Indigenous land rights in (un)settled Australia

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signed _____ date 26/8/96

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Synopsis

Indigenous and non-indigenous people in Australia understand the importance of land in different and sometimes conflicting ways. Contact histories since first colonisation are in one sense reviews of this complex and ongoing problem. The debate in late twentieth century Australia over land rights for indigenous peoples both takes account of, and is a new manifestation of, the conceptual difficulties that exist in accommodating different ideas about the significance of land.

Recent historical and epistemological research has provided more detailed and graphic accounts of the struggle that has ensued for the land between indigenous and non-indigenous since first colonisation. However, when such examinations are combined with better descriptions of indigenous societies, it may become more difficult to implement land rights. In practice, extinguishment of native title has been widespread in Australia. This reflects two broader complexities which must be considered as the state attempts to respond to ongoing indigenous relationships to land in contemporary Australia. Firstly, the difficulty of perceiving Aboriginality as wholly modern but also derived from the traditional past. Secondly, the concept of indigenous rights requires an idea of equality but also of distinct indigenous rights.

The connection between land and Aboriginality stems from the connecting of ongoing tradition with rights to land. However, I argue that it may be necessary for Australian institutions and society to be prepared to *not* understand Aboriginality but still acknowledge indigenous relationships to land.

This thesis argues that uncomfortable issues - for example, the *Milirrpum*, *Mabo* and Hindmarsh Island bridge debates - are also sites where an examination of political and conceptual principles can lead to incremental advances in the

acknowledgment of indigenous relationships to land. While acknowledging the importance of such expediency, at the same time I argue that conceptual difficulties are avoided and may become embedded in such advances.

Let the great world spin for ever down the ringing groove of change.

From title page of John Wrathall Bull's *Early Experiences of life in South Australia* 1884.

The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

Justice Brennan in *Mabo v Queensland* 1992