

Native Title – A Constitutional Shift?

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Introduction

The recognition of indigenous customary title to land and waters in Australia has been a part of Australia's constitutional history, constitutional in the 'C' and 'c' senses. That is not surprising for it has involved fundamental questions about the basis upon which Australia was colonised in the 18th century, the relationship between the law of the colonies, the common law of England, the provisions of the written Constitution that came into existence in 1901 and the law and custom of the indigenous inhabitants. The constitutional story is also part of a story of Australia's emergence as a nation state in a global community of nations which has become in some respects a global society. That larger story of Australia's emergence as a nation state was one on which the late George Winterton wrote with authority and clarity. In this chapter, I offer an overview of major developments leading to the recognition of indigenous land rights in Australia.

Pre-history

The colonisation of inhabited territories has given rise over many generations to acute social, economic and legal questions which persist to the present day. Some of those legal questions, relevant to customary title

* This chapter reproduces in part elements of previous papers given by the same author including: R French, 'The Constitution and the People' in R French, G Lindell and C Saunders (eds), *Reflections on the Australian Constitution* (Sydney: Federation Press, 2003), pp 68-85; R French, 'The Role of the High Court in the Recognition of Native Title' (2002) 30 *University of Western Australia Law Review* 129; R French and P Lane, 'The Common Law of Native Title in Australia' (2002) 2 *Oxford University Law Journal* 15; R French, 'A Moment of Change – Personal Reflections on the National Native Title Tribunal 1994-98' (2003) 27 *Melbourne University Law Review* 488; R French, 'The Race Power – A Constitutional Chimera' in HP Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Melbourne: CUP, 2003), pp 180-212; R French, 'Rolling a Rock Uphill? – Native Title and the Myth of Sisyphus', *Judicial Conference of Australian National Colloquium*, October 2008.

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