Indigenous rights.

### **The Indigenous right of self-determination in Canada and New Zealand**

As argued in chapters 5 to 9 in particular, overall Canada and New Zealand have made considerably more progress towards recognising and facilitating the Indigenous right of self-determination than Australia. The treaties negotiated in Canada and New

Zealand during the early stages of European colonisation have provided a relatively solid basis (reinforced in Canada by the Royal Proclamation of 1763) within the current constitutional fabric and political culture for acknowledging the Indigenous right of self-determination in the broadest possible terms. In Canada this shift was reinforced by constitutional recognition and protection of 'aboriginal and treaty rights' in the 1980s and further extended by the acceptance of the right to self-government as a basis for negotiations with Indigenous peoples by the Federal Government in 1995, making comprehensive negotiated land and self-government treaties and other agreements backed by constitutional guarantee possible. As noted in chapter 6, this change in Federal Government policy in Canada is a major turning point in relations between Indigenous and non-Indigenous Canadians. Tully (1995, 24) argues of such change that: "This world reversal, from a habitual imperial stance, where one's own customary forms of reflection set the terms of the discussion, to a genuinely intercultural popular sovereignty, where each listens to the voice of the others in their own terms, is the most important and difficult first step in contemporary constitutionalism."

As argued in chapters 5 and 6, in order to provide a comprehensive basis for and guarantee of Indigenous self-determination it is necessary to establish constitutional recognition and space, within which the devolution and decentralisation of powers and functions to Indigenous institutions can occur and arrangements for co-management can develop. Tully (1995, 6, 28) states of this aspect of the development of 'constitutional pluralism':

A Constitution can seek to impose one cultural practice, one way of rule following, or it can recognise a diversity of cultural ways of being a citizen, but it cannot eliminate, overcome or transcend this cultural dimension of politics...

A constitution should be seen as a form of activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with the three conventions of mutual recognition, consent and cultural continuity.<sup>195</sup>

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<sup>195</sup> In this sense Mitchell describes the parties to the Treaty of Albany (the Haudenosaunee Confederacy and the British Crown) signed in 1664 as: "two paths or two vessels travelling down the same river together... We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel." (Quoted in Armitage, 1995; 89; see also Brennan *et al*, 2005: 87-88)

The shift towards much more comprehensive recognition of and protection for Indigenous rights has continued since the 1990s to the extent that in areas where modern treaties and agreements have been concluded the period of transition from colonisation and subjugation to mutual recognition and co-existence has arguably been largely completed (in terms of establishing the basic principles and structural and procedural arrangements for mutual recognition and ongoing co-management) and a new era of relations between Federal, Provincial and First Nation Governments commenced. Notwithstanding the existence of treaties and with the exception of some of the later (post-1995) agreements in Canada and New Zealand in particular, the recognition of Indigenous land and self-government rights continues to be limited to varying degrees by the dominant constitutional frameworks and systems of government, as well as by practical obstacles. Many negotiated agreements have been framed as final settlements of ‘the Indigenous problem’ (i.e. demands for justice and the refusal to be culturally assimilated) by incorporation within and subordination to the state, extinguishing rights based on treaties and recognition of prior and concurrent sovereignty and replacing them with a codified set of statutory rights. Similarly, whether for conceptual or practical reasons the courts have not extended acceptance of some of the tenets of the Marshall doctrine (in the context of rights to land and resources) to acknowledgement of Indigenous peoples as domestic dependent nations with prior and concurrent sovereignty and a corresponding right to self-government based on the same (Indigenous) systems of law upon which land rights are founded (a notable exception is a decision of the British Columbia Supreme Court in 2000 – see chapter 6).

Notwithstanding the substantial progress made in Canada compared to Australia in particular, some of the conceptual and institutional legacies of the colonial paradigm that dominated the 1800s and 1900s remain in the jurisprudence. In this sense McNeil (2001, 211-13) argues of common law developments:

[Despite] section 35(1), the Supreme Court of Canada is still operating within a colonial paradigm insofar as the rights of the Aboriginal peoples are concerned. In *Sparrow*, the Court reaffirmed the standard colonial view that ‘there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to lands vested in the

Crown.’ Moreover, the colonial paradigm does not envisage an alternative to this denial of Aboriginal sovereignty, as the complementary principles of parliamentary sovereignty and the rule of (Euro-Canadian) law exclude Aboriginal governments and laws from their legitimate place in the Constitution...

In Canada, parliamentary sovereignty therefore has to be redefined so that legislative power is divided among the federal, provincial and Aboriginal governments. The rule of law must be redefined to include Aboriginal laws, as well as the common law and federal and provincial legislation...

Traces of these legacies of the colonial paradigm remain in some of the comprehensive land and self-government agreements negotiated in Canada during the 1970s, 1980s and early 1990s. Most of the agreements include clauses extinguishing (unspecified) inherent and common law Indigenous rights and replacing them with a ‘final agreement’ and statutory rights. The terms of some of these agreements provide exceptions that suggest other strategies to provide an additional layer of security for the Indigenous domain: for instance, Nettheim *et al* (2002, 104) note of the agreement concluded with the Yukon First Nations in 1984: “Most importantly, for the first time the Agreement did not require a blanket extinguishment of Aboriginal title.” Another strategy, in this instance pertaining to the right to self-government, is contained in the Inuvialuit Final Agreement: “Clause 4(3) provides that, where restructuring of the public institutions of the Western Arctic region occurs, the Inuvialuit shall not be treated less favourably than any other native peoples with respect to government powers and authority.” (Nettheim *et al*, 2002; 439) In many respects the Nisga’a agreement completed in 1998 after years of negotiation, reinforced by the constitutional guarantee of the terms of the agreement, has succeeded in transcending the colonial paradigm, setting new benchmarks for the recognition and accommodation of the Indigenous right of self-determination in the Anglo-Commonwealth countries.<sup>196</sup>

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<sup>196</sup> However, as Tully (in Ivison *et al* (eds), 2000) notes, the resulting framework document is described as a ‘Final Agreement’ rather than a treaty. In addition, the small proportion of the territory of the Nisga’a people restored to their ownership in effect legitimises much of the dispossession that has occurred since British colonisation (though the potentially detrimental effect of this may be avoided if co-management arrangements are successful). (See also Alfred & Corntassel, 2005)

McHugh (1999, 447) notes that the decision in *Wi Parata* that the Treaty of Waitangi was of no legal effect (see chapter 6) was delivered when the Maori still posed a significant threat to the self-governing British colony and argues that: “It was precisely because Maori ‘sovereignty’ was such a threat to the settler colony that its courts were so anxious to neutralise it doctrinally.” McHugh (1999, 449) further argues that although the decision in *Wi Parata* has been substantially revised and overruled by the courts of New Zealand since the 1980s, and the principles and guarantees of the Treaty have received increasing legal and political recognition: “its most important juridical consequence remains. The establishment of the absolute sovereignty of the Crown and the incapacity of the Treaty of Waitangi to act as any form of qualification upon that sovereignty.” In this sense and to this extent, negotiated agreements continue to provide for contingent Indigenous rights subject to the absolute sovereignty of the ‘Crown in Parliament’.

The nullification of the Treaty of Waitangi was reversed by the establishment of the Waitangi Tribunal in 1975, providing the basis for a similar foundation for Maori-Pakeha negotiations in New Zealand to the role of treaties, regional agreements and constitutional protection in Canada to develop (though in the case of New Zealand providing a somewhat more ambiguous ‘quasi-constitutional’ form of guarantee). The courts have been reluctant to intervene in disputes arising from the conduct of negotiations but continue to develop basic principles and define and elaborate specific obligations stemming from the Treaty of Waitangi, albeit largely within concepts of private law such as partnership and a duty to act in good faith in negotiations and decision-making affecting both parties rather than in the form of recognition of domestic dependent nation status and associated prior and concurrent sovereignty and treaty rights. McHugh (1999, 459-60) argues of the unusual jurisprudence that has resulted from this doctrinal compromise between completely subordinate (non-)status and recognition of prior and concurrent sovereignty:

In a landmark series of cases, and undoubtedly inspired by the deliberations of the Waitangi Tribunal, the Court of Appeal formulated a notion of ‘partnership’ between the Crown and Maori. This was a form of relation founded in contract (the Treaty of Waitangi) requiring the parties to negotiate in the utmost good faith ... [While] the court recognised Crown sovereignty, it simultaneously reformulated it into the status of a partner – admittedly a

senior, more powerful partner – whose conduct was counterpoised by the similar status of Maori...

In order to move beyond that unhelpful site of engagement [of ‘sovereignty talk’], the court essentially improvised by transplanting a private-law concept – principles of partnership and contract – into the public sphere. (See also Sharp, 1990)

As noted in chapter 6, the Treaty of Waitangi has also been incorporated into the jurisprudence through administrative law as a relevant factor to be taken into account in decision-making by public officers. Nonetheless, as in many of the regional agreement negotiations in Canada the Crown has regularly attempted to establish ‘final settlements’ based on the continuation of absolute and exclusive sovereignty vested in and exercised by the Parliament and Executive. Examples include the requirement that Maori negotiators forego all future commercial fisheries claims as a precondition for agreeing to the fisheries settlement in the 1990s, and the attempt to establish a ‘fiscal envelope’ in the late 1990s setting an upper financial limit to be available for the resolution of all outstanding Treaty claims. (O’Regan *et al*, 2006: Durie, 2005) Thus McHugh (1999, 461) argues of the persistence of the preference of the Crown during the 1990s for agreements that replace open-ended Treaty rights with codified and contingent statutory rights notwithstanding significant increases in political and legal recognition of the provisions and principles of the Treaty of Waitangi:

the settlements to date seem more concerned with finality and closure than with establishment of mechanisms to manage the ongoing relationship between Crown and tribe, from which exit is not an option. In that sense, rather than being an opportunity to establish new processes for dialogue and voice in a post-claims world, the settlement process seems to suppress the ongoing relationship between Crown and tribe. (See also Woodward, 1974; 5-9)

Similarly, Bennion (2001, 374-75) argues of agreements negotiated during the 1990s:

the NZ government has, in the last decade, focused upon satisfying the call of the general electorate for a final date when all claims will be heard and settled. International experience

with Indigenous issues shows that such a focus does not achieve the finality sought. It merely encourages a minimalist approach to the recognition of Indigenous claims, an approach which fails to recognise that claims are directed towards seeking resources for the ongoing cultural survival of the Indigenous group.

The Declaration on the Rights of Indigenous Peoples also states that treaties, agreements and other constructive arrangements should not prejudice future rights (Article 45). As in Canada there are an increasing number of exceptions to the persistence and extent of the dominance of the colonial paradigm in New Zealand, such as provisions for co-existence, mutual recognition and co-management in the Ngai Tahu Settlement.<sup>197</sup> Thus while many significant steps towards recognition and accommodation of the Indigenous right of self-determination have been made in these jurisdictions, to the extent that the parameters and conduct of negotiations remain within the limits of the colonial paradigm and parliamentary supremacy ‘settlements’ risk becoming the completion and legitimisation of “co-optation and conquest” by extensive dispossession of land and resources and assimilation by attrition (Macklem, 1993; 1340), rather than establishing a secure long-term basis for Indigenous self-determination. Palmer and Tehan (2006, 72) note that in Canada: “Some Aboriginal people believe that because indigenous institutions are viewed by the settler state as inferior, the Federal Government’s self-government policy is no more than a settler tool to impose a system of accountability and Western institutions on Aboriginal peoples. As a result, some groups refuse to participate in self-government negotiations.” For instance, Alfred (1999, 58) emphasises the risks involved in accepting such a basis for Indigenous rights, even when governments are prepared to ‘concede’ recognition as a ‘third order’ or level of government within the federal system:

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<sup>197</sup> The negotiation and implementation of the agreement was facilitated by the prior existence of a strong regionally based Maori organisation (Te Runanga o Ngai Tahu, formed as the Ngai Tahu Trust Board until the commencement of the *Te Runanga o Ngai Tahu Act 1996* (NZ)) with a substantial level of legitimacy amongst Maori in the affected region, as well as institutional capacity and experience, structural and operational autonomy, and a substantial degree of insulation from regulation by and accountability to the Pakeha Government. (McHugh, 1991; 201-2; Durie, 2005; 176; O’Regan *et al*, 2006)

To argue on behalf of indigenous nationhood within the dominant Western paradigm is self-defeating. To frame the struggle to achieve justice in terms of indigenous 'claims' against the state is implicitly to accept the fiction of state sovereignty... The mythology of the state is hegemonic, and the struggle for justice would be better served by undermining the myth of state sovereignty than by carving out a small and dependent space for indigenous peoples within it...<sup>198</sup>

By insisting on the codification and subordinate status of Indigenous rights and institutions the basis and effect if not necessarily the intent of government policies of particular significance to Indigenous peoples may be continuation of the process of cultural genocide ('assimilation') by attrition, perpetuating and purporting to legitimise substantial dispossession of land and resources and political and economic marginalisation. In this sense Alfred (1999, 59-60) argues of the challenge of Indigenous peoples to the legitimacy and claim to absolute sovereignty of 'the state' in Canada:

Recognizing the power of the indigenous challenge, and unable to deny it a voice, the state has attempted to pull indigenous people closer to it. It has encouraged them to re-frame and moderate their nationhood demands to accept the *fait accompli* of colonization, to collaborate in the development of a 'solution' that does not challenge the fundamental imperial lie.

By allowing indigenous peoples a small measure of self-administration and by foregoing a small portion of the money derived from the exploitation of indigenous nations' lands, the state has created incentives for integration into its own sovereignty framework...<sup>199</sup>

Alfred and Corntassel (2005, 603) further argue that in accordance with a core element of the refined (neo-)colonial strategy of some interest groups: "[The] most important strength of Indigenous resistance, unity, is ... constantly under attack as

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<sup>198</sup> Tully (1995; 34, 58) suggests of the preliminary conceptual and practical barriers facing cultural minorities in the politics of constitutional recognition: "The language in which they are constrained to present their claims is the language of the master: masculine, European or imperial. So the injustice of cultural imperialism occurs at the beginning, in the authoritative language used to discuss the claims in question... [The] language of modern constitutionalism which has come to be authoritative was designed to exclude or assimilate cultural diversity and justify uniformity".

<sup>199</sup> In another context, Alfred (1999, 117) argues of subsequent demands for revision of the Alaska Native Claims Settlement Act: "what the Native people are rejecting is not modernity, or the United States government, but forced compliance with an exploitative system and the imposition of an inappropriate form of government".

colonial powers erase community histories and senses of place to replace them with doctrines of individualism and predatory capitalism.” To reduce the risks associated with their minority position and subordinate status within the dominant society Alfred (1999, 136-37) argues that for the Indigenous peoples of Canada self-determination requires constant individual and collective efforts to strengthen their positions, and careful evaluation of existing and possible principles, mechanisms and measures prior to and during negotiations for mutual recognition and co-existence. In addition: “Given that Indigenous identities are (re)constructed at multiple levels – global, state, community, individual – it is important to recognize these multiple sites of resistance to state encroachment.” (Alfred & Corntassel, 2005; 600)

In this sense central tasks of Indigenous resistance and resurgence identified include “restructuring Native governments to accommodate traditional decision-making, consultation and dispute resolution processes”, the assertion and exercise of the right to govern their own territories and people (including the reintegration of Indigenous languages in formal community government structures and procedures), and devising long-term strategies to attain complete institutional and economic self-sufficiency. Revising the basis of and strengthening and extending the mechanisms for mutual recognition and co-management therefore requires the creation of constitutional, political, administrative and economic space for relations with the dominant society on a basis of equality: “Moving from wardship to partnership with the state and industry is progress toward self-determination; this is a matter of perspective, resolve, and skill.” (Alfred, 1999; 116)

Tully (1995, 136-37) argues that the increasing recognition of the right of Indigenous peoples to self-determination within national boundaries since the 1970s is a major element of constitutional evolution in terms of recognising cultural pluralism within the state, and that in this sense: “The James Bay and Northern Quebec Agreement, while far from ideal, is a precedent that has helped to set the ‘world reversal’ in motion. Since then, the justice of Aboriginal claims for recognition has begun to be acknowledged in the courts of common-law countries and in the United Nations”. The comprehensive regional agreements concluded in Canada since the 1970s and similar though usually more limited agreements in New Zealand, and the steady progression of

statutory and common law (and in Canada constitutional) developments incrementally expanding the level of recognition of and protection for Indigenous rights in these countries, may be shifting the basis of government policies and negotiations with Indigenous peoples from the conferral of limited and contingent rights by the state to increasing recognition of the Indigenous right of self-determination based on prior and concurrent sovereignty.

Although Indigenous peoples in both Canada and New Zealand have not transcended the colonial paradigm completely and remain subject to fluctuations in the prevailing political culture(s) and climate, the shift in the *grundnorm* towards Indigenous self-determination has generally continued. (McHugh, 1996) The developments in each country contribute to and reinforce the shifting *grundnorm* or “world reversal”, as McHugh (1991, 200) states of the increasing level of acceptance of Maori institutions and the right to self-government by the internationally recognised nation-state of New Zealand: “To the extent that these [measures recognising the legal capacity of Maori institutions] suppose the Maori have some inherent right to their own governing institutions, they will constitute state practice which contributes to the formation of customary international law.” As Nettheim, Meyers and Craig (2002) demonstrate in a comparative analysis of developments in the Anglo-Commonwealth countries, the United States and Scandinavia, incremental steps in the transition towards recognition of the Indigenous right of self-determination have continued since the 1970s in all of these jurisdictions. (See also e.g. Minde, 2000; Hocking, 2005; Nettheim, 2001a)

The emerging *grundnorm* is also apparent at the international level, including several conventions of the International Labour Organisation<sup>200</sup> and the attainment of formal status (albeit as ‘non-government organisations’) within the United Nations by many Indigenous organisations (Wilmer, 1994; Pritchard, 1999), culminating in the substantial level of acceptance by nation-states of the resolution of the General Assembly adopting the Declaration on the Rights of Indigenous Peoples in 2007 (the Anglo-Commonwealth countries and the U.S. being notable exceptions). Although a permanent forum has been established to review progress made in implementation of the

Declaration, unlike many international economic regimes there are no provisions or mechanisms for or otherwise requiring active implementation, enforcement or dispute resolution procedures. Nonetheless, as McHugh (1991, 203) states of associated developments in New Zealand, although the Declaration is not legally binding such forms of recognition are “grist to the international mill from which rules of customary international law emerge.”

### **Extending and deepening the accommodation of Indigenous rights in Australia**

The preceding chapters have identified constraints on the realisation of the Indigenous right of self-determination in Australia in the context of existing land rights and self-government regimes in the NT, and some of the ways in which these constraints might be reduced or eliminated over time within the existing constitutional framework and system of government. Imperatives examined include strengthening the Indigenous domains of self-government, substantial reinforcement of existing land rights regimes, and extending the range and capacity of bicultural mechanisms throughout the various regimes and components of the machinery of government. If the Indigenous right of self-determination is recognised by and accommodated within ‘the state’ the basis and types of arrangements at local, regional and pan-regional levels could be expected to change significantly over time. The following sections briefly consider institutional changes in the system of government at the Federal level, including changes within the extant arrangements as well as the long-term objectives of constitutional change and treaties to provide substantive recognition of and raise the threshold of protection for Indigenous rights.

The absence of treaties with Indigenous peoples during Australia’s colonisation by Britain, continued and affirmed by the absence of recognition of Indigenous rights in the constitutions of the colonies as self-government was conferred by the Imperial Parliament<sup>201</sup> and subsequently the Commonwealth and State Constitutions, contributes

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<sup>200</sup> Convention No 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries adopted in 1957, and Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries adopted in 1989.

<sup>201</sup> There has only been one instance of positive recognition of Australia’s Indigenous peoples in the constitutions established since British colonisation: “Aborigines featured in only one Australian colonial constitution – Western Australia... Before federation, the Western Australia Constitution Act 1889 contained provisions for compensation to be paid to (or spent on) Aborigines... This constitutional

to the persistence and extent of the continued dominance of the colonial paradigm and limited revision of *terra nullius* interpretations of the basis and nature of Indigenous rights by Commonwealth governments and courts. This greatly increases the vulnerability of Indigenous rights and interests to the prevailing political climate compared to Canada and New Zealand; there is no constitutional constraint on or protection against a major shift in the dominant political culture(s) against Indigenous rights or other forms of discrimination. Furthermore: “The crucial importance of self-determination to Aboriginal and Torres Strait Islander peoples is little appreciated by non-Indigenous Australians.” (ATSISJC, 1993; 41) Dodson (ATSISJC, 1996; 6) further argues that:

The recognition of our status as the First peoples of this country is the keystone. From this central point the structures which will shape our relationships with governments may be negotiated and built. The building blocks are our specific rights as Indigenous peoples which include the right to practise and enjoy our distinct cultures, the right to control our natural resources and the right to self-determination.

As discussed in chapter 5, the British and Commonwealth constitutions and political cultures excluded, dispossessed and subjugated Indigenous Australians entirely for many years. Although the dominant constitutional and political cultures continue to resist recognition of prior and concurrent Indigenous sovereignty and the right of self-determination as such, significant albeit incremental and fragmented gains have been made in the recognition of Indigenous rights. The continued marginalisation and vulnerability of Indigenous peoples in Australia is apparent in the variable but usually very limited or vulnerable recognition of Indigenous rights by Federal and Territory Governments; the associated policies of both Governments have fluctuated enormously since the 1970s and, other than the Federal Government between 1972 and 1975, neither has recognised the Indigenous right of self-determination.

The policies of Labor governments on the recognition and accommodation of Indigenous rights have usually been more expansive than those of conservative

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provision had been written in at the insistence of the British Government but ... [in] 1898 the expenditure provision was dropped from the constitution.” (Fletcher, in NTU, 1993; 88: see also Bartlett, 2000)

governments, but there are also many exceptions. Indigenous policy was the exclusive constitutional domain of State Governments until the Commonwealth referendum in 1967 (see chapter 5). Following the referendum a small Office of Aboriginal Affairs and an Advisory Council were established within the Department of the Prime Minister to develop a Federal Aboriginal Affairs policy. A Department of Aboriginal Affairs was established by the Federal Government following the 1972 election as a major element of the policy to recognise the Indigenous right of self-determination (complementing the appointment of the Aboriginal Land Rights Commission in the NT and preliminary drafting of the regime providing legal capacity to Indigenous institutions). An Aboriginal Land Fund Commission, Aboriginal Development Corporation and National Aboriginal Consultative Conference (a representative though purely advisory committee with a small secretariat seconded from the Department) were also formed during the 1970s, and Federal Government funding for Indigenous Affairs and Indigenous organisations substantially increased for several years. (Tatz, 1979: Coombs, 1978, 1994: Heatley, 1979: O’Faircheallaigh *et al*, 1999) Although these initiatives continued as the basis of Indigenous Affairs policy throughout the 1980s, the Federal Government policy of recognising and supporting Indigenous self-determination was still in a very early stage of implementation when it was restated as a policy of ‘self-management’ by the Coalition Government elected in 1975. (Sanders, 1991: Fletcher, 1999)

The Aboriginal and Torres Strait Islander Commission (ATSIC), established by the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), constituted a partial but nonetheless significant step towards providing a distinct means for Indigenous representation and participation within the institutions of the Commonwealth, and addressing “the past dispossession and dispersal of Aboriginal and Torres Strait Islander peoples and their present disadvantaged position in Australian society” (s. 3).<sup>202</sup> Established as a statutory authority to provide an instrument for a degree of Indigenous self-government, ATSIC replaced and amalgamated the functions of the Department of Aboriginal Affairs and Aboriginal Development Corporation: “ATSIC, however, is more than the sum of its predecessors – it is a unique, decentralised organisation, combining

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<sup>202</sup> Though the core statutory objective of the Commission was described as achieving Indigenous self-management and self-sufficiency rather than self-determination.

representative, policy-making and administrative elements.” (ATSIC, 1992-93: see e.g. Coombs, 1994: Fletcher (ed), 1994: Sullivan (ed), 1996: McRae *et al*, 1997: Rowse, 1992, 1998b: Sanders *et al*, 2000, Sanders, 2004: Johnston *et al* (eds), 2008) ATSIC consisted of elected representatives at the regional and national level responsible for forming and implementing the objectives and policies of the Commission. ATSIC was dismantled during 2004 and 2005.

A bicultural and operationally independent statutory Council for Aboriginal Reconciliation was established by the Federal (Labor) Government in 1991 to consider ways to advance the process of reconciliation between Indigenous and non-Indigenous Australians (discussed below). In addition, a ‘Social Justice Package’ was devised to recognise and address Indigenous social and economic disadvantages, influenced in part by the findings and recommendations of the Royal Commission into Aboriginal Deaths in Custody completed in 1991. (RCIADC, 1991) The office of the Aboriginal and Torres Strait Islander Social Justice Commissioner was established around the same time, and the Federal Government also appointed a Commissioner from the Human Rights and Equal Opportunity Commission in 1995 to examine the situation of those affected by the policy of forced removal of children from their families (the ‘Stolen Generations Report’). (Wilson, 1997) However, recognition of land rights at the national level did not occur until the *Mabo (No.2)* case in 1992 forced a legislative response from the Federal Government (see chapter 6).

By the mid-1990s Australia was in some respects at a broadly comparable level of political and legal recognition of Indigenous rights to Canada and New Zealand, albeit implemented in very different ways (such as the Native Title Act and separate land rights regimes in the NT and most of the States, and the establishment of ATSIC), and it was possible to argue that a *grundnorm* may be developing in the dominant constitutional and political cultures to the extent that major legislation and policies affecting the rights and interests of Indigenous Australians would be drafted and implemented only with their participation if not necessarily with their consent. (McHugh, 1996) However, the emergence of such a *grundnorm* as a basis for the development and implementation of policies of particular significance to Indigenous peoples has been repudiated at the

Federal level since the election of the Coalition Government in 1996, in terms of the procedures for policy development and the substance of many of those policies.

Although the overall tenor of relations between the NT Government and Aboriginal institutions has improved since 2001, at the Federal level recognition of Indigenous rights (and relations with Indigenous institutions generally) have in many crucial respects regressed substantially since 1996. The many reforms to the legal and administrative arrangements primarily responsible for devising and implementing policies pertaining to Indigenous Affairs have resulted in structures and processes that in key aspects closely resemble the arrangements of the late 1960s and early 1970s following the first relatively minor changes to the machinery of government implementing the policy of assimilation as the policy of integration developed. In contrast with developments in Canada and New Zealand during and since the 1990s, many Indigenous rights have been reduced rather than extended and strengthened, and almost all major Indigenous policies of the Federal Government since 1996 have been devised by top-down and closed-process policy development and implementation mechanisms (i.e. dominated if not entirely controlled by the objectives and priorities of the Executive).

As noted above, the Council for Aboriginal Reconciliation was a statutory authority formed for a ten year period “to promote a process of reconciliation and to recommend to parliament a document or documents of national reconciliation that outlined how the nation might go forward – whether it be a treaty, compact or some other instrument of agreement.” (Dodson, 2007; 21) Established by the *Council for Aboriginal Reconciliation Act* 1991 (Cth), the Council completed numerous reports during its existence. (See e.g. CAR, 1994a, 1994b, 1995) The final reports of the Council were completed in 2000, and contain extensive consideration of possibilities for recognising the right of self-determination and moving towards appropriate arrangements by which this right may be facilitated and exercised. (2000a, 2000b, 2000c, 2000d) Unlike the Royal Commission on Aboriginal Peoples in Canada and many of the recommendations of the Waitangi Tribunal in New Zealand however, the Council’s recommendations to accelerate and accommodate recognition of the Indigenous right of self-determination were not incorporated into Federal Government policy.

Similarly, the recommendations of the Stolen Generations Report (Wilson, 1997), the Royal Commission into Aboriginal Deaths in Custody (RCIADIC, 1991), the report of the Australian Law Reform Commission on the recognition of Indigenous customary law (ALRC, 1986), and the annual reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner have been largely or completely ignored by the Federal Government since 1996. (Johnston *et al* (eds), 2008) Consequently, as in the era of assimilation what may be considered by some to be aggressive politics may be experienced by others as a continuation of the ruthless and systematic process of cultural genocide by attrition. For example, Patrick Dodson (2007, 23, 25) argues that the cumulative effect of Federal Government policy after 1996 is the systematic “dismantling of the building blocks of self-determination” and that: “The extinguishing of Indigenous culture by attrition is the political goal of the Howard Government’s Indigenous policy agenda”,<sup>203</sup>

The core elements of the Federal Government’s strategy for Indigenous Affairs since 1996 have involved a multi-pronged and relentless assault on Indigenous self-determination, resulting in a large number and variety of disempowered, administratively isolated and severely under-resourced Indigenous organisations and advisory committees. (ATSISJC, 2005a, 2006a) Accountability is primarily if not exclusively to non-Indigenous regimes, regimes that have themselves been substantially overhauled since 1996 to reduce if not eliminate subsisting Indigenous rights and capacity. Mansell (2007, 77, 79) notes the stultifying effect of Federal Government policy on achieving further progress towards reconciliation amongst Indigenous and non-Indigenous Australians since 1996, arguing that:

Instead of building on a platform of land rights and the social developments of the latter part of the twentieth century, and identifying the mechanisms required to protect and enhance indigenous cultures, discussion is much more basic. Aborigines are again on the back foot. Harsh policy is again being imposed from the outside. Aboriginal people have a genuine grievance about paternal policies put in place by the Howard Government...

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<sup>203</sup> As Tatz (2003) argues in detail, the policy of assimilation implemented until (at least) the 1960s amounted to cultural genocide according to international law and principles. This was also one of the conclusions of the Stolen Generation Report. (Wilson, 1997)

It is debatable whether Howard is just plain racist or is driven by his economic and patriotic dreams. Apart from his misguided policy of assimilation, his economic and social policy for Aborigines is likely to be devastating.

Rather than maintaining a gradual shift towards unequivocal recognition of the Indigenous right of self-determination and the accommodation of that right within the system of government, the Coalition Government considered that the ‘pendulum’ of recognition of and support for Indigenous rights had swung too far in the favour of Indigenous peoples. Together with substantial cuts in funding and intensive auditing and regulation of Indigenous organisations, the institutional ‘assassination’ of ATSIC (allegedly on the grounds that it was a “failed experiment” in Indigenous self-management: SSCAIA, 2005) has resulted in a substantial hiatus in terms of progress towards the consolidation of regionally based Indigenous institutions of self-government and the maintenance of a significant Indigenous presence and autonomous capacity internationally, at the Federal level, and in relations with State and Territory Governments. There has also been substantial revision of land rights regimes further extinguishing or restricting Indigenous rights and interests since 1996, introduced by the amendments to the Native Title Act in 1998 and the Land Rights Act in 2006 and 2007 in particular (e.g. Tehan, 2003: Bartlett, 2000: Altman & Hinkson (eds), 2007: Keon-Cohen (ed), 2001), further demonstrating the imperative that core rights and arrangements of Indigenous self-determination are not only protected against Executive encroachment, but that they be placed “beyond the assail of Parliament”,<sup>204</sup> i.e. every Parliament of the Commonwealth of Australia, whether by some sort of framework treaty, constitutional amendment, or specific regional treaties; as developments in Canada demonstrate, these can be mutually supportive measures.

If the Indigenous right of self-determination is to be respected, as with increasing the level of recognition and protection in land, natural resource management, cultural heritage protection and self-government regimes, some other measures are necessary irrespective of the basis, principles and structures established to implement such a policy.

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<sup>204</sup> Gaudron J, in *Northern Territory v GPAO* (1999) 196 CLR 553 at 601, in this instance referring to the powers and functions of the High Court.

Others will depend on the types of measures identified as appropriate founding principles, mechanisms and short, medium and long-term objectives, and the level of support they can garner amongst Indigenous and non-Indigenous Australians. (Behrendt, 2003: Brennan *et al*, 2005) As noted above, the Council for Aboriginal Reconciliation identified many possible options to promote and support efforts to achieve reconciliation based on recognition of and respect for the Indigenous right of self-determination. Alternatives include a process to negotiate and establish a treaty(s) or other form of compact, constitutional reform to recognise and guarantee Indigenous law and rights, the negotiation of regional agreements, fundamental reform of many property rights systems (potentially including *sui generis* regimes for the protection of Indigenous cultural heritage and extending to amendments to e.g. land, minerals, wildlife, and intellectual property ownership and management regimes) and land use and economic development planning and assessment regimes, a massive increase in the level and quality of essential infrastructure and services, a bill of rights, and/ or some type of Indigenous claims (rights) tribunal and dispute resolution procedure.

Calma (ATSISJC, 2005b, 14-32) also emphasises the symbiotic nature of Indigenous self-government and land rights and associated measures, identifying three other rationales for the recognition of land rights: to provide a form of restitution or compensation for dispossession, the recognition of Indigenous law and the spiritual and cultural importance of maintaining connections with land, and a basis for economic and social advancement. Calma (ATSISJC, 2005b, 31) further argues that while there “are links and overlaps between these rationales”, this does “not mean that the different rationales are interchangeable.” These are complementary rather than mutually exclusive strategies and objectives; each element has a vital and distinct contribution to make to effective land rights regimes and to providing a viable basis for the exercise of the right of self-determination, and must be founded on substantive measures and measurable objectives to reduce the enormous disparity between the economic and social conditions of Indigenous and non-Indigenous Australians. (See also e.g. Dodson, 1999: Nettheim, 2001b: Behrendt, 2003: Johnston *et al* (eds), 2008)

Some type(s) of interim arrangements to re-activate the transition towards the recognition and accommodation of Indigenous self-determination at the Federal level are

clearly necessary while Indigenous institutions and bicultural mechanisms are consolidated, to review and evaluate possible methods for increasing the ‘cultural appropriateness’ (Rowse *et al* (eds), 1999) of constitutional, governance, property and economic systems. There are many examples of structural and procedural mechanisms by which principles and systems for co-existence, mutual recognition and co-management can be explored and developed, including by establishing a permanent parliamentary committee for Indigenous Affairs and the use of sub-committees (such as the sub-committees in Canada in 1983 and the NT in 2005), a bicultural statutory authority (such as reinstating the Council for Aboriginal Reconciliation), a royal commission (as in Canada in the 1990s) or the appointment of additional Social Justice Commissioners, constitutional conventions, a bicultural tribunal to consider and make recommendations on general principles and/ or specific land and self-government rights and claims (perhaps based to some extent on the functions and powers of the Waitangi Tribunal or British Columbia Treaty Commission), or some combination of these and other measures. Ideally these would be co-ordinated with similar processes at the State/ Territory and local/ regional levels.

Even though ATSIC remained primarily an institution for ‘self-management’ rather than self-determination, with the structures, powers, functions and basis of intergovernmental relations devised and determined by and remaining subject to the Federal Government, it was in many ways a significant improvement on preceding arrangements. The abolition of ATSIC and mainstreaming of associated policies and programs of the Federal Government since 1996 have in some respects returned the structure of the machinery of government responsible for Indigenous Affairs to the predominantly monocultural status and forms that existed in the late 1960s, 1970s and 1980s. Although the Federal Government “asserted that it intends to invite Indigenous people and organisations to form representative bodies of some form or another, to perform the functions now carried out by ATSIC regional structures” (SSCAIA, 2005a; 93), and several initiatives that may have considerable potential in the development of Indigenous institutions for self-government at the regional level continued during this time: “No replacement Indigenous representative bodies were actually in place when ATSIC Regional Councils ceased to exist on June 2005”. (ATSISJC, 2005a; 111)

Agreements with two regional Indigenous councils were concluded shortly thereafter, but the level of support for the establishment of regional institutions for self-government, in particular the provision of resources necessary to establish and consolidate regional Indigenous institutions and commitments to build negotiated co-management arrangements with such institutions as they are consolidated, remains minimal. (ATSISJC, 2005a, 2006a)

Some of the other functions of ATSIC not replicated by subsequent arrangements also suggest that the real target was Indigenous self-determination *per se*, including: “ATSIC’s international representative role, in particular, is not replaced or paralleled in the new arrangements”, nor are the associated and requisite consultative and analytical capacities that also provide the ability to independently assess and respond to government policies at the national level, as well as to take the initiative in policy formulation and implementation; the elimination of statutory rights and procedures under other Commonwealth regimes cross-referenced to ATSIC;<sup>205</sup> the “transfer [of] oversight of Regional Councils from ATSIC to the Minister” prior to their dismantling (they continued to exist in skeletal form until 1 July 2005, one year after the rest of ATSIC had been dismantled); and, the transfer of the Office of the Registrar of Aboriginal Corporations and ATSIC’s functions under the Native Title Act to mainstream Federal departments, the latter transfer of functions “giving the Government the power to both decide which Native Title organisations it will fund (and therefore which land claims will be funded), while also, through the Attorney-General’s department, opposing such claims”. (SSCAIA, 2005; 92: see also Nettheim *et al*, 2002; 379: Davis, 2007)<sup>206</sup> ATSIC had also established a monitoring unit to review progress nation-wide in the implementation and development of the recommendations of the Royal Commission into Aboriginal Deaths in Custody to complement the roles of State and Territory-based advisory committees.

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<sup>205</sup> The potential synergies of strong Indigenous institutions are also demonstrated by the role of the Land Councils in the appointment of members of the management board of the Aboriginal Areas Protection Authority and the Community Living Areas Tribunal (see chapter 7).

<sup>206</sup> There had also been many earlier attempts, sometimes unsuccessful, by the Federal Government to increase Executive control over the functions of ATSIC. (McRae *et al*, 1997: AILR, 1996: Ivanitz, 2000)

In addition to the elimination of ATSIC's representative and policy coordination functions and regional structures, the abolition of ATSIC raises the question of whether sufficient expertise in Indigenous matters can be attained by fragmented units within mainstream agencies. A Department of Indigenous Affairs or ATSIC-type statutory authority (with an Indigenous board of management) may be necessary to provide a sufficient basis for the requisite institutional capacity and expertise and to co-ordinate and support the activities of Indigenous domains within specific agencies. In Canada and New Zealand there is a distinct department with primary responsibility for Indigenous Affairs at the national level. Nonetheless, while each of these departments provides for the building and continuity of expertise in Indigenous Affairs they are based on a more or less conventional departmental structure rather than having an autonomous Indigenous board of management as ATSIC had. In this sense: "ATSIC represents a peculiar form of administrative democracy, quite unlike Indian and Northern Affairs Canada (INAC), or the Ministry of Maori Development in New Zealand, which continue to be public service departments." (Fletcher, 1999; 344)<sup>207</sup>

There remains considerable scope for the establishment or reinforcement of bicultural mechanisms to address specific functions and activities within the Federal system and machinery of government, with the objective of providing open rather than closed 'top-down' arrangements in each instance by strengthening the role and increasing the regularity of consultation with Indigenous representatives (or delegates in each instance), designed to complement and support 'bottom-up' arrangements and initiatives as they develop. (O'Faircheallaigh, 1999) In accordance with the functions of the core components of the Westminster-derived system as described in chapters 3 and 4, top-down arrangements could be designed to provide correspondence with the key focal points of legislation and policy development, review and accountability functions, as well as providing participation in strategic nodal points of operational management.

Following the establishment of the Council for Aboriginal Reconciliation for ten years in 1991, a similar statutory arrangement established a parliamentary committee (the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait

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<sup>207</sup> The Ministry of Maori Development is also called Te Puni Kokiri, INAC is now called the Department of Indian Affairs and Northern Development.

Islander Land Account) to review aspects of Indigenous Affairs policy (primarily pertaining to certain land rights regimes) for ten years. As with Indigenous Affairs in the Federal administration, the functions of the committee were 'mainstreamed' following the statutory ten year period. The establishment of a permanent parliamentary committee on Indigenous Affairs could make a significant contribution towards increasing the depth and continuity of the consideration of matters of concern to Indigenous Australians in this pivotal top-down institution, as well as providing a basis for direct Indigenous input and participation (particularly if reinforced by a sub-committee(s) comprising Indigenous members). This may be an interim measure until another method for Indigenous representation in the Parliament is agreed upon, or until the right of Indigenous self-determination is firmly established and Indigenous institutions consolidated (for consideration of other alternatives for parliamentary reform see Durie, 2005: CAR, 2000d: AILR, 2003a: Iorns, 2003: Johnston *et al* (eds), 2008).

The electoral significance of Aboriginal Territorians compared to Indigenous Australians in other jurisdictions, harnessed in the 2005 election (with five Aboriginal Members of Parliament elected, several of whom became members of Cabinet), makes parliamentary reforms to provide for distinct Indigenous representation less likely (and also perhaps less significant) in the absence of major electoral reform or a significant increase in the membership of the Legislative Assembly (an exception might be the establishment of sub-committees, possibly also including members from local governments, to reinforce the capacity of the parliamentary committee system: Edgar, 2008). Although as with the 'major' political parties electoral fortunes may fluctuate significantly in each election under the current system, the establishment of a significant Aboriginal presence in the Legislative Assembly is likely to be a permanent feature of the NT's political landscape.

There are a large number of Indigenous advisory committees (or members on committees) at the Federal, State/ Territory and local government levels, but members are usually appointed by the relevant Commonwealth government on a part-time basis and they have negligible independent institutional capacity. While emphasising their significance as a mechanism for influencing Commonwealth policies and their implementation, O'Donoghue's description of the functions of Aboriginal Justice

Advisory Committees (established by State and Territory Governments to review implementation of the principles and recommendations of the Royal Commission Into Aboriginal Deaths In Custody) provides a succinct statement of the potential benefits, as well as the disadvantages, of 'advisory' committees: "To tell governments what is happening on the ground, to give local and regional perspectives, to report on progress and to complain long and hard if agencies are reluctant to change their ways." (Quoted in CAR, 1994b; 6: see also Behrendt, 2003) The lack of security and resources that has plagued Indigenous organisations, and the scale and frequency of reforms to their operating environment, undermines and disrupts their capacity to contribute to policy development and requires the diversion of already extremely scarce resources compared to the scale of the tasks they must undertake. (ATSISJC, 2005a, 2006a: SLCAC, 2006)

Many of the deficiencies identified in critiques of ATSIC involved the centralised structure of ATSIC, the 'junior' status of the responsible Minister, and its operating environment as a portfolio within a portfolio of the Federal Government rather than rejection of the objective of an Indigenous domain at the Federal level. (Reynolds, 2002: Nettheim *et al*, 2002: Ivanitz, 2000: ATSISJC, 2003, 2004: SCAIA, 2005) Although suggestions for the re-instatement of ATSIC remain subject to strong political resistance, some type of autonomous Indigenous representative, administrative and research capacity at the Federal level is an imperative however this may be achieved. (ATSISJC, 2005a, 2006a) There are many possible alternative methods for establishing an autonomous Indigenous domain(s) and capacity at the Federal level. While the alternatives are identified and evaluated, interim measures to enhance Indigenous representation and co-management could include co-location and seconding arrangements within existing facilities and agencies with a significant role in Indigenous Affairs.

In particular, additional social justice commissioners could be appointed to review specific topics or areas of government in more detail (e.g. criminal and justice systems, health and education, land and natural resource management, Indigenous law and cultural heritage), as the office of the Aboriginal and Torres Strait Islander Social Justice Commissioner is the closest thing to an Indigenous domain at the Federal level and has an enormous task (the position was created by an amendment to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), the first annual report being completed in

1993). This would also permit much more detailed comparative reviews and evaluations of concurrent State and Territory policies (and could be further enhanced by the appointment of at least one social justice commissioner in each State and Territory). The additional commissioners could be based primarily within the existing office (located in the Human Rights and Equal Opportunity Commission), in the Parliament, or the Australian Institute for Aboriginal and Torres Strait Islander Studies (as the other main approximation to an Indigenous domain, in this instance with significant facilities in Canberra), or some other location (e.g. specific Indigenous organisations if there is a national representative/ functional organisation widely acknowledged amongst Indigenous peoples as having primary responsibility for a specific matter). Such arrangements should not preclude the medium to long term objective of establishing a distinct location for a permanent Indigenous domain in the vicinity of Canberra to provide an administrative, research and operational base for Indigenous delegations and organisations.

There are many other nodal points within the machinery of government where Indigenous domains could be established to extend the range and capacity of bicultural mechanisms and the areas of government subject to co-management. In addition to the Parliament, the other key focal point to potentially influence the development of top-down measures and increase the levels and areas of government subject to co-management is ministerial, inter-departmental and inter-governmental committees and representative and managerial boards of statutory authorities, in this instance primarily to increase participation in operational management. The Office of Indigenous Policy Coordination in the Department of the Prime Minister and Cabinet is of major significance being located in the *de facto* centre of government, but arguably functions as an instrument of centralised control over Indigenous policy and organisations rather than a source of Indigenous expertise and liaison point with Indigenous representatives and organisations.

Other arrangements that could be considered to establish Indigenous domains at the Federal level for the purposes of the thesis include the co-location of distinct Indigenous policy, administration and/ or liaison units within the Australian National Audit Office (to build Indigenous capacity in relation to financial management and

accountability - this may also be a more suitable location for the Office of the Registrar of Aboriginal Corporations in the absence of an Indigenous institution at the Federal level), Intellectual Property Australia (to assist in the development and coordination of regimes for the recognition, administration and enforcement of “cultural and intellectual property rights” and heritage protection - a similar unit has been established in the comparable agency of the New Zealand Government: Janke, 1998), and within major land and wildlife management agencies. The establishment of regional Indigenous Coordination Centres (discussed below) is another important development, but is premised on the coordination of activities of Federal (and in some cases State and Territory) agencies in each region rather than establishing an Indigenous domain in the national capital.

### **Constitutional reform**

Shortly after the 1983 Federal election the NT Government attempted to hasten the transition towards Statehood by establishing a select committee on “constitutional development”, and subsequently a ministerial portfolio dedicated to constitutional development. In addition, a series of ‘option papers’ was prepared from 1986 to 1988 to present arguments and methods for the devolution of all ‘State-type’ functions to the Territory, including the ‘patriation’ of the Land Rights Act. The options papers canvassed a range of methods for transferring the Land Rights Act to Territory jurisdiction (NTG, 1986; 7-19), as well as consideration of associated matters such as ownership and management of minerals and parks and reserves. Proposals for a constitution for a new State had been under consideration by a select committee of the Legislative Assembly since 1985, replaced by a sessional committee in 1989; numerous discussion papers were prepared, including on the possibility of constitutional recognition of Aboriginal (‘customary’) law, local government, and human rights and freedoms, and a draft Constitution was completed in the final report of the Sessional Committee on Constitutional Development in 1996. (Gray (ed), 1998: Murphy, 2005: NTSSC, 2007)

Notwithstanding the elaborate preparations and constant lobbying by the NT Government, admission as a new State would require corresponding measures by the Federal Parliament in accordance with s. 121 of the Constitution. (Loveday & McNab (eds), 1988) Following the election of the Coalition to Federal Government in March

1996 the NT Government had an opportunity to attain Statehood, announcing in December 1997 that a constitutional convention would be held “in the first half of 1998”. (Carment, 1998; 314) As with the conferral of self-government on the NT in 1978 therefore, the conduct of the Statehood referendum of 1998 was a “construct of ‘conservative’ parties at both Commonwealth and NT levels.” (Heatley, 1996; 57)

Although provisions were included in the draft Constitution endorsed by the NT constitutional convention that addressed recognition and in some cases protection of Aboriginal law, rights and responsibilities (including recognising Aboriginal law as a concurrent source of law), the final version did not include a range of measures contained in the 1996 draft completed by the sessional committee to enhance (or introduce) constitutional principles or mechanisms for the accountability of government, the protection of human rights and freedoms, and the status and substance of distinct Aboriginal rights and interests including the Land Rights Act, protection of heritage areas and self-determination. (Nettheim, 1999; Reeves, 1998; Appendices S, T; Flynn, 1998)

The prospective recognition of Aboriginal customary law as a source of law, even in the diluted format retained in the draft Constitution put to referendum, would nonetheless have been significant in the context of the constitutions of the Commonwealth of Australia, though perhaps even this may have been more of symbolic than practical effect had the referendum endorsed Statehood without a significant change in the dominant political culture in the NT. Apart from a requirement for statutory codification (undermining the significance and substance of recognition as a concurrent source of law), the details of the recognition remained to be identified before they could be implemented, and as Flynn (1998) notes the NT Government had previously asserted in 1993, 1994 and 1995 that the recommendations of the 1986 Australian Law Reform Commission report on the recognition of Aboriginal customary law were always “in the process of implementation”, but have never been implemented.<sup>208</sup>

The NT Government rejected a recommendation of the constitutional convention that three questions be put to voters, addressing separately whether the NT should

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<sup>208</sup> These assertions were themselves prompted by a recommendation of the Royal Commission Into Aboriginal Deaths In Custody that Australian governments specifically address progress in implementation of the recommendations of the report: shortly thereafter the NT Government introduced ‘mandatory sentencing’ laws.

become a State, the name of the new State, and whether the draft Constitution should be accepted; the threshold question of Statehood was the only matter to be voted upon in the 1998 referendum, and as noted above crucial topics remained to be elaborated or negotiated by the NT and Federal Governments. During the campaign preceding the referendum:

Aboriginal peoples' organisations set out to inform their own constituencies about the issues, armed, in particular, with the Kalkaringi Statement. They also sought to establish common cause with non-indigenous Territorians, many of whom had their own concerns with the draft Constitution, particularly on issues of the process by which it had been developed, and its perceived inadequacies on issues of good governance... (Nettheim, 1999; 92)

The referendum for Statehood was rejected by a narrow majority; concerns over the final process of constitutional development and the terms of the draft Constitution adopted contributing to the negative vote notwithstanding widespread support for Statehood (indicated by several polls held at the time). (Nettheim, 1999; Carment, 1998, 1999; Murphy, 2005) Aboriginal organisations and representatives were excluded from the negotiations between the NT and Federal Governments entirely as well as from significant participation in the drafting of the Constitution (the few Aboriginal delegates attending the NT constitutional convention walked out prior to the final vote in protest against the version drafted). The short time frame adopted for the final process of constitutional development also limited the opportunity for Aboriginal peoples to formulate a preferred basis and strategy for the transition to Statehood amongst themselves. As noted in chapter 5, only one of the two Aboriginal constitutional conventions could be organised prior to the referendum. (See also Rowse *et al* (eds), 1999; Viner, 1999)

Constitutional development is again under consideration, the NT Government referring responsibility for the process to the Standing Committee on Legal and Constitutional Affairs of the Legislative Assembly in 2005, assisted by a Statehood Steering Committee consisting of parliamentary and community representatives to make preparations for the convening of an elected constitutional convention to finalise arrangements for a referendum. The importance of the rights and interests of Aboriginal

peoples of the NT is recognised in the preamble of the terms of reference to the Steering Committee appointed in 2005: “A central principle for the Northern Territory to achieve Statehood is the respect for and proper recognition of the Indigenous people of the Territory and that the Indigenous people are to be involved in all stages of the process.” (See also NTSSC, 2007) The many inquiries and discussion papers completed during the 1980s and 1990s and the Kalkaringi Statement provide a solid basis for comprehensive evaluation of the alternatives for systemic constitutional and institutional reform. The strongest form of constitutional protection for Indigenous rights would occur if amendments to provisions central to the recognition and protection of Aboriginal law and rights were also subject to the separate consent of the Aboriginal Nations of the NT (as provided for in the Kalkaringi Statement). The successful completion of a draft Constitution with substantial public support and the consent of the Aboriginal Nations to be put to referendum would be of enormous symbolic and practical importance to constitutional development in Australia.

Constitutional reform at the Federal level is arguably a much more complicated matter as, apart from the much more elaborate requirements to be passed, there is the further requirement for substantial changes to modernise the Constitution as well as many other fundamental questions, such as whether to become a republic (see chapters 2 and 3). Due to significant Executive dominance of the composition and terms of reference of the NT and Federal constitutional conventions held in 1998, both referenda (the latter over whether the Commonwealth of Australia should become a republic) amounted to a ‘forced choice’ between the status quo and the alternative preferred by the extant Government. Either in addition to or instead of a completely elected constitutional convention, a suggestion of the Queensland Constitutional Review Commission (2000, 86) is of particular relevance for the wide-ranging constitutional reform that is required at the Federal level (and also many State jurisdictions) to bring the constitutions into line with the extant systems of government and establish a secure basis for the recognition of Indigenous rights:

The recent experience of the federal referendum on retention of the monarchy or replacement by a form of presidential government has clearly shown the consequences of a forced choice

between two alternatives when much of the population believes that more than two choices exist and that these should be voted on, simultaneously or serially...

[The use of 'indicative plebiscites'] would allow the alternatives to the status quo to be narrowed to the most popular alternative to the status quo, before the people are asked to make a final choice. (See also COG, 1996)

Detailed consideration of the possible methods of constitutional recognition of Indigenous rights is beyond the scope of the thesis; there are many examples and methods from other jurisdictions that could be considered, and also an extensive literature examining and comparing the different approaches. Something similar to the succinct provisions of the Canadian Constitution (guaranteeing 'aboriginal and treaty rights', including the terms of subsequent negotiated agreements – see chapter 2), and a commitment to establish in conjunction with Indigenous peoples "a fair, independent, impartial, open and transparent process ... to recognize and adjudicate the rights of indigenous peoples to their lands, territories and resources" (Declaration on the Rights of Indigenous Peoples, Article 27), may provide a sufficient basis to bring Indigenous institutions and rights within the protective ambit of the Constitution and for the further elaboration of treaties and other arrangements. (CAR, 2000d: ATSIC, 2001: Hocking (ed), 2005: Blackshield & Williams, 2002: Jull, 2003: Attwood & Markus, 2007)

### **Treaties and regionally-based agreements**

Indigenous Australians have long called for a treaty. (See e.g. RAC, 2000d: ATSIC, 2001: Dodson & Strelein, 2001: Nettheim, 2001a) As Langton (2001, 13) argues:

There is a persistent unwillingness to acknowledge that, in Australia, the rights of Indigenous people are inferior to those in the United States, Canada and New Zealand...

The calls for a treaty go to the heart of the juridical denial, in Australian case law, of the existence of Aboriginal nations in Australia prior to the seizure of the land and consequent dispossession of Indigenous people by the British Crown. This denial has in effect accorded our nations the status of an anomaly among the settler colonial states.

Such recognition and protection could place the relevant rights, principles or processes beyond the legislative and executive jurisdiction of the government of the day,

and are therefore the strongest guarantee on paper that such rights, interests and responsibilities will not be unilaterally eroded or extinguished by governments of the Commonwealth of Australia. In a comparative analysis of Indigenous land and resource rights and governance structures Nettheim, Meyers and Craig (2002, 381) consider prospects for and types of regional agreements and planning in detail, concluding that: “Regional agreements are the foundation mechanism that most advocates for the rights of Indigenous Australians currently promote as the best means to improve Indigenous governance nationally.” (See e.g. Bartlett & Meyers (eds), 1994: Fourmile (ed), 1996: Harris (ed), 1994: Fletcher (ed), 1994: Edmunds (ed), 1999: Richardson *et al*, 1994: Jull *et al* (eds), 1994: Jull & Craig, 1997: Johnston *et al* (eds), 2008)

Although the term regional agreements is widely used in Australia and also Canada where the concept has provided a basis for the negotiation and implementation of comprehensive land and self-government agreements, the term treaty is used in this section to emphasise the nature of the agreements – between the internationally recognised nation-state and Indigenous peoples as domestic dependent nations with prior and concurrent sovereignty and the right of self-determination as distinct peoples (nations) within the state. In this sense Tully (1995, 124) states of the treaties with Indigenous peoples in the U.S. and Canada: “the treaty system is expressly designed not only to recognise and treat the Aboriginal people as equal, self-governing nations, but also to continue, rather than extinguish, this form of recognition through all treaty arrangements over time.”

Treaty-based recognition may include national, regional or other forms, including an ‘organic’ document in the form of the Treaty of Waitangi (as a separate statement of basic rights and principles affirmed at the national level) or those of the Canadian comprehensive land and self-government agreements and British Columbia Treaty Commission (pursuant to which detailed arrangements are negotiated at the regional level). (See e.g. CAR, 2000d: Langton *et al* (eds), 2004, 2006: McHugh, 2004: Altman, 2002) As the Australian Law Reform Commission inquiry into customary law noted of the broad and in-principle basis for constitutional recognition and the development of regional agreements in Canada: “The rights are recognised but remain to be defined in each case.” (ALRC, 1986; 200) As argued above, the various regional and local land and

self-government agreements in Canada and New Zealand suggest that measures with a substantial level of support from both Indigenous and non-Indigenous constituents are most likely to occur at the local and regional levels, and the procedures for and components of the resulting agreements provide many examples of the types of arrangements that can be made to further these objectives. Similarly, Peter Yu (2001, 251) argues that in Australia:

Regional empowerment is the loom for successful weaving of indigenous rights into the national economic and social fabric, repairing the threadbare rips of chronic disadvantage. It is the key ingredient to a reconciled Australia. When I raise the concept of regional governance I am not advocating some form of separatism, but quite the opposite. It is a mechanism that will empower Aboriginal people to negotiate our inclusion and participation in the society and economies we share with our non-Aboriginal neighbours.

In some areas, such as within the Kimberley and Cape York Land Council regions and the Torres Strait Islands, there has been strong and persistent agitation for self-government at a regional level for many years and they may require little more than for the various shackles of dispossession and regulation by Commonwealth institutions to be removed, basic principles and mechanisms for mutual recognition and co-management to be established, and a secure and adequate land and financial resource base for the capacity and autonomy of existing regional and sub-regional Indigenous organisations and arrangements to be consolidated; in many other regions institutions of self-government may take much more time to evolve, as existing powers, functions and mechanisms are evaluated and possible alternatives considered. Similarly, some regional or sub-regional groups may consider existing mechanisms appropriate or at least adequate for certain purposes; others may prefer more fundamental change to the options available within existing regimes.

The consolidation of Indigenous institutions and recognition of their status and authority by the constitutions and governments of the Commonwealth would provide a much stronger basis for the negotiation of specific regional land settlements, natural resource management, cultural heritage protection, housing, infrastructure, essential service provision and other co-management agreements. (See e.g. O’Faircheallaigh,

1999: Behrendt, 2003: Brennan *et al*, 2005: ATSIJ, 2005a, 2006a) Regionally negotiated framework agreements could also be put to referendum at the relevant level as agreements are concluded, to emphasise their status and legitimacy as negotiated treaties between equal partners. A combination of these strategies could be considered as could other measures, such as invocation of the principles of the Declaration on the Rights of Indigenous Peoples, and provision for bicultural 'claims' tribunal(s) and dispute resolution procedures rather than automatically referring the final decision in each instance to the will of the Executive(s), Parliament(s) or courts of the Commonwealth.

If the basis of co-existence is the Indigenous right of self-determination rather than the conferral of fragmented, contingent and revocable rights to land and resources and municipal-type powers and functions and other limited and subordinate 'privileges', as with the membership and boundaries of each Indigenous people (and associated provisions for the involvement of sub-groups within them and pan-regional arrangements) the basis, structures, principles, functions and objectives of Indigenous self-government can only be determined by self-identification and the consolidation of Indigenous institutions over time. The role of Commonwealth institutions in this sense is largely limited to supporting such processes with a viable resource base and establishing interim bicultural arrangements to review co-management arrangements as principles and mechanisms for mutual recognition and co-management are identified and agreed upon and local, regional and pan-regional Indigenous institutions are consolidated.

The establishment of regional 'Indigenous Co-ordination Centres' are a potentially significant step towards improving the co-ordination of functions and services of Commonwealth governments to Indigenous people and communities, but even if consolidated to include all levels and functions of Commonwealth institutions at the regional level this is merely one aspect of the necessary arrangements. The centres could be of particular significance for Indigenous peoples whose territorial domains cross State and Territory boundaries; other possibilities in this respect include re-activating the Inter-State Commission provisions of the Commonwealth Constitution, or the adaptation of other frameworks for inter-governmental arrangements such as the Murray-Darling Basin Commission. (See e.g. Morgan *et al*, 2006: Brennan *et al*, 2005: see also chapter 2) Nonetheless, if the Indigenous right of self-determination is to be respected they must be

complemented by empowered and resourced Indigenous institutions, and support for the development of regional systems of self-government (in the manner and to the extent this is considered desirable by the relevant Indigenous peoples in each instance) within a secure Indigenous domain.

In this sense the objective is not only to achieve a substantial reduction in the number of monocultural (non-Indigenous) legislative, policy and administrative processes of particular relevance to Indigenous Affairs (as discussed above), but also to increase the linkages between top-down and bottom-up developments by simultaneously increasing support for local initiatives for the development of local, regional and pan-regional self-government arrangements to establish completely autonomous Indigenous institutional capacity and systems of government capable of interacting with all relevant components of the system(s) of government of the Commonwealth of Australia. The empowerment of Indigenous institutions does not (necessarily) mean that central governments must be 'disempowered', but that power is shared and exercised by the establishment of locally based institutions with concurrent roles in decision making (as occurs on Aboriginal land under the Land Rights Act). As Munro (1997, 83) argues of local government more generally, local and regional institutions have a "unique capacity [or at least potential] to involve citizens and to mesh the unrelated initiatives of separate portfolios and spheres of government on the ground".

Many constitutional, legal, administrative and economic provisions and regimes in Australia, as well as policies of the dominant political cultures pertaining to Indigenous rights, continue to deny and marginalise rather than recognise and exploit the potential of regional arrangements and treaties to enhance and fuse top-down and bottom-up arrangements, though regional planning processes and governance structures and pan-regional organisations and alliances continue to develop within these constraints in many areas. In many cases the degree of marginalisation has increased since 1996, as Crough (1998, 290) argues of the amendments to the Native Title Act in 1998 which "enhance the regional agreement provisions while at the same time these very same amendments

take away the right to negotiate from many native title claimants.”<sup>209</sup> Following on the substantial reduction in the level of procedural and substantive Indigenous land rights and the continued lack of funding for and intense regulation of Indigenous organisations, the elimination (suspension?) of most emerging regional plans and arrangements that occurred with the abolition of ATSIC has further decimated processes of regional empowerment; although a small number of trial regional government structures were established around the same time they have received negligible resources and no commitment to ensure ongoing support for Indigenous initiatives, and regional processes in many areas were stalled completely.

Consequently, existing regimes continue to maintain and exacerbate the imposed fragmentation and subordination of Indigenous self-determination, rather than providing constitutional, political, administrative and economic space for regimes based on mutual recognition and cooperation to identify and achieve shared objectives. The development of regional structures and arrangements and principles and systems of mutual recognition must build on and reinforce rather than undermine or displace the gains that have been made in establishing secure Indigenous domains under existing land rights and self-government regimes.

## **Conclusion**

Notwithstanding the persistence of legal and practical limitations on the Indigenous right of self-determination, substantial progress has been made towards their elimination in Canada and New Zealand. Although subsequently abrogated for many years, the negotiation of treaties in New Zealand and many parts of Canada have provided a much stronger conceptual and procedural basis for the gradual decolonisation of the constitutions and systems of government, and the emergence and strengthening since the 1970s of constitutional and political cultures and systems of government based on recognition of the Indigenous right of self-determination and the adaptation of the systems of government and property of ‘the state’ to facilitate that objective. These developments, reinforced in Canada by constitutional recognition of Indigenous rights

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<sup>209</sup> Similarly, Ritter and Flanagan (2004, 130) argue that: “It is all very well to encourage parties to focus on interests, rather than rights, but it is not clear how this is achieved where there is a manifest power imbalance and where the legal rights of one party simply overwhelm the legal rights of the other.”

since 1982 and political recognition at the Federal level since 1995 that these rights include the right to self-government, are resulting in the establishment and development of a distinct and constitutionally protected 'third order of government' in some parts of Canada. An increasing number of agreements include most of the aspects and objectives identified by the Declaration on the Rights of Indigenous Peoples including provisions for a viable land and financial base, natural resource ownership and management, self-government and the operation of Indigenous legal systems, intergovernmental relations (including areas of exclusive and concurrent jurisdiction and principles for resolving functional and legal inconsistencies in their operation), and distinct procedures for dispute resolution.

In Australia the suspension of the rule of law has ended but its operation remains fundamentally lopsided and monocultural, comprising sets of rules and standards that are drafted, administered, interpreted and enforced by Commonwealth institutions. While significant progress has been made in the recognition of Indigenous rights since the 1960s, many forms of recognition and accommodation in Australia remain conceptually, substantively and procedurally very limited. In particular, associated regimes have almost invariably been devised and implemented within a fundamentally monocultural context in which Indigenous rights remain subject to unilateral abrogation or extinguishment by Commonwealth governments. The legal basis of and requirements for recognition of Indigenous rights according to Commonwealth law results in extremely variable levels of recognition in different areas and contexts, and principles and procedures for the mutual recognition and co-existence of Indigenous and Commonwealth law and systems of government are only partially apparent in the systems of government of the nation-state. To address these deficiencies, in addition to extending and strengthening the recognition and accommodation of Indigenous rights within the existing constitutional framework, constitutional recognition and protection of Indigenous rights and the negotiation of treaties are essential long-term objectives if the Indigenous right of self-determination is to be respected, guided by the principles and provisions of the Declaration on the Rights of Indigenous Peoples and, in the NT, the Kalkaringi Statement. Most importantly, arrangements for mutual recognition and co-management must be devised and subject to

ongoing review by bicultural mechanisms, involving equal representation of Indigenous and non-Indigenous interests to the extent this is possible.

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## **Appendices**

Diagram 1: Institutional Framework of the Federal Polity of the Commonwealth of Australia

Diagram 2: Institutional Framework of the Polity of the NT - 1979

Diagram 3: Institutional Framework of the Polity of the NT - 1987

Diagram 4: Institutional Framework of the Polity of the NT - 1996

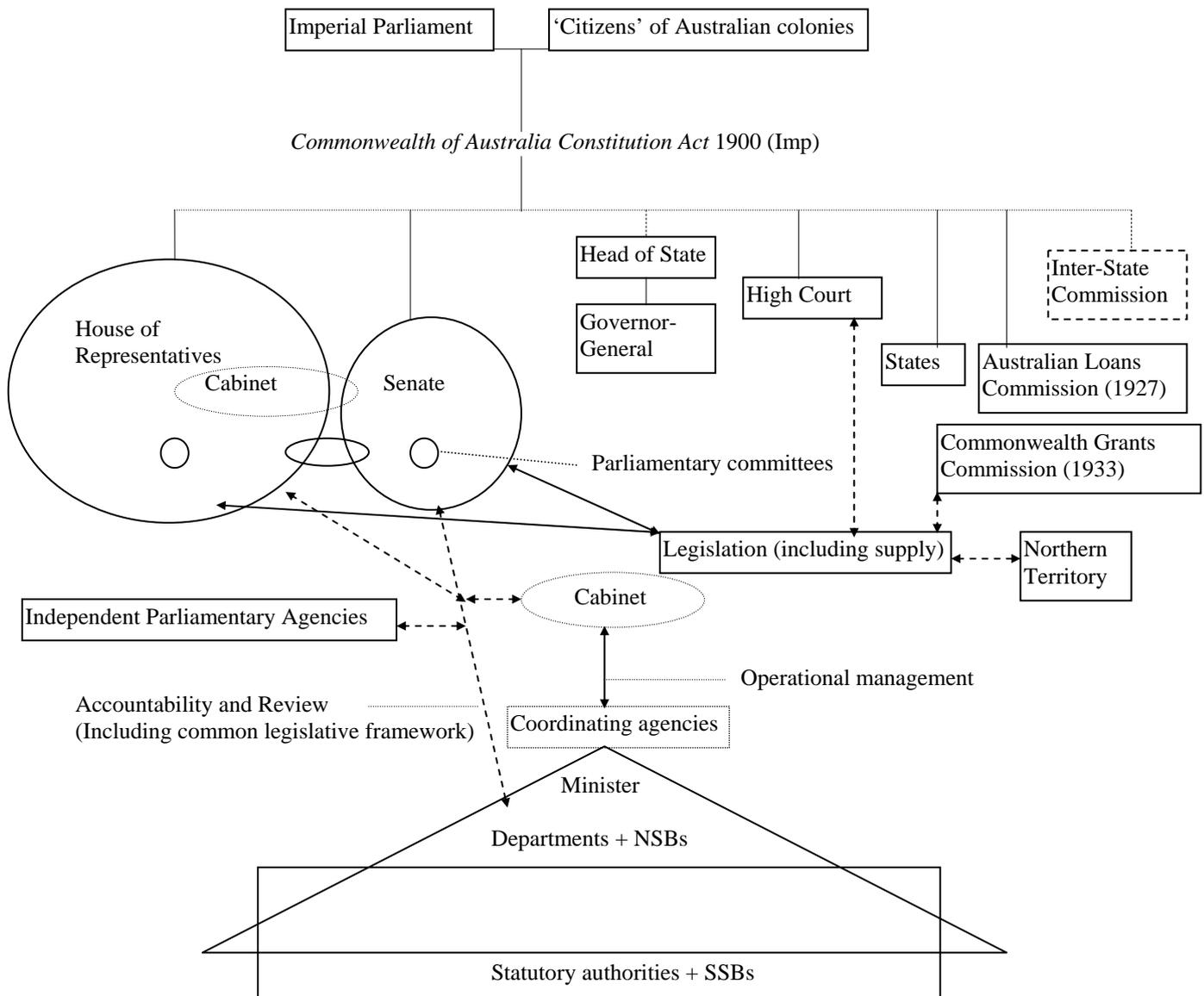
Diagram 5: Institutional Framework of the Polity of the NT - 2002

Diagram 6: Wildlife Management Regimes

Diagram 7: Regimes Providing for Indigenous 'Self-Government'

Diagram 8: Possible Institutions of Concurrent Sovereignty and Mutual Recognition

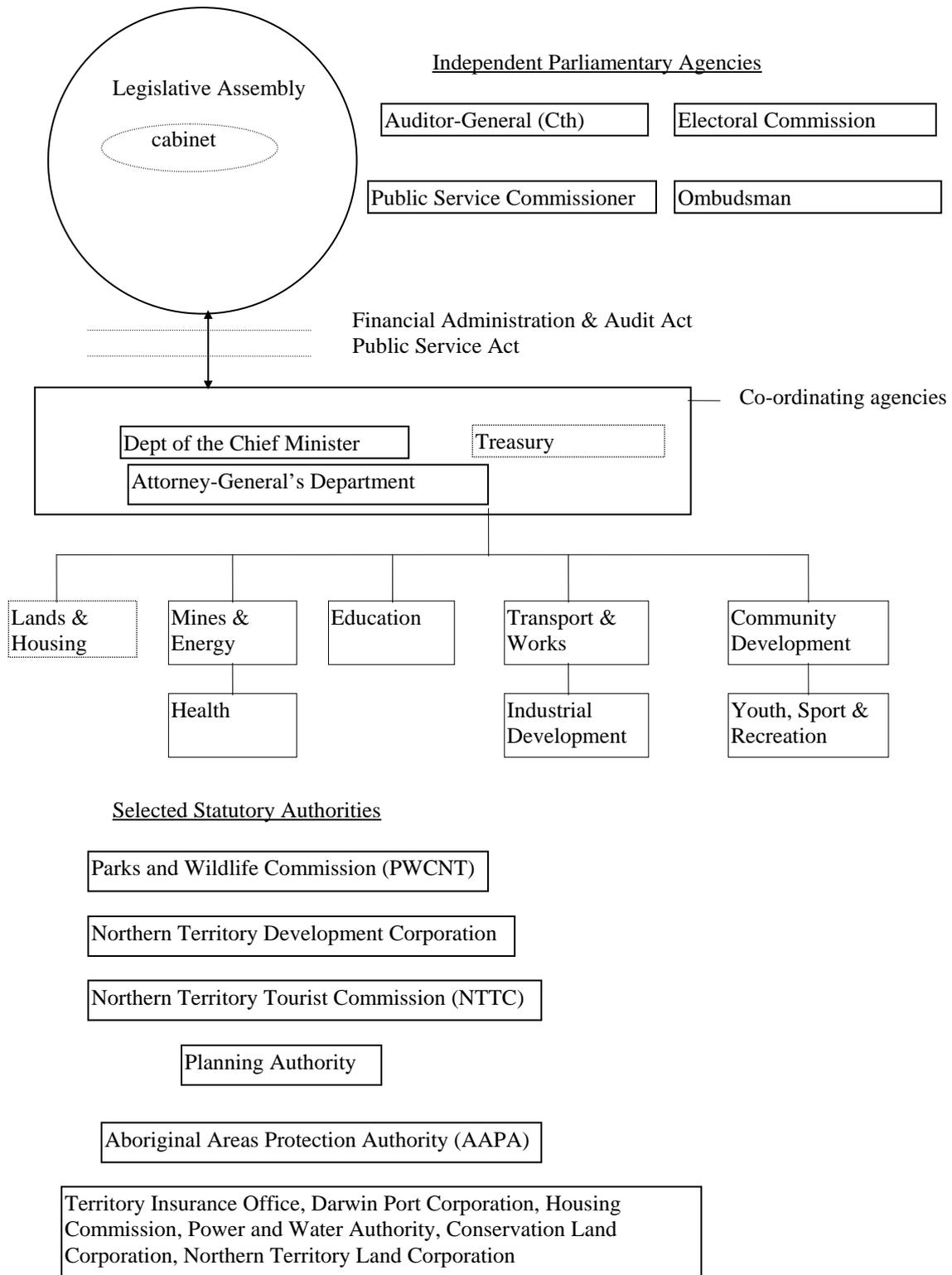
Approximation of the Institutional Framework of the Commonwealth 'body politic'



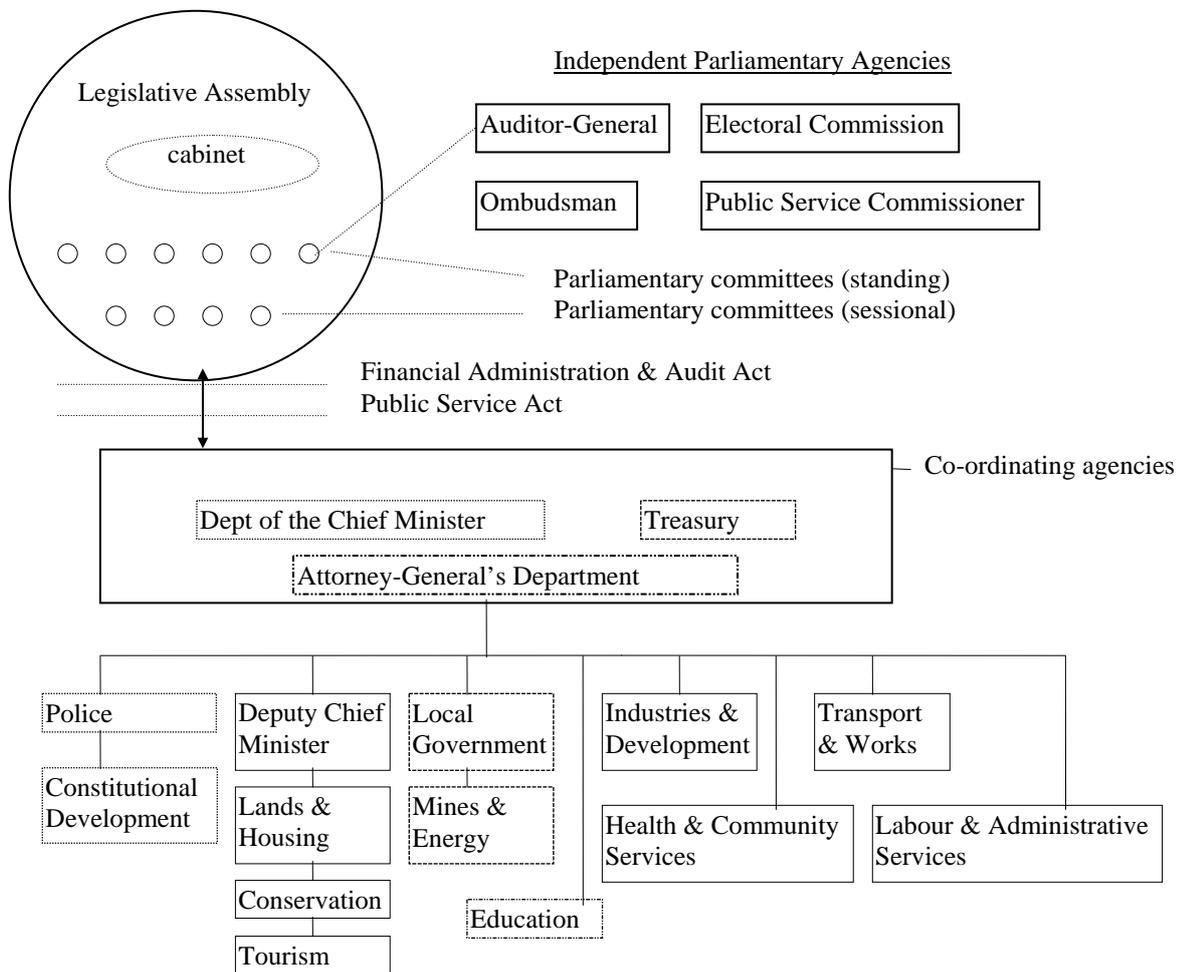
Sizes of Parliaments (Cabinets) of Australian polities (1990)

Cth:	House of Reps	- 148 (30)	SA:	Legislative Assembly	- 47 (13)
	Senate	- 76		Legislative Council	- 22
NSW:	Legislative Assembly	- 109 (19)	WA:	Legislative Assembly	- 57 (13)
	Legislative Council	- 45		Legislative Council	- 34
Vic:	Legislative Assembly	- 88 (18)	Tas:	Legislative Assembly	- 35 (10)
	Legislative Council	- 22		Legislative Council	- 19
Qld:	Legislative Assembly	- 89 (18)	NT:	Legislative Assembly	- 25 (9)
			ACT:	Legislative Assembly	- 19

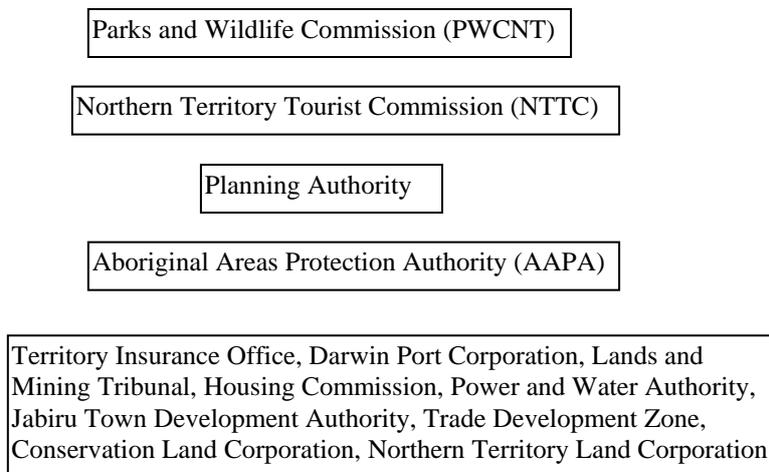
## Institutional Framework of the NT polity - 1979



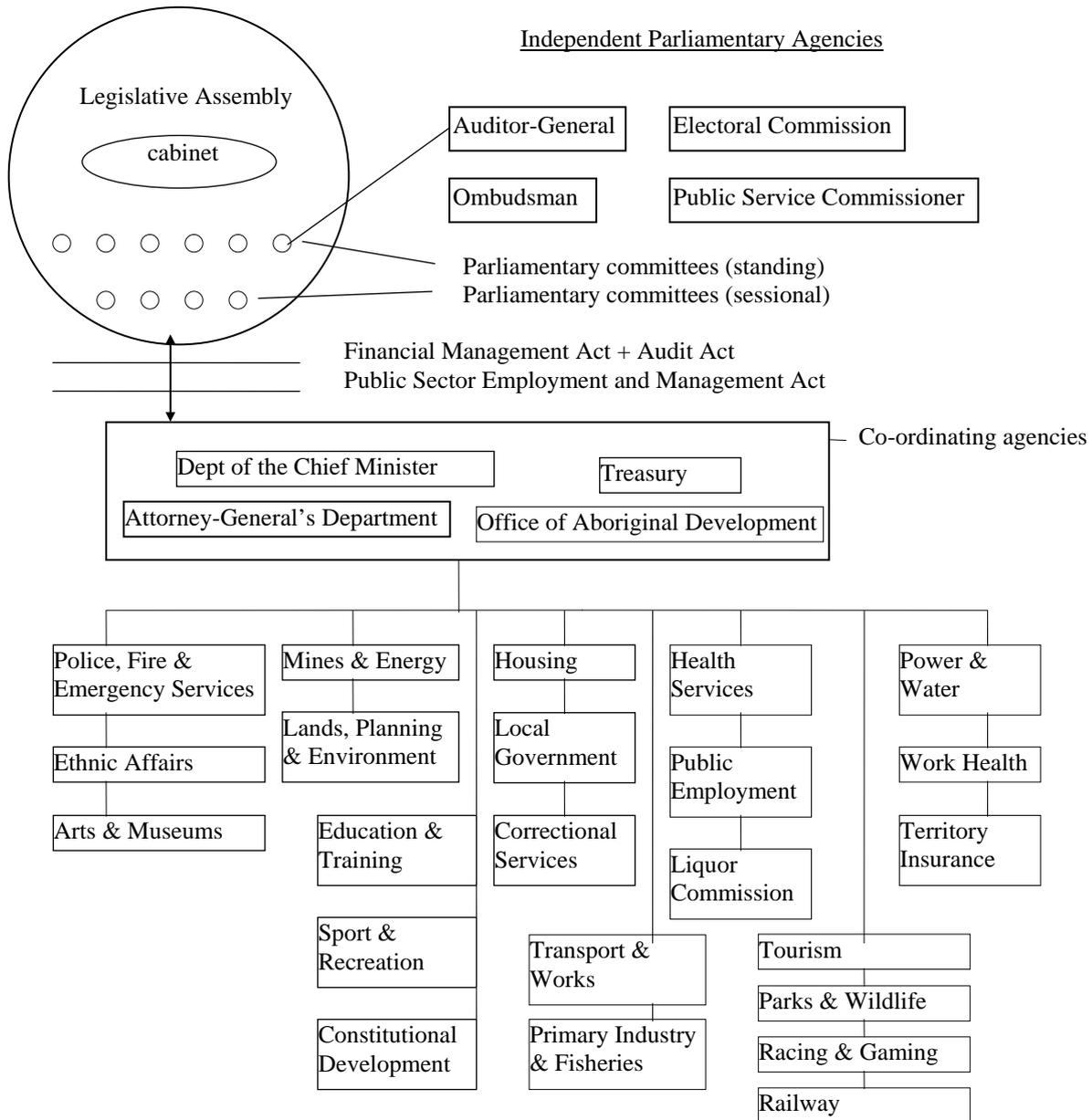
## Institutional Framework of the NT 'body politic' - 1987



### Selected Statutory Authorities



## Institutional Framework of the NT 'body politic' - 1996



### Selected Statutory Authorities

PWCNT      NTTC      AAPA

Planning Authority

Territory Insurance Office, Darwin Port Corporation, Lands and Mining Tribunal, Housing Commission, Power and Water Authority, Jabiru Town Development Authority, Trade Development Zone, Conservation Land Corporation, Northern Territory Land Corporation

## Institutional Framework of the NT 'body politic' - 2002

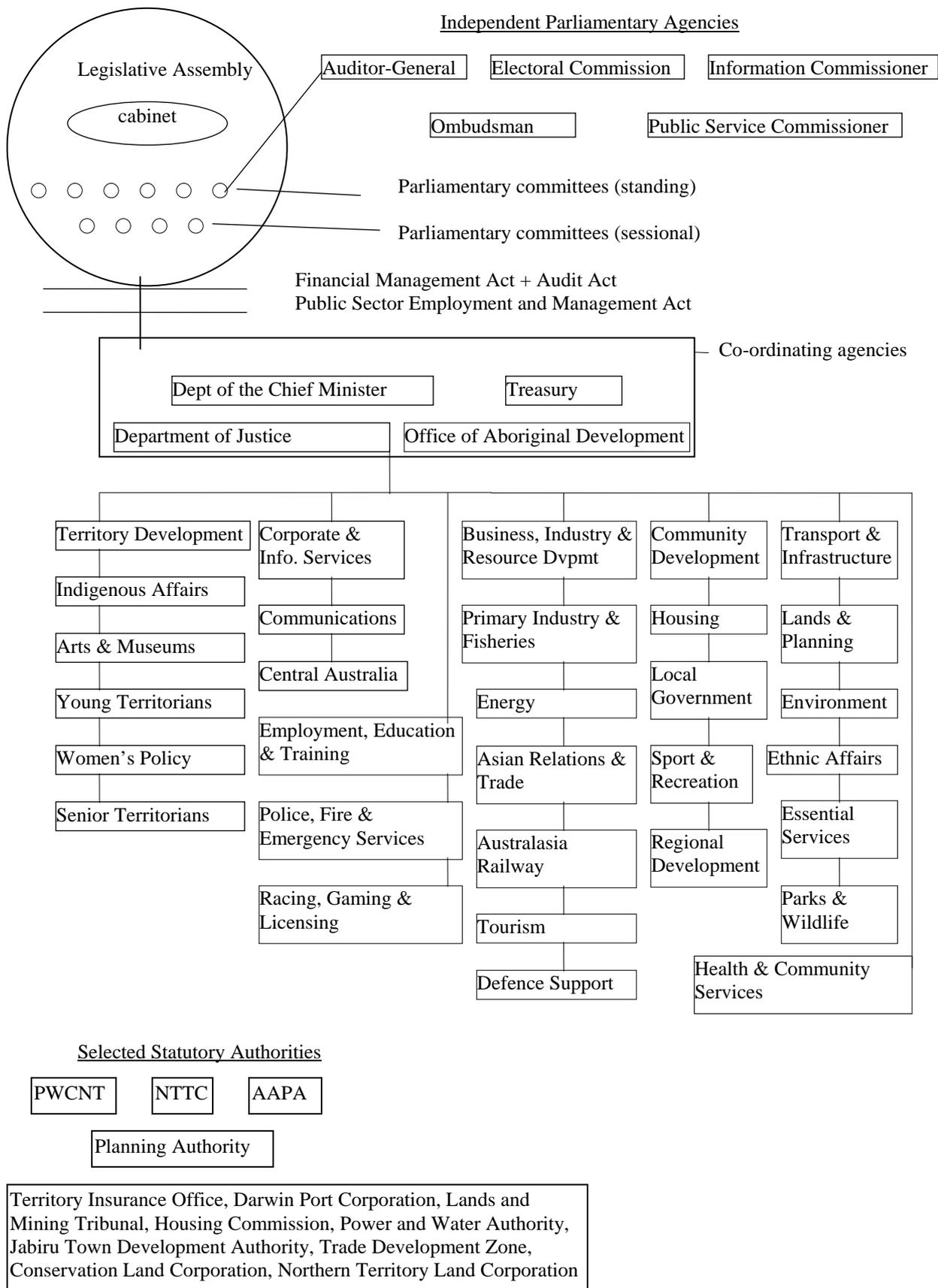


Diagram 5

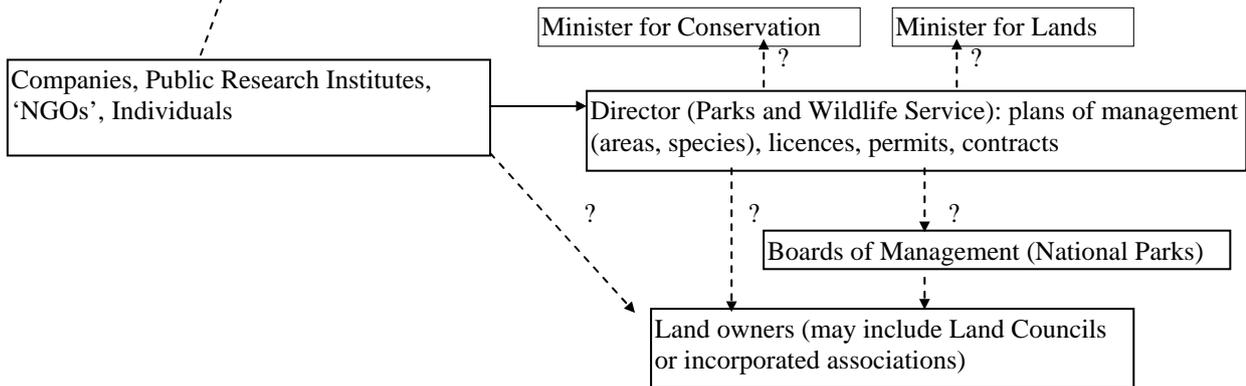
## Wildlife management regimes

### Federal Agencies

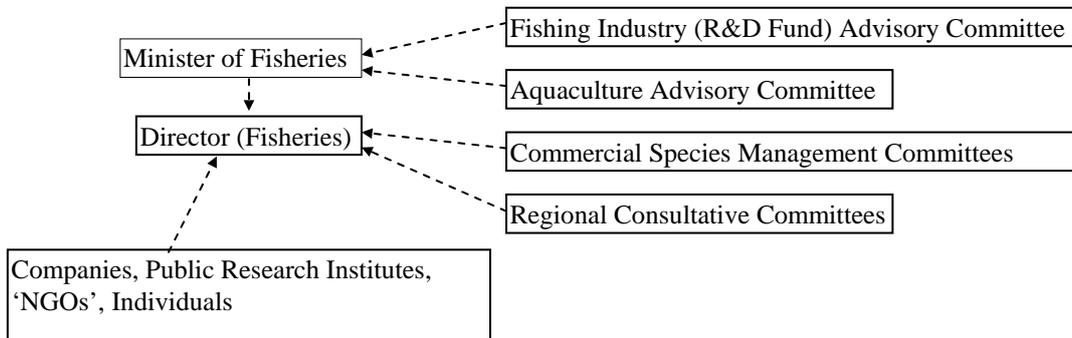


### Northern Territory Regimes

#### Territory Parks and Wildlife Conservation Act

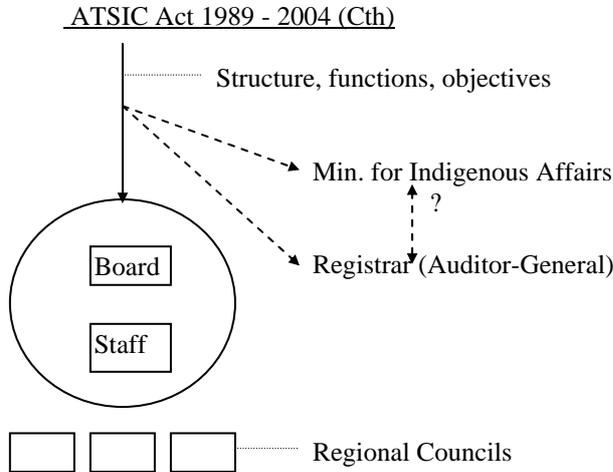


### Fisheries Act

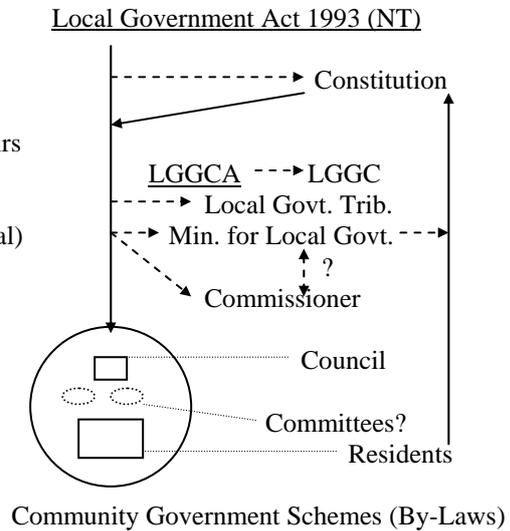


## Regimes Providing for Indigenous “Self-Government”

### Aboriginal and Torres Strait Islander Commission

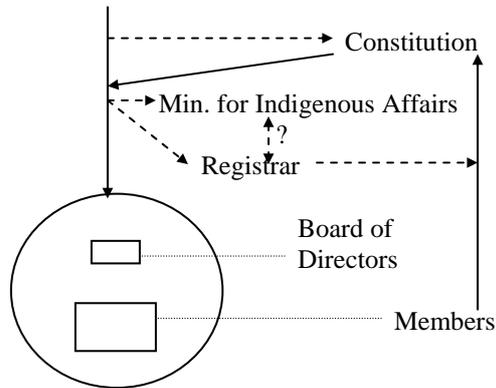


### Community Government Councils

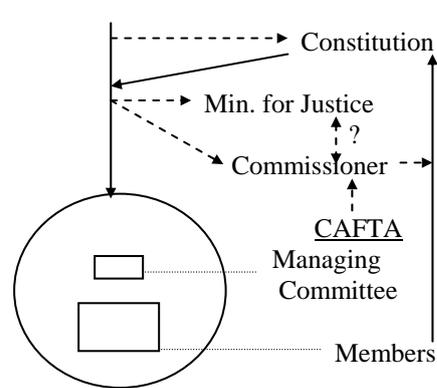


### Incorporated Associations

#### Corporations (ATSI) Act 2005



#### Associations Act 2003 (NT)



CAFTA – Consumer Affairs and Fair Trading Act  
 LGGCA – Local Government Grants Commission Act  
 LGGC – Local Government Grants Commission

## Possible Systems for Concurrent Sovereignty, Mutual Recognition and Co-Management

