

# RIGHTS OF INDIGENOUS PEOPLES INTEREST GROUP NEWSLETTER

## Interest Group Highlights

### The Newsletter

The Newsletter is a place to share information concerning recent developments, scholarship, and other matters of interest to the Group relating to the rights of Indigenous peoples. Your contributions are essential to the quality and success of this publication. To contribute to an upcoming issue, please contact Kirsty Gover at [kgoover@unimelb.edu.au](mailto:kgoover@unimelb.edu.au) or Harry Hobbs at [hobbs.harry@uts.edu.au](mailto:hobbs.harry@uts.edu.au).

Many thanks to Dr Steve Young (Otago) who wrote the case note on *Timber Creek*, and Professor Katy Barnett (Melbourne) who wrote the case note on *ASIC v Kobelt*.

### Indigenous Rights Developments

- **Fifth Circuit Court of Appeals Reaffirms the Constitutionality of the US federal Indian Child Welfare Act 1978 (ICWA) in *Brackeen v Bernhardt* (9 August 2019).**

Non-Indian foster parents of Indian children sought to adopt those children. In accordance with the mandatory placement preference rules of the ICWA, priority was given instead to placing Indian children with Indian families. The parents challenged the constitutionality of the ICWA. (This note focuses on the equal protection clause arguments in the case, for analysis of the courts' reasoning on other arguments advanced in the case, e.g. the 10<sup>th</sup> amendment, non-delegation and the Administrative Procedure Act arguments, readers are invited to refer to the broader scholarship on the *Brackeen* cases. Useful starting points can be found in contributions to the Turtle Talk blog at <https://turtletalk.blog/?s=brackeen> and in Matthew L. M. Fletcher's 'On Indian Children and the Fifth Amendment' 80 *Montana Law Review* 99 (2019))

In October 2018 the federal Court for the Northern District of Texas found that the mandatory placement preference provisions of the ICWA (§ 1915), coupled with the definition of an 'Indian child' as a child that is a member of an Indian tribe or 'is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe' (§ 1903) were classifications that used 'ancestry as a proxy for race'. The Court's determination was based on the assumption that persons *eligible* for membership in a tribe were a class of persons identified by ancestry. According to the District Court, such a provision could not survive strict scrutiny review and so violated the equal protection clause. It was further found to be a measure not covered by the

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#### Rights of Indigenous Peoples Interest Group

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pivotal precedent established in *Morton v Mancari*, 417 US 535 (1974), (certain preferences for Indians are 'political rather than racial in nature' and so subject to 'rational basis' review rather than 'strict scrutiny' (553-4)), because the ICWA provisions were necessarily not limited in their application to members of federally recognised tribes (*Brackeen v Zinke* (2018) 338 F. Supp. 3d 514, available here: <https://turtletalk.files.wordpress.com/2018/07/155-ordernotgrantingmtd.pdf>).

In *Brackeen v Bernhardt*, No. 18-11479 (5th Cir. 2019), decided on 9 August 2019, the Fifth Circuit Court of Appeals overturned the District Court's decision. On the equal protection clause determination, it found that the District Court had erred in finding that the impugned provisions amounted to race-based classifications (p 20), and affirmed Supreme Court precedent to the effect that Congress' plenary power over Indians has always been deemed to be a political one, and that federal legislation passed in exercise of the plenary power is not based on impermissible racial classifications. The Court of Appeals further noted that in accordance with the membership criteria used by tribes, some biological children of tribal members are not 'racially' Indian (because their member parent is not 'racially' Indian), so that the ICWA definitional class includes persons not defined by race. Likewise many 'racially' Indian children are not eligible for membership in a tribe (p 23). The provision thus establishes a political not racial classification, and is consistent with the precedent set in *Morton v Mancari* (p 23):

'Conditioning a child's eligibility for membership, in part, on whether a biological parent is a member of the tribe is therefore not a proxy for race, as the district court concluded, but rather for not-yet formalised tribal affiliation, particularly where the child is too young to formally apply for membership in a tribe.' (p 23).

In reaching this conclusion the Court of Appeals also dismissed the District Court's application of *Rice v Cayetano* 528 US 495 (2000) to the facts, noting that *Rice* (in which the Supreme Court struck down voter eligibility rules specifying that only descendants of native Hawaiians could vote for the state's Office of Hawaiians Affairs) could be distinguished from the facts in *Brackeen* because the ICWA 'Indian child' definition did not identify Indian children solely on the grounds of ancestry, and was a 'federal law enacted

by Congress for the protection of Indian children and tribes' (p 25) that concerned federally recognised Indian tribes (native Hawaiians are not classified as such in US federal law).

In its reasons, the Court of Appeals affirmed the ICWA as a centrally important statute that protects and expresses the 'special relationship' between the federal government and recognised tribes, that is premised on the long history of treaty-making between federal and tribal governments and the attendant federal trust responsibilities owed to Indians and tribes. The decision further implicitly affirms the variegation of tribal membership criteria among the 563 US federally-recognised tribes and correctly understands that these do not align with past or present federal law definitions of 'Indianness' but instead are premised on a complex mix of eligibility rules governing both birthright and acquired citizenship (as is of course typical of the citizenship regimes of other nations and nation-states). The *Brackeen* cases and the anticipated appeal to the US Supreme Court are of central relevance to debates underway in other settler states about the intersections of Indigeneity, tribal membership and race, and the implications of these designations for Indigenous peoples subject to settler non-discrimination law, especially in Canada, New Zealand and Australia and more recently, in Finland (see the two Human Rights Committee cases initiated by Sami applicants, discussed in the last issue of this newsletter).

The stakes for tribes and native peoples in the US are high. In the appeal to the Fifth Circuit, five federally recognised tribes joined the United States federal government as defendants, and numerous amicus briefs were filed in support of the constitutionality of ICWA, including briefs submitted on behalf of 325 federally recognised tribes and 57 tribal organisations, 21 state attorneys general and 30 child welfare organizations. Indigenous peoples and their supporters in the US and in the other settler states will pay close attention to the fate of the *Brackeen* decisions. The precedents to be set by this case and its anticipated appeal directly implicate the constitutionality of numerous federal statutes directed to Indians and to Indian tribes, a class of legislation taking up (as the Supreme Court noted in *Mancari*) an entire chapter of the US Code:

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'If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U. S. C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.' (p 552).

*Brackeen v Bernhardt* can be found here: <https://turtletalk.blog/tag/brackeen-v-bernhardt/> (thanks to the Turtle Talk team for the links).

- Australian High Court issues a decision on compensation for extinguished native title rights: *Northern Territory v Griffiths* [2019] HCA 7 (13 March 2019). In March 2019, the High Court handed down a highly anticipated decision on a claim that had been working its way through the court system for nearly two decades. In 2006 the Ngaliwurru and Nungali people of the North-west of Australia's Northern Territory successfully claimed non-exclusive native title rights over their traditional land within and around the remote town of Timber Creek. The Federal Court recognised that developments from 1975 to 1996 infringed or extinguished some of those rights. As a result, in 2011, the native title holders instituted a claim for compensation for loss of traditional attachment to that land. *Northern Territory v Griffiths* is the first case in Australia to consider how to compute the value of compensation for extinguishment or infringement of native title.

Three issues were argued in the High Court, with five of seven judges constituting a joint, majority opinion. The first issue was how to value the compensation owed for extinguishment. The claimant group asked for the economic loss to be equivalent to the compulsory acquisition of a freehold estate of an equivalent size in the area, which would amount to \$640,000 (AUD). It argued that failures to treat the native title rights as equivalent to freehold estate were discriminatory under the *Racial Discrimination Act 1975* (Cth). The High Court agreed that if the native title right is exclusive, then it may equate to the objective economic value of unencumbered freehold. But, because the native title rights at issue were non-exclusive rights, they were not equivalent to unencumbered freehold, instead the economic value of the non-exclusive native title rights was set at 50% of the value of freehold. The second

issue was how to calculate the interest owed on those economic losses (paras 67-106). While the claimants argued for the award of compound interest, the High Court elected to assess the quantum on the basis of simple interest (paras 110-150).

The third issue involved computing compensation for the non-economic effects or the loss of connection to land (paras 154-237). The trial judge employed a two-step test to assess the non-economic value. The first was to identify the nature and extent of the native title holders' connection to lands and waters by their laws and customs, while the second was to then consider the effect of the relevant infringing acts on those connections. As reported by the High Court, the trial judge emphasized the claimants' spiritual connection to land and that the developments had incremental effects that will continue to impact future generations of native title holders. He assessed the value at \$1.3 million (AUD). The Commonwealth and the Northern Territory appealed that valuation to the Full Court and then the High Court. The High Court upheld the trial judge's assessment, noting that '[t]here is nothing to suggest that the trial judge's award would not be accepted by the Australian community as appropriate, fair or just' (para 237).

Gageler J agreed with the proposed orders and reasoning of the joint opinion but disagreed over the methodology for assessing the economic value (para 240-250). Edelman J's concurring (in the result) opinion is notable for his valuation of non-economic damages. Edelman J noted that a cultural loss occurs at the moment of extinguishment. As such, while the majority treats the non-economic loss as analogous in a personal injury claim to a loss of solatium or pain and suffering, which accrues over time as calculated at the time of judgment, a loss at the moment of extinguishment is analogous in personal injury to a loss of amenity. Edelman J explains that a non-economic valuation of \$1.3 million could look excessive compared to a total freehold value of \$640,000, but that is why the comparison is inapt. By treating the non-economic losses as analogous to loss of amenity, \$1.3 million is not excessive – it is a 'conservative award' (para 328). Decision available here: <http://eresources.hcourt.gov.au/showCase/2019/HCA/7>.

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## Indigenous Rights Developments —continued from page 3

- The Australian High Court holds that a “book-up” credit system issued to a remote Indigenous community was not unconscionable conduct: *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18 (12 June 2019).

This note was prepared by Professor Katy Barnett (Melbourne) and originally published on Melbourne Law School’s Opinions on High blog at <https://blogs.unimelb.edu.au/opinionsonhigh/2019/06/20/australian-securities-and-investments-commission-v-kobelt/>. In writing this note, Katy pays respect to her Dharumbal ancestors.

Mr Kobelt operated a general store in Mintabie, South Australia. The store sold second-hand cars, food, groceries and fuel. From 2008 onwards, Kobelt supplied a form of credit to customers who were predominantly Indigenous Anangu people, most of whom lived in two remote communities within the Anangu Pitjantjatjara Yankunytjatjara Lands (APY Lands’). The customers were poor and had low levels of literacy and numeracy. The credit system was called a ‘book-up’ system. Payment for goods was deferred in whole or in part, subject to the customer supplying Kobelt with the keycard and PIN linked to the bank account into which the customer’s wages or welfare payments were credited. Very few transactions were documented carefully or at all. On the days when the customer had told Kobelt moneys were coming in, he would withdraw money in increments until there were no funds left. He usually retained possession of the keycard until the debt was repaid.

A majority of the seven judge bench held that Kobelt’s conduct was not unconscionable because it carried advantages for the Anangu people and they voluntarily entered into the transaction. Kiefel CJ and Bell J held that there was an ‘absence of unconscientious advantage obtained by Mr Kobelt from the supply of credit to his Anangu customers under his book-up system’ (para 19). The ‘book-up’ system had advantages for Anangu people unrelated to their lack of education and financial acumen (including the capacity to deal with a bust and boom economy, to avoid paperwork, and to avoid the ‘demand sharing’ or ‘humbugging’ of economic resources by relatives which is characteristic of many Indigenous societies) (paras 63 – 74).

Gageler J held that unconscionable conduct was conduct outside ordinary norms of societal conduct. He considered that factors pointed both ways. Factors which suggested the ‘book-up’ system was unconscionable included Kobelt’s strength of bargaining power, that Anangu customers were treated differently to non-Anangu customers, that there were other means by which he could have provided credit to customers, that there was no need to withdraw almost all of the customers’ funds, the charge on Anangu customers was very high compared to the lending rate for commercial loans and that this was not disclosed (paras 98 – 99). Factors which suggested that the ‘book-up’ system was not unconscionable included a lack of any undue influence on the customers, Kobelt did not act systematically in bad faith, and he was willing to negotiate with customers if they needed money (para 100). It was pivotal that customers could end their relationship with Kobelt (paras 107 – 109). Accordingly, the Anangu people had voluntarily entered into the ‘book-up’ agreements, chose to continue them, and were not precluded from making that choice by reason of vulnerability (para 110).

Keane J agreed with the judgment of Kiefel CJ and Bell J. He held that ASIC ‘did not establish that the respondent exploited his customers’ socio-economic vulnerability in order to extract financial advantage from them’ (at para 115).

Implicit in all three majority judgments was the notion that it is paternalistic to say that Anangu customers are not capable of voluntarily entering into transactions. Explicitly, the judgments emphasized that such transactions may in fact be beneficial to Anangu customers because of their particular culture and remote situation.

Nettle and Gordon JJ, and Edeleman J wrote detailed, strongly worded dissents. Their Honors held that Kobelt’s conduct was unconscionable because he took advantage of the Anangu customers’ special disadvantage and the system was discriminatory and unfair.

Nettle and Gordon JJ considered that Kobelt had taken advantage of the Anangu customers by taking all their money, had failed to take accurate or adequate records,



## Indigenous Rights Developments —continued from page 4

that the effective rate of interest was very high and that the system tied customers to Kobelt's store (paras 172 – 207). Nettle and Gordon JJ were very skeptical about the advantages to Anangu customers of the 'book-up' system (paras 211 – 218). Moreover they were skeptical that there was no other better, fairer system (paras 219 – 229). Nettle and Gordon JJ said that the Anangu customers were clearly laboring under vulnerability or special disadvantage because they lived in remote communities, were poor, uneducated, and lacked financial literacy (paras 235 – 236).

Edelman J also dissented. One learns from Edelman J that several of the Anangu customers bought several second-hand cars in a very short period after the previous cars broke down, and did not have the most basic understanding of what their bank statements meant or what the key cards signified (paras 297 – 300). He acknowledged that other customers found that the system had advantages for them (para 301). However, on balance he found that the system was unconscionable (paras 303 – 309). Decision available here: <http://classic.austlii.edu.au/au/cases/cth/HCA/2019/18.html>.

- Justice Joe Williams becomes the first Māori lawyer appointed to the Supreme Court of New Zealand. Justice Williams has previously served as the Chief Judge of the Māori Land Court, Chair of the Waitangi Tribunal, and Judge of the Court of Appeal. More information can be found here: <https://www.rnz.co.nz/news/national/388307/joe-williams-first-maori-judge-appointed-to-supreme-court>.
- The Queensland government (Australia) has agreed to pay AUD\$190 million to around 10,000 Aboriginal people in order to settle a long-running dispute over stolen wages. From the 1880s to the 1970s, thousands of Aboriginal people worked in the cattle industry in Northern Australia. Aboriginal workers were only entitled to be paid two-thirds of the wages of non-Aboriginal people, but were often paid even less, or received in-kind payment such as 'room and board'. In many cases, Australian governments withheld wages for paternalistic reasons, placing them in trust funds that Aboriginal people were unable to access. This claim centred on an allegation that the Queensland government misappropriated those

funds. The quantum is significant, but far below the \$500 million in estimated lost wage entitlements. More information here: <https://www.abc.net.au/news/2019-07-09/hans-pearson-class-action-settled-qld-government/11292886?pfmredir=sm>.

- The Australian state government of Queensland has announced its commitment to starting a conversation about a treaty or treaties with Indigenous peoples. The process is in the very early stages and it is expected to take several years. The government will establish a bipartisan 'eminent panel' of Indigenous and non-Indigenous leaders to lead conversations, and an Indigenous Treaty Working Group to hold consultations within Indigenous communities. No treaties were signed at first contact between the British Crown and First Nations peoples in Australia. Queensland joins two other Australian governments – Victoria and the Northern Territory – in formally commencing a treaty process. More information here: <http://statements.qld.gov.au/Statement/2019/7/14/historic-signing-of-tracks-to-treaty-commitment>.
- In its 2019 budget the Canadian government, commits to forgive all outstanding loans provided to First Nations participating in treaty negotiations, and to reimburse First Nations who had already repaid their loans. First Nations require sufficient resources in order to enter treaty negotiations with government. For many years, the federal government required First Nations to re-pay 80 per cent of any funding received, which was treated as a cash advance on any final settlement. Inquiries suggested that this was a barrier to progressing treaty. In the 2018 budget, the federal government announced that it would no longer fund First Nations participation in treaty negotiations via loans, instead the government would directly support groups in these negotiations through non-repayable contributions. In 2019, this commitment was extended, with the government committing to forgive all outstanding loans and reimburse First Nations who had already repaid their loan, at a total cost of CAD\$1.4 billion. Budget document available here: <https://www.budget.gc.ca/2019/docs/plan/chap-03-en.html?wbdisable=true>.

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## Book Reviews

- *Constitutional Recognition: First Peoples and the Australian Settler State*, by Dylan Lino (Federation Press, 2018), review by Harry Hobbs.

For many years, debate in Australia on Indigenous affairs has centred on the notion of 'constitutional recognition'. As Dylan Lino ably demonstrates in this excellent book—awarded the 2017 Holt Prize—constitutional recognition is a malleable concept that carries multiple meanings. For some, recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution is a means to symbolically complete rather than change that instrument. For others, recognition carries practical consequences that aim squarely at amending the distribution of political power within the state. Lino's sophisticated historical and theoretically informed analysis charts a path between these two poles. For Lino, constitutional recognition is an ongoing process of renegotiating the

settler-Indigenous political relationship, which involves both substantive and symbolic features. To make this case, Lino identifies earlier efforts at renegotiating this relationship. Examining the 1967 constitutional amendment which empowered the federal parliament with the authority to make laws on Indigenous affairs and the 1975 passage of the *Racial Discrimination Act* in this light, demonstrates the incompleteness and provisional nature of constitutional recognition. While these reforms accomplished significant positive developments they did not (and could not) resolve all concerns over the relationship between the state and Indigenous Australians. This may be 'sobering' but it 'should not be disabling' (p 266), because constitutional recognition is the language in which Indigenous and non-Indigenous Australians debate what it means to share the land and live in a just state.

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## Indigenous Rights Developments —continued from page 5

- The Ecuadorian Pastaza Provincial Court found that three government bodies did not adequately consult with the Indigenous Warorani community before putting their territory up for sale in an international oil auction. The Court found that the consultation process consisted only of a series of presentations on how the oil industry would promote economic development, and failed to mention any potential negative environmental effects. The government bodies never sought the consent of the Warorani community. Following their presentations, the government commenced the process to sell the land. The Ecuadorian Ministry of Environment is challenging the decision in the Appeals Court. Details here: <https://www.amazon-frontlines.org/chronicles/waorani-appeals-court-hearing/>.
- The United States Supreme Court has deferred consideration in *Carpenter v Murphy*, a case that considers whether the 1866 territorial boundaries of the Muscogee (Creek) Nation in eastern Oklahoma constitute an 'Indian reservation' under United States law.

Oral argument was heard in November 2018, and a supplemental briefing was made in January 2019. The case will now be re-argued after the summer. Patrick Murphy, a member of the Muscogee (Creek) Nation, was convicted of murder by an Oklahoma state court in 2000 and sentenced to death. Murphy challenges that conviction on the basis that the federal government has exclusive jurisdiction to prosecute murders committed by Indians on Indian Territory. Murphy argues that the murder took place within the boundaries of the Muscogee (Creek) reservation. The Tenth Circuit agreed, finding that the United States Congress never formally disestablished the reservation. If the Tenth Circuit decision is upheld, the federal government will defer to the Muscogee (Creek) Nation's decision not to seek the death penalty. More significantly, it will mean that almost half of Oklahoma will be treated as Indian reservation. Case details here: <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1107.html>. ■

## Recommendations from UN and Treaty Bodies

### Human Rights Committee (HRC)

The Human Rights Committee made recommendations relating to Indigenous peoples' rights in its Concluding Observation on state periodic reports at its 125th session (4–29 March 2019), including with respect to Angola (CCPR/C/AGO/CO/2, paras 13–14 and 49–50).

### Committee on the Elimination of Racial Discrimination (CERD)

The Committee on the Elimination of Racial Discrimination made recommendations relating to Indigenous peoples' rights in its Concluding Observations on state periodic reports at its 98th session (23 April–10 May 2019), including with respect to Zambia (CERD/C/ZMB/CO/17-19, paras 25–6 and 35).

### Committee on Economic, Social and Cultural Rights (CESCR)

The Committee on Economic, Social and Cultural Rights made recommendations relating to Indigenous peoples' rights in its Concluding Observations on state periodic reports at its 65th session (18 February–8 March 2019), including with respect to Cameroon (E/C.12/CMR/CO/4, paras 13, 17, 37, 61 and 63).

### Committee on Migrant Workers (CMW)

The Committee on Migrant Workers made recommendations relating to Indigenous peoples' rights in its

Concluding Observations on state periodic reports at its 30th session (1 April–12 April 2019), including with respect to Guatemala (CMW/C/GTM/CO/2, para 27).

### Committee on the Elimination of Discrimination against Women (CEDAW)

The Committee on the Convention on the Elimination of Discrimination Against Women made recommendations relating to indigenous women's rights in its Concluding Observations on state periodic reports at its 72nd session (18 February–8 March 2019) including with respect to Colombia (CEDAW/C/COL/CO/9, paras 12, 14, 16, 20, 24, 26, 34, 38, 40, 42 and 51–2) and Botswana (CEDAW/C/BWA/CO/4, paras 34 and 43–4); and at its 73rd session (1–19 July 2019) with respect to Côte d'Ivoire (CEDAW/C/CIV/CO/4, para 48) and Guyana (CEDAW/C/GUY/CO/9, paras 15, 22, 28, 32, 37–8 and 43–4).

### Committee on the Rights of Persons with Disabilities (CRPD)

The Committee on the Rights of Persons with Disabilities made recommendations relating to Indigenous peoples' rights in its Concluding Observations on state periodic reports at its 21st session (11 March–5 April 2019), including with respect to Norway (CRPD/C/NOR/CO/1, para 8).

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## Selected Publications & Reports

### Books

- Jeffrey Bachman, *Cultural Genocide: Law, Politics, and Global Manifestations* (Routledge, 2019)
- John Borrows, *Law's Indigenous Ethics* (University of Toronto Press, 2019)
- John Borrows, Larry Chartrand, Oonagh E. Fitzgerald, Risa Schwartz (eds), *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (McGill-Queen's University Press, 2019)
- Karen Drake and Brenda Gunn (eds), *Renewing Relationships: Indigenous Peoples and Canada* (Native Law Centre, 2019)
- Jessika Eichler, *Reconciling Indigenous Peoples' Individual and Collective Rights Participation, Prior Consultation and Self-Determination in Latin America* (Routledge, 2019)
- R. Aída Hernández Castillo, Suzi Hutchings, Brian Noble (eds), *Transcontinental Dialogues: Activist Alliances with Indigenous Peoples of Canada, Mexico, and Australia* (University of Arizona Press, 2019)



## Selected Publications & Reports —continued from page 9

- Rauna Kuokkanen, *Restructuring Relations: Indigenous Self-Determination, Governance, and Gender* (Oxford University Press, 2019)
- Kent McNeil, *Flawed Precedent: The St. Catherine's Case and Aboriginal Title* (University of British Columbia Press, 2019)
- Elizabeth McPherson, *Indigenous Water Rights in Law and Regulation* (Cambridge University Press, 2019)
- Kathryn E. Fort and Adrian T. Smith, 'Indian Child Welfare Act: Annual Case Law Update and Commentary' 7(2) *American Indian Law Journal* 21 (2019)
- Roger Hamilton and Joshua Nichols, 'The Tin Ear of the Court: Ktunaxa Nation and the Foundations of the Duty to Consult' 56(3) *Alberta Law Review* 729 (2019)
- Harry Hobbs and George Williams, 'Treaty-Making in the Australian Federation' 43(1) *Melbourne University Law Review* 178 (2019)

### Articles and chapters

- Daniel Brinks, 'Access to What? Legal Agency and Access to Justice for Indigenous Peoples in Latin America' 55(3) *The Journal of Development Studies* 348 (2019)
- Kristen A Carpenter and Angela Riley, 'Privatizing the Reservation?' 71(4) *Stanford Law Review* (2019)
- Michael Dunford, 'Indigeneity, ethnopolitics, and tain-gyintha: Myanmar and the global Indigenous Peoples' movement' 50(1) *Journal of Southeast Asian Studies* 51 (2019)
- Cathal Doyle, 'The Evolving Duty to Consult and Obtain Free Prior Informed Consent of Indigenous Peoples for Extractive Projects in the United States and Canada' in Isabel Feichtner, Markus Krajewski and Ricarda Roesch (eds), *Human Rights in the Extractive Industries* 169 (Springer, 2019)
- Daniel Dylan, "'We the North" as the Dispossession of Indigenous Identity and a Slogan of Canada's Enduring Legacy' 56(3) *Alberta Law Review* 1 (2019)
- Angelique EagleWoman, 'Envisioning Indigenous Community Courts to Realize Justice in Canada for First Nations' 56(3) *Alberta Law Review* 669 (2019)
- Colton Fehr, 'Infusing Reconciliation into the Sentencing Process' 28(2) *Constitutional Forum* 25 (2019)
- Matthew L. M. Fletcher, 'On Indian Children and the Fifth Amendment' 80 *Montana Law Review* 99 (2019)
- Svein Jentoft, Natasha Stacey, Jackie Sunde and Miguel González, 'The Small-Scale Fisheries of Indigenous Peoples: A Struggle for Secure Tenure Rights' in Ratana Chuenpagdee and Svein Jentoft (eds), *Transdisciplinarity for Small-Scale Fisheries Governance* 263 (Springer 2019)
- Howard Kislowicz and Senwung Luk, 'Recontextualizing Ktunaxa Nation v. British Columbia: Crown Land, History and Indigenous Religious Freedom' 88 *Supreme Court Law Review* 205 (2019)
- Charles Lawson, Edwin Bikundo Kieran Tranter, 'The Perils of Parliamentarism: The World Intellectual Property Organization and Indigenous Peoples' 39(2) *Oxford Journal of Legal Studies* 285 (2019)
- Kent McNeil, '(2018) 'Indigenous and Crown Sovereignty in Canada', in Michael Asch, John Borrows and James Tully, eds, *Resurgence and Reconciliation: Indigenous Settler Relations and Earth Teachings* (University of Toronto Press) 293 (2018).
- Kent McNeil, 'The Louisiana Purchase: Indian and American Sovereignty in the Missouri Watershed' 50(1) *Western Historical Quarterly* 17 (2019).
- Tanya Mitchell, 'A Dilemma at the Heart of Criminal Law: The Summary Jurisdiction, Family Violence, and the Over-Incarceration of Aboriginal and Torres Strait Islander Peoples' 45(2) *University of Western Australia Law Review* 136 (2019)
- Sarah Morales, 'Digging for Rights: How Can International Human Rights Law Better Protect Indigenous Women from Extractive Industries?' 31(1) *Canadian Journal of Women and the Law* 58 (2019)





## Statements and Reports

- UN human rights experts condemn murder of Costa Rican Indigenous leader Sergio Rojas Ortiz (March 26, 2019). Statement available here: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24410&LangID=E>
- United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz provided an *End of Mission Statement* following her visit to Timor Leste (April 16, 2018). The Statement is available here: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24492&LangID=E>
- The Eighteenth Session of the UN Permanent Forum on Indigenous Issues was held between 22 April and 3 May 2019 on the theme 'Traditional Knowledge: Generation, Transmission and Protection'. Report available here: <https://undocs.org/en/E/2019/43>
- UN human rights experts called on the United Nations to establish an independent investigation into human rights violations in the Philippines (June 7, 2019). Statement available here: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24679&LangID=E>
- Algeria: Hunger striker's death in custody alarming, say UN experts (June 18, 2019). Statement available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24707&LangID=E>
- UN human rights experts have urged India to prevent the potential eviction of up to 9 million people, most of whom are forest dwellers and members of scheduled tribes following the 13 February Supreme Court order (July 4, 2019). Statement available here: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24786&LangID=E>
- New members elected to the Permanent Forum on Indigenous Issues (July 8, 2019). Announcement available here: <https://www.un.org/development/desa/indigenouspeoples/news/2019/07/newly-elected-members-to-the-permanent-forum-on-indigenous-issues/>
- 12th Session of the United Nations Expert Mechanism on the Rights of Indigenous Peoples (July 18, 2019). Statement of Ms Victoria Tauli-Corpuz, Special Rapporteur on the Rights of Indigenous Peoples avail-

## Upcoming Events

- *16th Annual Indigenous Law and Policy Center and Tribal In-House Counsel Association Indigenous Law Conference*, Michigan State University College of Law, October 10-11, 2019 (with pre-conference activities on October 9) [https://turtletalk.files.wordpress.com/2019/08/2019\\_agenda\\_080719.pdf](https://turtletalk.files.wordpress.com/2019/08/2019_agenda_080719.pdf)
- *12th Annual Polar Law Symposium*, Institute for Marine and Antarctic Studies, Hobart, Australia, December 1-2 2019 <https://www.conferences.com.au/2019-polarlaw/>
- *Public Law Conference*, University of Ottawa, Canada, 17-19 June 2020 <https://publiclawdroitpublic.ca/public-law-at-uottawa/>
- *National Treaties Summit 2020*, University of Melbourne, Australia, April 16-18, 2020 <https://www.national-treatiessummit.com.au>

able here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24836&LangID=E>

- UN experts urge decade of action to aid survival of indigenous languages (August 9, 2019). Statement available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24873&LangID=E>
- The Expert Mechanism on the Rights of Indigenous Peoples presents its study on Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: Recognition, Reparation and Reconciliation to the Human Rights Council (2 September 2019). A/HRC/EMRIP/2019/3/Rev.1 (Advance Edited Version) available here: <https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/3Rev1.docx>
- The Expert Mechanism on the Rights of Indigenous Peoples presents its study on Indigenous Peoples' Rights in the Context of Borders, Migration and Displacement to the Human Rights Council (18 September 2019) A/HRC/EMRIP/2019/2/Rev.1 (Advance Unedited Version) available here: [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwjM1IjCO\\_nkAhWVheYKHfyNCTEQFjABegQIBxAC&url=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FIpeoples%2FEMRIP%2FA\\_HRC\\_EMRIP\\_2019\\_2\\_Rev.1\\_ADVANCE%2520EDITED%2520VERSION.docx&usg=A\\_OvVaw1BjbPGMKTt5T2I9aNF19e7](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwjM1IjCO_nkAhWVheYKHfyNCTEQFjABegQIBxAC&url=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FIpeoples%2FEMRIP%2FA_HRC_EMRIP_2019_2_Rev.1_ADVANCE%2520EDITED%2520VERSION.docx&usg=A_OvVaw1BjbPGMKTt5T2I9aNF19e7) ■



## Selected Publications & Reports —continued from page 8

- Stephen Munzer, 'Dam(n) Displacement: Compensation, Resettlement, and Indigeneity' 51 *Cornell International Law Journal* 823 (2019)
- William Nikolakis and Ngaio Hotte, 'How Law Shapes Collaborative Forest Governance: A Focus on Indigenous Peoples in Canada and India' (2019) *Society and Natural Resources* (online first)
- M. Alexander Pearl, 'Originalism and Indians' 93 *Tulane Law Review* 269 (2018)
- Malayna Raftopoulos and Damien Short, 'Implementing free prior and informed consent: the United Nations Declaration on the Rights of Indigenous Peoples (2007), the challenges of REDD+ and the case for the precautionary principle' 23(1-2) *International Journal of Human Rights* 87 (2019)
- Antony Scott Taubman, 'New Dialogues, New Pathways: Reframing the Debate on Intellectual Property and Traditional Knowledge' 58(2) *Washburn Law Journal* 373 (2019)
- Shlomit Stein, 'Reflections on Indigenous Peoples' Rights Vis-à-vis the Law of Occupation' (2019) 23(1-2) *International Journal of Human Rights* 297
- Bethany Sullivan and Jennifer Turner, 'Enough is Enough: Ten Years of *Carcieri v. Salazar*' 40 *Public Land and Resources Law Review* 1 (2019)
- Edward Willis, 'The Treaty of Waitangi: Narrative, Tension, Constitutional Reform' 3 *New Zealand Law Review* 185 (2019)
- Rani Yan Yan and Raja Devasish Roy, 'Personal Laws of the Indigenous Peoples of the Chittagong Hill Tracts, Bangladesh: A Gender Perspective' in Faustina Pereira, Shahnaz Huda and Sara Hossain (eds), *Revisiting Personal Laws in Bangladesh* (Brill, 2019) ■

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