

Dancing with Strangers: Native Title and Australian Understandings of Race Discrimination

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Introduction

This chapter considers the interplay between principles and laws relating to racial discrimination and the recognition and development of native title in case law and legislation. It asks how principles of non-discrimination and equality influenced the recognition of native title, including its extinguishment; how native title and laws that sought to override it were understood for the purposes of the *Racial Discrimination Act 1975 (Cth) (RDA)*; and how discrimination and ‘special measures’ featured in the legislative recognition of native title under the *Native Title Act 1993 (Cth) (NTA)* and its amendment following the Howard government’s ‘Ten Point Plan’. In examining these issues, I also offer some thoughts on what the interaction between these principles might tell us about Australian understandings of racial equality and non-discrimination.

Inga Clendinnen’s book *Dancing with Strangers* tells a history of early contact between the Eora people of what we now call Sydney and those on the First Fleet.¹ The title of the book comes from the stories of dancing and singing between the two groups who otherwise struggled to communicate and were separated by what Clendinnen refers to as a ‘cultural chasm’. I have borrowed the title for this chapter, as the image has struck me as a metaphor for the way in which Indigenous rights, particularly native title rights, have interacted with concepts of racial discrimination and equality. While there has certainly been dancing, there has also been miscomprehension.

Defining ‘Equality’ and ‘Non-discrimination’

As a working definition of ‘equality’ in the context of racial discrimination, I refer in general terms to equal treatment without distinction based on ‘race’.² However, it is

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1 Inga Clendinnen, *Dancing with Strangers: Europeans and Australians at First Contact* (Cambridge University Press, 2005).

2 ‘Race’ is itself a contentious term, but I use it here as a shorthand for the compendious terminology used in the law: for example, the *RDA* itself applies to ‘race, colour or national or ethnic origin’.

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