

AUSTRALIAN INDIGENOUS LAW REVIEW

2008 • Volume 12, Number 1



INDIGENOUS LAW CENTRE

A PUBLICATION OF THE
INDIGENOUS LAW CENTRE
UNIVERSITY OF NEW SOUTH WALES
www.ilc.unsw.edu.au



AUSTRALIAN INDIGENOUS LAW REVIEW

2008 • Volume 12, Number 1

EDITORS

Megan Davis
Dylan Lino

STUDENT EDITOR

Liron Shmilovits
Sophie Marjanac

EDITORIAL PANEL

Thalia Anthony BA LLB PhD (Sydney)
Toni Bauman BA (Macquarie)
Sean Brennan BA LLB LLM (ANU)
Ngiare Brown BMed (Newcastle) MPHTM (James Cook) FRACGP (Aust Coll GP)
Claire Charters BA LLB (Hons) (Otago) LLM (NYU)
Donna Craig BA LLM (Osgoode Hall)
Kyllie Cripps BA (Hons) (South Aust) PhD (Monash)
Chris Cunneen BA DipEd (UNSW) PhD (Sydney)
Dalee Sambo Dorough MALD (Tufts) PhD (British Columbia)
Brendan Edgeworth LLB (Hons) MA (Sheffield)
Tim Goodwin BA LLB (Hons) (ANU)
Brenda Gunn BA (Manitoba) JD (Toronto) LLM (Arizona)
Jackie Hartley BA (Hons) LLB (UNSW) LLM (Arizona)
Samantha Joseph BA LLB (UNSW)
Peter Jull BA (Toronto)
Patricia Lane BA LLB (Hons) LLM (Sydney)
Terri Libesman BA LLB (Macquarie)
Erin Mackay BA LLB (UNSW)
Hannah McGlade LLB LLM (Murdoch)
Garth Nettheim LLB (Sydney) AM (Tufts)
Keryn Ruska LLB (Melbourne) GDLP (ANU)
Sonia Smallacombe BA DipEd (Monash) BA (Hons) MA (Melbourne)
Prue Vines BA MA (Sydney) DipEd (Syd Teach Coll) LLB (UNSW)

STUDENT EDITORIAL PANEL

Lauris de Clifford, Talia Epstein, Charisse Hodgeman, Lauren Kapp,
Madonna Kobayassi, Zsofi Korosy, Ella Kucharova, Sonya Redman,
Nadia Rosenman, Julia Smith, Rebecca Smith,
Tom Smyth, Michelle Wen



Editorial communications should be addressed to:

The Editor
Australian Indigenous Law Review
Indigenous Law Centre
Faculty of Law
University of New South Wales
Sydney NSW 2052 Australia
phone 61 2 9385 1496
fax 61 2 9385 1266
email ailr@unsw.edu.au

To register a subscription to:

Australian Indigenous Law Review
for 1 volume (four issues) @ AUD\$220 please visit:
www.ilc.unsw.edu.au/ailr
for details and a subscription form, or contact:
Subscriptions Manager
Indigenous Law Centre
Faculty of Law
University of New South Wales
Sydney NSW 2052 Australia
phone 61 2 9385 2252
fax 61 2 9385 1266
email ilbsubscriptions@unsw.edu.au
web www.ilc.unsw.edu.au

This issue may be cited as (2008) 12(1) AILR
ISSN 1835-0186
Print Post Approved Number 255003/05849

© Indigenous Law Centre, University of New South Wales

This publication is copyright. Other than for purposes of and subject to the conditions prescribed under the Copyright Act, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to the publishers.

Graphic Design / DTP:

John Hewitt

INDIGENOUS LAW BULLETIN

Since 1981 the Indigenous Law Bulletin has led the way with accessible, accurate and timely information about Australia's Indigenous peoples and the law. We write for legal practitioners, advocates, policy makers, researchers and students. We cover legislation and government policy, case law, parliamentary proceedings, international developments, local activism and the work of Indigenous communities and organisations.

We report on crime, family law, native title, custody issues, legal services, international and comparative law, land and water rights, intellectual property and copyright law.

CONTACT DETAILS

*Indigenous Law Bulletin, Faculty of Law, UNSW, Sydney 2052, Australia
phone 61 2 9385 2256 fax 61 2 9385 1266 email editors ilb@unsw.edu.au
email subscriptions ilbsubscriptions@unsw.edu.au
web www.ilb.unsw.edu.au*

SUBSCRIPTION RATES

*(all GST inclusive),
one year / eight issues*

individual	\$ 49.50
organisation	\$ 66.00
unwaged individual	\$ 33.00
community and non-government	\$ 49.50
international (one year)	\$ 85.50



ADVISORY COUNCIL

Professor S James Anaya
*United Nations Special Rapporteur on the situation of human rights
and fundamental freedoms of Indigenous people;
College of Law, University of Arizona*

Professor Michael Dodson
Chairperson, Australian Institute of Aboriginal & Torres Strait Islander Studies

Justice ETJ Durie
High Court of New Zealand

Judge Caren Fox
Maori Land Court

Professor Kent McNeil
Faculty of Law, Osgoode Hall Law School

Professor Doug Sanders
Faculty of Law, University of British Columbia (Retired)

Professor Brian Slattery
Faculty of Law, Osgoode Hall Law School



EDITORIAL NOTE

The *Australian Indigenous Law Review* ('AILR') is a DEST-approved publication unique for its currency, wide range of material, expert commentary and international perspectives. It draws together legal materials from all areas affecting Indigenous peoples in Australia and around the world.

The AILR publishes detailed, peer-reviewed commentary from leading Australian and international experts. It also includes recent and relevant case law, publishing the most prominent cases alongside those which would otherwise go unreported. In furthering the transition from its previous incarnation as a reporter-style journal to a review, and in recognition of the increased availability of primary source materials online, the AILR has in 2008 strengthened its focus on commentary, and also removed the Digest section.

Information is presented in an accessible, easy-to-read format. The AILR includes a cumulative index in the last volume of each edition.

Previous volumes of the AILR are available online at AustLII. The AILR is designed to complement the Indigenous Law Centre's long established publication, the *Indigenous Law Bulletin*.

Previous editions of the AILR are available online at <<http://www.austlii.edu.au/au/journals/AILR/>>.

ACKNOWLEDGMENTS

The AILR is prepared at the Indigenous Law Centre at the University of New South Wales, Sydney, Australia. The AILR gratefully acknowledges the support of the Commonwealth Attorney-General's Department in the development of this publication.

The headnotes for *Griffiths v Minister for Lands, Planning and Environment*, *Bodney v Bennell*, *Western Australia v Sebastian*, *Mueller v Vigilante* and *Cal v Attorney General (Belize)* were prepared by Liron Schmilovits. The headnote for *Bropho v Western Australia* was prepared by Sonya Redman. The headnote for *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* was prepared by Charisse Hodgeman. The headnote for *Davis & Spring* was prepared by Nadia Rosenman. The headnote for *Bleathman v Taylor* was prepared by Michelle Wen. The headnote for *Tsilhqot'in Nation v British Columbia* was prepared by Jackie Hartley. The headnote for *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada* was prepared by Zsofi Korosy. The headnote for *Bullock v The Department of Corrections* was prepared by Ella Kucharova. Headnote reviews were conducted by Dylan Lino and Sophie Marjanac.

The editors wish to extend their thanks to the Editorial Panel for their excellent guidance and help, Rebecca Smith for her subeditorial assistance, and Tom Smyth and Ella Kucharova for their research assistance. The editors would also like to thank Dani Johnson, Janette Murdoch, Jacqui Houston, Bridget McDermott and John Hewitt for their contributions to the creation and production of this edition of the AILR.

Artist's Note

The cover artwork is entitled *Country* and is by Hazel Morton Kngwarrey. Hazel hails from the Ngkwarlerlanem and Arnkawenyerr areas of country, which are parts of the Utopia region in the Northern Territory. Stories told in the work are of Hazel's country, including of *boor-la-da* (rainbow), *tharrkarr* (sweet honey grevillea) and *yerramp* (honey ant). Prior to beginning painting in 1991, Hazel worked in the batik medium, though she has since become established in a variety of media. She is one of many artists in a large family, and her work has been exhibited widely in Australia and internationally.



CONTENTS

Volume 12, Number 1

Commentary

Coercive Governance and Remote Indigenous Communities: The Failed Promise of the Whole of Government Mantra <i>Greg Marks</i>	2
'The Cost of a Wounded Society': Reparations and the Illusion of Reconciliation <i>Andrea Durbach</i>	22
Government Responses to the Indian Residential Schools Settlement in Canada: Implications for Australia <i>Bradford W Morse</i>	41
Cultural Timelessness and Colonial Tethers: Australian Native Title in Historical and Comparative Perspective <i>Simon Young</i>	60
Indigenous Policy and Its Historical Occlusions: The North American and Global Contexts of Australian Settlement <i>Lisa Ford</i>	69
Native Title, Sovereignty and the Fragmented Recognition of Indigenous Law and Custom <i>Zsofia Korosy</i>	81

Court and Tribunal Decisions

Australia

<i>Griffiths v Minister for Lands, Planning and Environment</i> [2008] HCA 20	98
<i>Bodney v Bennell</i> [2008] FCAFC 63	100
<i>Western Australia v Sebastian</i> [2008] FCAFC 65	103
<i>Bropho v Western Australia</i> [2008] FCAFC 100	106
<i>Mueller v Vigilante</i> [2007] WASC 259	108

<i>NSW Aboriginal Land Council v Minister Administering the Crown Lands Act</i> [2007] NSWCA 281	110
<i>Davis & Spring</i> [2007] FamCA 1149	112
<i>Bleathman v Taylor</i> [2007] TASSC 82	114
Belize	
<i>Cal v Attorney General (Belize)</i> Claim Nos 171 and 172 of 2007	116
Canada	
<i>Tsilhqot'in Nation v British Columbia</i> , 2007 BCSC 1700	118
<i>Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada</i> , 2007 ONCA 814	121
New Zealand	
<i>Bullock v The Department of Corrections</i> [2008] NZHRRT 4	123

