ALTA 2005
The University of Waikato

Abstracts from the Indigenous Peoples and the Law Interest Group

One Law for All? The Foreshore and Seabed Act! Need I say more?

Craig Coxhead
Senior Lecturer, Law School, The University of Waikato

Abstract
The Foreshore and Seabed Act (Act) has not been forgotten. Since the enactment of the Foreshore and Seabed Bill we have seen the United Nations Committee on the Elimination of Racial Discrimination's decision that the Foreshore and Seabed Act discriminates against Maori and the first coastal claim under the Act. The Act continues to attract much attention. This presentation will look at the specific aspects of the Act which illustrate how one law is being applied with different results for different peoples.
The first example is where the Act places ownership of the foreshore and seabed in the Crown and in doing so removes the common law rights of the Tangata Whenua, of Maori. Maori rights to the foreshore and seabed as recognised in both tikanga (custom) and Te Tiriti of Waitangi/Treaty of Waitangi have been extinguished. A further example if when the Act's specific reference to "public seabed and foreshore" which excludes areas that are already privately owned. The Act therefore takes away the rights of Maori, while protecting the property rights of owners of private title, who in the main are non-Maori.

Postcolonial or Post solo-mother: Are there any parallels?

Harata Paterson
Lecturer, Law School, The University of Waikato

Abstract
This paper examines the evolving identity constructions of indigenous women dependent on state-funded assistance who attempt to alter their life paths. How do these women simultaneously resist negative constructions of themselves and attempt to forge new ways of being, while navigating the margins? This paper draws on my personal experiences as a Maori solo mother and former recipient of the Domestic Purposes Benefit and, in my latest incarnation, as a fledgling law lecturer to explore my journey from the margins to the centre or my evolution from being an outsider to becoming an insider. The paper will draw parallels between my journey from the margins and the story of Britain's colonisation of New Zealand.

Special Cultural Laws for Indigenous Peoples or "One Law for All?"
James Macdonald

Abstract
My proposed paper is a response to several papers presented last July at the ALTA Conference in Darwin. The papers proposed incorporation of certain indigenous group customs into the national legal systems of several Australasian countries. My paper will caution restraint with respect to such proposals, focusing, for example, on the problematic customary treatment of females in a number of indigenous societies. I will instead recommend "One Law for All" and an approach analogous to the regime of Equal Protection of the law under the 14th Amendment to the U.S. Constitution. If an indigenous custom is in fact a better way of taking care of a particular problem, then my argument will be that the customary approach should be available to all citizens, not just those with a particular indigenous identity.

Unresolved Legal Issues Pertaining to the Native Residential School
Julie Cassidy
Associate Professor, School of Law, Deakin University

Abstract
“The research paper considers the legal issues arising from the Canadian Native Residential Schools and the Australian ‘stolen generation’. The paper compares and contrasts the approaches taken by the respective courts and governments in these Nations to the various causes of actions stemming from such. Building on this, the paper will focus on the legal issues that are yet to be considered by the courts including breaches of domestic and international treaties, liability for loss of culture and language intergenerational claims.”

Waimaori - Freshwater
Linda Te Aho
Senior Lecturer, Law School, The University of Waikato

Abstract
This presentation examines the New Zealand Government’s recent proposals regarding freshwater from an indigenous perspective. There is no doubt that the problems of declining water quality and over-abstraction are major problems to be addressed. As our nation moves forward to seek solutions to these problems, the New Zealand Government must work in partnership with Maori. Any water programme of action must see water as something to be treasured in the context of our Treaty and this worldview benefits all - not just the indigenous Maori.
Yet, the indigenous Maori, particularly in the context of Resource Management legislation are often perceived as ‘anti-development’, or as problematic. We perceive our role as caregivers of the environment, including our rivers, streams and all sacred sites as affirmed in a Treaty entered into between the British Crown and Maori, at the time of British settlement in the 1840s. The Resource Management legislation sets us apart as

world leaders in this area, however, the application of this Act has been unacceptable from a Maori, perspective.

Tikanga Maori (Maori Law) and the NZ Judicial Approach to Interpretation

Marie Were
Senior Tutor, Law School, The University of Waikato

Abstract
This paper examines the NZ judicial approach to interpretation of tikanga Maori (Maori Law). Tikanga is found, amongst other things, in waiata, haka, oral recitations, cultural artistry - carvings, and weaving and oral tradition. Traditional Maori society derived and followed their tikanga from these sources as well. Today, with the incorporation of Maori terms into Pakeha law, a pattern is emerging that indicates that the customary norms of tikanga is being assimilated into Pakeha legal norms – posing the question of "where is our tikanga Maori?"

Waiata Maori as a legal Text book

Matiu Dickson
Senior Lecturer, Law School, The University of Waikato

Abstract
Waiata tawhito or traditional waiata of the Maori were the some of the text books of Maori Law. The waiata "Takiri ko te Ata" is from the hapu of NgatiHangarau in Tauranga. It is the hapu of my great grandmother Tangiwai WiParata. The waiata was composed by our tupuna Turupa for her husband Kereti who was killed in the land wars at Te Ranga in the 1860s. It was sung by the hapu in 2000 at the hearing of their claims before the Waitangi Tribunal. I will discuss the images and issues raised in the waiata and the how it was sung. I will also refer to its importance as tribal history and law."

One Heritage Law to Fit Them All? - Examining the new national heritage legislation in Australia

Mietta Olsen

Abstract
Heritage legislation within Australia has long struggled to recognise that indigenous peoples have unique ways of viewing the world which link directly to concepts of heritage and its protection. After lengthy consultation and various revisions, new national heritage legislation came into force in February 2004. The legislation relies on the premise that it attempts to encompass that viewing within the scope of heritage law and protection. Specifically, the Environment and Heritage Legislation Amendment Act 2003 (Cth), and the Australian Heritage Council Act 2003 (Cth) now contain broader notions of what constitutes heritage value and significance, demonstrating a move beyond previous definitions, where 'heritage' primarily existed as tangible objects and material, or 'built', places. This paper will argue, however, that focusing on the integration of

broader notions of value and significance has meant that the ways in which heritage legislation sets up a 'correct' structure to be followed – and thus orders, codifies and attempts to control forms of knowledge – has been overlooked.
This paper will examine how, via an emphasis on 'proving' authenticity of knowledge prior to accepting places within the national heritage paradigm, the new national heritage legislation within Australia has not abandoned altogether the language of imperialism and colonialism.

Life in a lucky country! - A fair go for everyone ...so who stole our Wages!
Phillip Falk
Lecturer, Griffith Law School, Griffith University

Abstract
This discussion shall give my views of judicial reasoning (and other systemic anomalies) as observed and/or experienced in the recent Australian Federal court case of Baird and ors v the State of Queensland (Feb 2005) (unreported as yet). As a member of the eight litigant's legal team, I shall discuss (from my own perspective) the numerous issues raised during proceedings and the ongoing failure of the courts to make adequate allowances for 'otherness' (and/or cultural diversity) within its judicial framework. In doing so, I shall trace the socio-legal history and the historical remnants of colonial law in Australia as they relate to the issue of 'un-equal payment of wages' to Indigenous Australians, specifically between the years of 1975 and 1986. I shall also discuss the Aboriginal Welfare Fund and the indentured and contracting out of Indigenous labour (slavery) as a form of economic resource for the Queensland government.
This case raises questions of racial discrimination in the payment of 'under-award wages' to Aboriginal people living on 'church' managed and controlled missions/reserves in far north Queensland between the years 1975 and 1986. Topics covered will include: evidential hurdles and burdens; the foreign environment experienced; communication and physical presentation issues; entrenched racial norms; and judicial bias.

White Judge, Black Law: the interpretation of Indigenous law in Native Title Litigation
Sky Mykyta
Associate Lecturer, School of Law, Deakin University

Abstract
Native title in Australia requires that rights and interests be proved to exist in accordance with the traditional laws and customs of claimants. Increasingly this requires non-Indigenous judges to interpret Indigenous law. This paper will look at the consequences of requiring judges to interpret unfamiliar law, including the consequences for Indigenous people of scrutiny of their law by outsiders. Is the current system workable or culturally appropriate? Is it leading Australia towards a legally pluralist society or simply subjecting Indigenous people to greater burdens with minimal reward?
Perhaps there are other solutions.