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# OPPRESSIVE 'BLACK LETTER LAW' IN 'HYPERLINK BLUE': NEW ONLINE DATABASE INCREASES ACCESSIBILITY TO INDIGENOUS LEGAL RESOURCES

by Stijn Denayer

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## INTRODUCTION

A new online database of indigenous legal resources—the result of a joint project of the Indigenous Law Centre (ILC) and the Australasian Legal Information Institute (AustLII)—was launched in early 2016. As Indigenous research and perspectives are still often neglected in mainstream library collections, the project aims to develop the database, which is hosted on AustLII's website, as a free-access online collection of important legal materials relating to Indigenous issues.<sup>1</sup>

To date, the 'Indigenous Law Resources' database has made freely available more than 800 documents, dating from 1768 to 2015. The collection includes parliamentary papers, government reports and policy documents affecting Indigenous peoples, reports and submissions by civil society organisations and documents related to significant test cases and legal proceedings as well as Indigenous advocacy. Particularly noteworthy inclusions are previously undigitised resources relating to discrimination, intellectual property, cultural heritage, land rights and native title.

## WHY AN(OTHER) ONLINE COLLECTION?

'When I was a PhD student, I found it very difficult to access the foundational documents in Aboriginal affairs,' says ILC Director Professor Megan Davis. 'Given that most of the significant developments in Indigenous rights have come through activism or litigation, these documents are critical to understanding Indigenous legal issues in Australia.'

While there are extensive online collections available, there are still serious concerns regarding the accessibility of important legal resources relating to Indigenous history and issues, and the ILC–AustLII project aims to address these concerns.

'The Koori History website maintained by Gary Foley is excellent, as is AIATSIS and the old ATSIC website archived by the National Library,' Davis went on to say. 'Still, I noted that when I teach the Frontier Wars, for example, students do not view such phases through the prism of law. Yet there are many documents from that

era as well as the Protection Era that highlight the way the law—black letter law—has been the primary tool for dispossession and subjugation. We felt that the database was an important project to frame these documents, many not publicly available or previously digitised, from First Contact to today.'

Almost 50 new 19th century resources have been uploaded onto AustLII in 2016, with one of the main focuses being parliamentary papers that discuss laws and policies affecting Indigenous peoples in the so-called Killing Times era and the early Protection Era. Some notable new additions include:

- *Copies of all Correspondence between Lieutenant-Governor Arthur and His Majesty's Secretary of State for the Colonies, on the Subject of the Military Operations lately Carried on against the Aboriginal Inhabitants of Van Diemen's Land* (House of Commons, 1831)—an extract of this document is reproduced at the end of this article;<sup>2</sup>
- *Return to an Address by Sir Thomas Mitchell for Numbers of Whites and Aborigines Killed in Conflicts since the Settlement of the Port Phillip District* (New South Wales Legislative Council, 1844);<sup>3</sup> and
- *Report of the Select Committee of the Legislative Council on the Aborigines Bill: together with Minutes of Proceedings* (South Australia, 1899).<sup>4</sup>

The project is particularly concerned with the preservation of rare and vulnerable documents. This includes physically fragile documents of which there are only a limited number of copies and which may not be stored in secure libraries or repositories. Vulnerability does not necessarily have to be restricted to the quantity or physical quality of the documents, but can also relate to an assessment of the stability and accessibility of their online environment. Indigenous resources can also be 'digitally vulnerable'. This is especially the case for digital documents of civil society organisations that struggle for funding to maintain their websites, but also applies to digital resources on government websites, in the context of frequent changes in the Indigenous Affairs portfolio between various departments as well as changeovers of governments. As such, the project has secured several vanished indexes of important documents from the old

websites of now defunct government bodies, organisations or departments. These documents may still have been traceable via internet archival websites such as Pandora or Wayback Machine, but their visibility and accessibility, in particular for a non-specialist public, had been severely restricted.

Apart from vulnerability concerns, the project is also concerned with the sheer accessibility of important Indigenous legal resources. As such, the database also includes key documents that are not strictly vulnerable, and may indeed be available in multiple libraries across the country, but have not yet been digitised and are not available online and are therefore not very accessible for people who are unable to travel to the repositories that hold them or request items through them. This can be especially the case for Aboriginal and Torres Strait Islander people who live in remote communities or who are not associated with any university or government institution.

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## INDIGENOUS VOICES

‘Especially critical to the project are those documents that over the decades capture the aspirations of Aboriginal and Torres Strait Islander peoples,’ says Davis. ‘Having those documents publicly available provides nuance and texture to what Aboriginal people want, for example in the post-1967 period up to today’s resistance to constitutional recognition.’

Documents of Indigenous civil society and representative organisations form the core of the collection. Significant inclusions are the complete collection of Aboriginal and Torres Strait Islander Commission (ATSIC) annual reports, as well as around 70 other ATSIC reports relating to various thematic areas, previously unavailable online. The database also includes several previously undigitised documents by the National Aboriginal Consultative Committee (NACC), the National Aboriginal Conference (NAC) and the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI), as well as a number of important reports and submissions by Indigenous civil society organisations, for example, Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council, the National Committee to Defend Black Rights (NCDBR), and Karu Aboriginal Child Care Agency.

## INTELLECTUAL PROPERTY

One of the highlights of the database is a substantial collection of court materials relating to a number of significant intellectual property cases between the late 1980s and the early 21st century. In total, the database contains more than 170 digital copies of original documents relating to cases such as *Yumbulul v Aboriginal Artists Agency* (also known as the Morning Star Pole or Ten-Dollar Note case),<sup>5</sup> *Milpururru v Indofurn* (or the Carpets case),<sup>6</sup> and *Bulun Bulun v Nejlam Investments* (or the T-shirts case).<sup>7</sup>

‘Appropriation of Aboriginal and Torres Strait Islander art and culture was mainstream throughout the 20th century,’ says Professor Kathy Bowrey of the University of New South Wales. ‘Following successful advocacy around land rights, Aboriginal and Torres Strait Islander people started to seek redress through the courts in the 1990s. These efforts were assisted by then Northern Territory solicitor, Martin Hardie, and barrister, Colin Golvan. Donation of primary sources related to the running of a surprisingly large number of cases forms the backbone of new material concerning copyright and trademark in the collection.’

The significance of the cases cannot be understated. Arguably the most momentous case was *Bulun Bulun v Nejlam Investments* (1989), in which John Bulun Bulun, a prominent bark painter from Maningrida, Central Arnhem Land in the Northern Territory, took the unprecedented step of bringing legal action for copyright infringements when a Queensland T-shirts manufacturer in 1987 reproduced two of the artist’s most famous paintings, at the time held at museums in Darwin and Canberra, without his permission on T-shirts intended for commercial sale. This led to the company discontinuing production and sale of the T-shirts and handing over the remaining stock to the artist. The case signifies the first occasion on which an Aboriginal artist successfully litigated to protect his work from unauthorised reproduction.

‘Some of the copyright matters proceeded as test cases through the Federal Court and became internationally renowned,’ says Bowrey. ‘Others have received far less attention. Combined, they show how law came to impact on industry practices and change expectations around the right to protect culture.’

The documents also reveal the broader context and related advocacy that is needed to conduct major test cases. As Bowrey explains: ‘Most importantly, the database also contains the original affidavits of the Aboriginal complainants, of non-Indigenous experts, and the defendants, allowing readers to consider the way Indigenous demands are strategically framed through litigation.’

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## DISCRIMINATION

The database is also well stocked with documentation relating to discrimination against Aboriginal and Torres Strait Islander people, and contains several dozens of previously undigitised or vulnerable reports from anti-discrimination bodies, for example, reports from the 1970–80s by the Office of the Commissioner for Community Relations and the New South Wales Anti-Discrimination Board.

The database also contains a set of six significant pastoral award cases brought before the Court of Conciliation and Arbitration (1904–56) and the Commonwealth Conciliation and Arbitration Commission (1956–73). The cases, many only now available online for the first time, span more than four decades of legal argument and demonstrate the history of discrimination against Aboriginal pastoral workers and the ambivalent role of employment law in Australia.

On 7 March 1966, the Commonwealth Conciliation and Arbitration Commission handed down its decision in *Re Cattle Station Industry (Northern Territory) Award, 1951*<sup>8</sup> and granted Aboriginal pastoral workers equal pay with white stockmen. A year earlier, the North Australian Workers' Union had applied for the deletion of clauses excluding Aboriginal workers from the *Cattle Station Industry (Northern Territory) Award*. The clauses had led to a situation whereby the cattle industry, the largest employer of Aboriginal labour in the Northern Territory, was legally required under administrative ordinances to pay Aboriginal stockmen only about a fifth of the salary white stockmen were entitled to under the *1951 Pastoral Award*.

'It's important that the six cases are now available online for the first time as a complete set,' says Dr Jennifer Nielsen of Southern Cross University. 'The 1966 judgement is remembered as a profound step forward in the nation's history. Yet few remember the five pastoral award cases (1924, 1928, 1932, 1938 and 1944) and the 42 years of argument that proceeded this decision, within which Aboriginal pastoral workers were considered by the Court only for the purpose of assessing the pay rates and working conditions of the "competent white" stockmen who worked alongside them.'

This ambivalence can still be detected in the 1966 judgement. On the one hand the Commission bluntly stated: 'We agree with the pastoralists that there are many aborigines on cattle stations who for cultural reasons and through lack of education are unable to perform work in a way normally required in our economic society'. On the other hand it also believed that its decision to grant equal pay rights was 'the only proper one to be made at this point in

Australia's history', as it ruled: 'There must be one industrial law, similarly applied, to all Australians, aboriginal or not.'<sup>9</sup>

Nielsen highlights the importance of considering the historical interweaving of the fight for equal wage rights with the broader struggle for land justice in grassroots Indigenous activism.

'The Commission stalled implementation of its 1966 equal wage decision for 33 months. But it was only six months later—on 22 August 1966—that Vincent Lingiari led the strike and walk-off at a Wave Hill cattle station by 200 Gurindji, Ngarinman, Bilinara, Warlpiri and Mudbara stockmen and their families, in protest at their pay and living conditions. The group moved to Wattie Creek the following year, and as their protest turned to the issue of land rights, they would bring national and world attention to Aboriginal claims for the return of lands in Australia.'

**In 2016, the project will not only invest in expanding the collection but also in further improving the accessibility and usability of the database.**

## LAND JUSTICE

Land justice is another major focus of the project, with over 100 documents relating to land rights and native title already available on the database, and several dozens of other important resources in the pipeline.

'The Indigenous Law Resources database has become a unique resource for anyone with an interest in land rights,' says ILC Research Director Dr Leon Terrill. 'It includes a thorough and accessible collection of documents about the struggle for land justice in Australia—documents such as the 1973 and 1974 Woodward reports,<sup>10</sup> the 1980 report of the NSW Select Committee upon Aborigines<sup>11</sup> and Paul Seaman QC's 1984 Aboriginal Land Inquiry in Western Australia.<sup>12</sup> Most of these documents were not previously available online and those that were tended to be difficult to find. It's great that they are now all available in the one place.'

'I also like the fact that the documents are available in a searchable form. For example, if you want to know what John Reeves QC had to say about the permit system—you can simply find his important 1998 report, *Building on Land Rights for the Next Generation*, and search for 'permits' within the 688-page document.<sup>13</sup> It's such a useful resource,' added Terrill.

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All documents in the database are indeed full-text searchable and are available in HTML (web page), Word (RTF) and/or PDF formats. 'Just like the other databases available on AustLII, those documents that are available in HTML format include hyperlinks to other legal resources on AustLII,' says AustLII's Executive Director Dr Philip Chung. 'This is a very useful and efficient feature, as it means users can access the legislation, cases or journal articles mentioned in any one of the documents with one simple click.'

'In 2016, the project will not only invest in expanding the collection but also in further improving the accessibility and usability of the database. Subject to resources, we will also further develop the broader Indigenous Law Library, of which the database is part.'<sup>14</sup>

**EXTRACT FROM *DESPATCH FROM LIEUTENANT-GOVERNOR ARTHUR TO VISCOUNT GODERICH (VAN DIEMEN'S LAND, GOVERNMENT HOUSE, 10 JANUARY 1828)***

This despatch is part of a larger collection of correspondence between Lieutenant-Governor Arthur and the Secretary of State for the Colonies on the issue of frontier violence, now available online for the first time.<sup>15</sup>

My Lord,

I have the honour to report to your Lordship, that a more than usual temper of hostility has, within the last six months, manifested itself on the part of the Aborigines of this Colony, and has rendered some active steps for protection necessary, and I fear some still stronger measures will be required.

On my succeeding to the government, I found the quarrel of the Natives with the Europeans, occasioned by an unfortunate step of the officer in command of the garrison on the first forming of the settlement, was daily aggravated, by every kind of injury committed against the defenceless Natives, by the stock-keepers and sealers, with whom it was a constant practice to fire upon them whenever they approached, and to deprive them of their women whenever the opportunity offered. I considered it my duty, therefore, to declare by proclamation, that every individual found to have committed any criminal act of aggression upon the Aborigines, should be prosecuted before the Supreme Court. At the same time I enjoined the magistrates and respectable settlers to use every means to conciliate and protect them. The proclamation, I have reason to believe, was not without effect; and I endeavoured still further to cultivate a friendly intercourse, and at least make the attempt to civilize this abased race, on the occasion of the unexpected appearance of a tribe in Hobart Town, by alluring them, with the promise of food and clothing, to repeat their visit. And I had formed the plan of establishing an institution, to

which they might resort, in the hope that some might be persuaded to adopt the habits of civilized life. After stopping a few days, however, in the neighbourhood of Hobart Town, the tribe went back to their haunts, and have not again returned; though, to all appearance, they were highly satisfied with the treatment they received, and made it understood that they looked upon the Governor as their protector.

It is not a matter of surprise that the injuries, real or supposed, inflicted upon the blacks, have been revenged upon the whites, whenever an occasion presented itself; and I regret to say, that the Natives, led on by a Sydney black, and by two Aborigines of this island, men partially civilized, (a circumstance which augers ill for any endeavour to instruct these abject beings), have committed many murders upon the shepherds and herdsmen in remote situations. And they have latterly assumed so formidable an appearance, and perpetrated such repeated outrages within the settled districts, that I have been pressingly called upon by the settlers, in several petitions, to adopt some measure which should effectually free them from these troublesome assailants, and from the nuisance of their dogs, which, originally purloined from the settlers, have increased to such a number as to threaten to become a lasting pest to the country.

But it is much easier to complain than to find a cure for the evil, which none of the petitioners has ventured to suggest; and I have not thought proper to do more than afford the protection of some additional parties of police and military, and to point out, by government notices, how far the settlers would be justified by law in making use of arms to drive off the Natives who should present a hostile front.

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The Indigenous Law Library Project is still looking for material. Material for the library is being identified and sourced with the generous assistance of a number of libraries and organisations, and through the expert advice of several internal and external subject experts.<sup>16</sup> If you would like to provide materials for digitisation or inclusion in the library, please contact Stijn Denayer at [s.denayer@unsw.edu.au](mailto:s.denayer@unsw.edu.au).

*Stijn Denayer has been working as the Project Officer on the Indigenous Law Library Project since April 2015. Before joining the ILC, he worked as Legal and Policy Advisor for Unia, the National Human Rights Institution (NHRI) of Belgium, specialising in racial discrimination and hate speech. He has also held positions as Legal Researcher and Project Coordinator at several local and international human rights organisations in South Asia and the Middle East.*

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- 1 The 'Indigenous Law Resources' database is accessible via <<http://www.austlii.edu.au/au/other/IndigLRes/>>. The database is being redeveloped by Professor Megan Davis, Professor Kathy Bowrey, Dr Philip Chung, Professor Simone Degeling (2015) and Associate Professor Sean Brennan (2016). The project has been made possible by two UNSW Major Research Equipment Infrastructure Initiative (MREII) grants in 2015 and 2016.
  - 2 See <<http://www.austlii.edu.au/au/other/IndigLRes/1831/2.html>>.
  - 3 See <<http://www.austlii.edu.au/au/other/IndigLRes/1844/3.html>>.
  - 4 See <<http://www.austlii.edu.au/au/other/IndigLRes/1899/2.html>>.
  - 5 For all materials relating to the case, see <<http://www.austlii.edu.au/au/other/IndigLRes/toc-Y.html>>.
  - 6 For all materials relating to the case, see <<http://www.austlii.edu.au/au/other/IndigLRes/toc-M.html>>.
  - 7 For all materials relating to the case, see <<http://www.austlii.edu.au/au/other/IndigLRes/toc-B.html>>.
  - 8 *In the Matter of the Conciliation and Arbitration Act 1904–1965 and of the Cattle Station Industry (Northern Territory) Award, 1951* (1966) 113 CAR 651, <<http://www.austlii.edu.au/au/other/IndigLRes/1966/2.html>>.
  - 9 Ibid at 669.
  - 10 See <<http://www.austlii.edu.au/au/other/IndigLRes/1973/1.html>> and <<http://www.austlii.edu.au/au/other/IndigLRes/1974/1.html>>.
  - 11 See <<http://www.austlii.edu.au/au/other/IndigLRes/1980/6.html>>.
  - 12 See <<http://www.austlii.edu.au/au/other/IndigLRes/1984/8.html>>.
  - 13 See <<http://www.austlii.edu.au/au/other/IndigLRes/1998/22.html>>.
  - 14 The Australian Indigenous Law Library is accessible via <<http://www.austlii.edu.au/au/special/indigenous/>>.
  - 15 See <<http://www.austlii.edu.au/au/other/IndigLRes/1831/2.html>>.
  - 16 For the full list of libraries, organisations and experts involved, see the 'acknowledgments' section on the homepage of library: <<http://www.austlii.edu.au/au/other/IndigLRes/>>.
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Rika Hamaguchi in 'Iore', 2015  
Jacob Nash  
Bangarra Dance Theatre

