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# First Nations Heritage: Land Rights, Cultural Integrity and Succession Law

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Chapter 23

# First Nations Heritage: Land Rights, Cultural Integrity and Succession Law

*Prue Vines*

## I Introduction

For my title I have drawn on Sir Anthony Mason's article entitled 'First Nations Heritage: Land Rights and Cultural Integrity'[1] because I want to argue that part of Sir Anthony's influence on succession law includes the shift created by *Mabo v Queensland (No 2)* ('*Mabo*')[2] which recognised First Nations or Indigenous customary law in a way that the common law had refused to do before. Sir Anthony went on to keep arguing about the importance of customary law in articles like that one.[3] This is a theme I have picked up in my work in succession law and it is now possible to say that Indigenous customary law has a place in the common law of succession in at least some parts of Australia. This can indeed be traced back to *Mabo*.

In this chapter I address the issues created by the failure to properly address the needs of Indigenous Australians in respect of succession law since the common law arrived on our shores. We all know well the failings of the common law in its inability to recognise the sophistication of the First Nations civilisations it encountered. The fact that the land was argued to be 'terra nullius' relied on assumptions about what civilisation, law and government looked like – assumptions that were useful to the colonists and detrimental to the first inhabitants. The inability and self-interested unwillingness to recognise the inhabitants as people worthy of respect led to massacres, wholesale dispossession and wrongs that continue to reverberate today. However, in a few cases, and then *Mabo*, there developed a gradual recognition that 'terra nullius was false and that the assumptions it was based on were problematic. These developments have been discussed elsewhere, but in this chapter I want to draw on the fact that *Mabo* made it possible to talk coherently about customary law in ways beyond native title.

1 (1997) 2(3) *Art Antiquity and Law* 293.
2 (1992) 175 CLR 1.
3 Eg, 'Preface' in M Langton et al, *Honour Among Nations – Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004); 'Ethical Dilemmas for Charities: Museums and the Conscionable Disposal of Art' (2003) 8 *Art Antiquity and Law* 1, 2–5.



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## II Sir Anthony and Succession Law

As Sir Anthony said, *Mabo* 'is a limited victory only for Aboriginal people'[4] because native title is so easily extinguished by early inconsistent land grants and legislation manifesting intention to extinguish native title. However, the fact that native title to land could only be established by showing continuing connection with their lands and adherence to customs relating to that land meant that, for the first time in Australian law, there was some wholesale recognition of the existence of customary law as law.[5] This little thread allowed for further development of recognition of customary law and, in the case of succession law, legislation to protect rights under it.

Sir Anthony was involved in some judgments in our general succession law. These include *Easterbrook v Young* ('*Easterbrook*'),[6] *Official Receiver in Bankruptcy v Schultz* ('*Schultz*')[7] and *Bone v Commissioner of Stamp Duties (NSW)* ('*Bone*').[8] He was also involved in a number of cases which had impact on succession law. These included *Baumgartner v Baumgartner*;[9] and, on the duties owed by solicitors and will drafters in negligence, *Hawkins v Clayton Utz.*[10]

*Easterbrook* was a joint judgment of Barwick CJ, Mason and Murphy JJ which held that in family provision (then the *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW)), an application could be made to extend the time under s 5(2A) to claim in circumstances where the assets had been distributed but some were still being held as trustee by the legal personal representative ('LPR'). The question was whether assets are still in the estate so that provision may be made 'out of the estate' (s 3(1) and (1A)) after administration has been completed where some property may still be in the hands of the LPR as trustee. The Court held, as a matter of construction of the Act, that only a final or complete distribution would prevent the possibility of an extension,[11] although distribution that has already been made should not be disturbed.[12] *Schultz*[13] clarified the rights of a discharged bankrupt in unadministered estate – that is, the right to due administration, and how those rights could be affected by court orders.

In *Bone*, the testatrix had appointed her children as executors, and shortly before her death had made a loan to each in similar terms.[14] The terms of the loan included that the debt should be paid in full upon the lender giving notice. No such notice was ever given and the children had each paid one annual instalment before the testatrix died. The Commissioner of Stamp duties claimed that the loan amount should be part of the dutiable estate. The children argued that their appointment as executors had

4 Mason, above n 1, 296.
5 *Native Title Act 1993* (Cth); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
6 (1977) 136 CLR 308.
7 (1990) 170 CLR 306.
8 (1974) 132 CLR 38.
9 (1987) 164 CLR 137.
10 (1988) 164 CLR 539.
11 Ibid 318.
12 Ibid 316.
13 (1990) 170 CLR 306.
14 *Bone* (1974) 132 CLR 38, 50–1 (Mason J) for the facts.



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extinguished the debt by the common law rule of construction and the fact that clauses 4, 5 and 6 of the will forgave the debts.

Stephen and Mason JJ gave separate majority judgments (with which Barwick CJ, McTiernan and Menzies JJ agreed), both of which held that clauses 4, 5 and 6 released the debt and that therefore the appellants should succeed. They rejected the appellants' argument based on executorship for slightly different reasons from each other. They both noted that the rule that appointment of an executor extinguishes a chose in action for recovery of a debt the executor owes to the deceased was subject to an equitable rule that the executor is still treated as holding those assets for the estate if due administration requires it.[15] Stephen J held that because in New South Wales the executor's right does not vest at the moment of death but merely relates back to it (under *Wills Probate and Administration Act 1898* (NSW) s 44), the chose in action continues to exist until the grant of probate.[16] Mason J noted the difference between executorship and letters of administration in this respect in that an executor could not maintain an action against himself because the executorship arose as a voluntary action by the testator, but an administrator was not so appointed and therefore the debt was not extinguished for an administrator at common law.[17] One of Sir Anthony's characteristics here comes into play – he considers the true basis of the rule:

> [I]ts true basis lay in the significance attributed to a voluntary act on the part of the testator, the person entitled to bring the action. Once this is recognized, the true character of the rule is perceived. It reflected the presumed intention of the party having the right to bring the action and was not absolute in its operation.[18]

This ability to go beyond the form of the law and deeper into its meaning and purpose is characteristic of Sir Anthony and is why his judgments are so incisive and influential. He went on to conclude that the release in equity when it takes effect on death, destroys the debt, so that it does not vest in the executor and therefore there was nothing to attract s 102(1) of the *Stamp Duties Act 1920* (NSW), which applied to property of the testatrix 'to which anyone becomes entitled under the will'.

Despite his participation in cases such as these, Sir Anthony is not usually thought of as a stalwart of succession law. He is thought of as a stalwart of equity, which makes up a great deal of succession law. In discussions with me he would say he did not know much about succession law, but this was just modesty, or perhaps an indication of how very much he knew about other areas. In my view these technical cases about executorship, stamp duty and so on are nowhere near as important for the development of succession law as is *Mabo.*

As Chief Justice when *Mabo* was decided Sir Anthony had major responsibility in not only deciding the case but in presenting it to the world. I regard his contribution to *Mabo* as a significant part of his leadership in what is now known as the 'Mason Court', and the changes *Mabo* made to native title have consequences for the law of succession for Indigenous people in Australia that were not immediately recognised. It is also true that as a consequence of his continuing recognition of the problems created for First

15 Ibid 44–5 (Stephen J), 52–3 (Mason J).
16 Ibid 46 (Stephen J).
17 Ibid 53 (Mason J).
18 Ibid 53.



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Nations people by the common law,[19] Sir Anthony was deeply interested in the impact of the common law of succession on Indigenous people in Australia, so it is reasonable to discuss this in a collection honouring his influence on the law.

## III What *Mabo* Said About Customary Law

In *Mabo,* Mason CJ and McHugh J gave a short judgment agreeing with the reasons of Brennan J. Mason CJ and McHugh J said that 'the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland'.[20] In his judgment, Brennan J observed that:

> Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of the clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence … However, when the tide of history has washed away any real acknowledgement of traditional land and any real observance of traditional customs, the foundation of native title has disappeared.[21]

Brennan J's judgment implicitly recognised Aboriginal customary law as law where he refers to 'acknowledge[ing] the laws'. Brennan J's judgment was the narrowest view of the law within the majority. Although Toohey, Deane and Gaudron JJ could be argued to have taken broader views of native title, they did not take a view of the customary law that is any more developed than that discussed by Brennan J. Because his judgment was about land, there is a great deal of emphasis on connection to the land. For example:

> The incidents of a particular native title relating to inheritance … the transfer of rights and interests in land, the grouping of persons to possess rights and interests in land are matters to be determined by the laws and customs of the indigenous inhabitants, provided those laws and customs are not so repugnant to natural justice, equity and good conscience that judicial sanctions under the new regime must be withheld.[22]

The reference to inheritance is important in this context. Again, the emphasis is on the fact that there are laws and customs in existence which can be drawn on to determine that inheritance and the incidents of native title. What is important to me here is that the Court is recognising the existence of customary law as law which is binding on the inhabitants of Australia. This is a profoundly important moment in the development of recognition of customary law, despite the fact that at this stage it was limited to land.

19 Including his recognition of concerns about repatriation of Indigenous remains: eg, above n 3, 'Ethical Dilemmas', 2–5. The treatment of dead bodies is a major concern of First Nations people in Australia, both immediately after death (when it may be an issue treated in the general law of succession, with focus on executors) and in the very long term. See P Vines, 'Resting in Peace: A Comparison of the Legal Control of Bodily Remains in Cemeteries and Aboriginal Burial Grounds in Australia' (1998) 20(1) *Sydney Law Review* 78; P Vines 'Consequences of Intestacy for Indigenous People in Australia: The Passing of Property and Burial Rights' (2004) 8(4) *Australian Indigenous Law Reporter* 1.

20 *Mabo* (1992) 175 CLR 1, 15.

21 Ibid 59–60.

22 Ibid 61.



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*Mabo* did not create a situation where all customary law was recognised by any means, but it opened the door more than a crack. The frequent remark that *Mabo* was of only limited assistance with land rights is true, but there were two problems in *Mabo* – first, whether Indigenous people could be regarded as owning land in Australia, and second, whether customary law could be recognised as law which determined land ownership. The fact that *Mabo* recognised customary law as law in relation to land opened up the door for recognising customary law as law for other purposes as well.

## IV Aboriginal Customary Law as Law

Aboriginal customary law was not regarded as law well into the 20th century. It was mostly studied by anthropologists and ignored by the legal system. There was a strong tendency to see customary law as religion and therefore not something the law could recognise. Occasional piecemeal recognition such as of customary law marriage occurred when convenient. If customary law was considered as law, it was more likely to be regarded as 'primitive' law and therefore as not suitable for purpose. Maddock, in 1984, observed:

> Whether anything in the broad Aboriginal concept is seen as answering to a lawyer's idea of law will depend on the lawyer. For instance, Geoffrey Sawer identifies, as legally significant features of modern society, a legislature to make laws, courts to decide disputes, court officers and police to compel compliance and a legal profession to advise clients and assist courts. This is a degree of specialisation foreign to Aboriginal society. Moreover the insistence on man-made law would seem queer indeed to those who live by *julubidi* or *djugaruru*.
>
> Sawer thinks that important changes in social organisation result from the rise of these features … Therefore a specialised name is needed for them. It may be law in contrast to non-law, for example, or modern in contrast to primitive law. Sawer argues that this need was felt even by AL Goodhart, who took a wide view of law as 'any rule of human conduct which is regarded as obligatory'.[23]

Goodhart's definition is a good one, probably even more useful now than at the time Maddock was writing. What is clear about customary law in Australia is that in the communities it is regarded as binding or obligatory, even though it is not enforced by a court system or police force. Elizabeth Eggleston's work was some of the earliest which recognised 'binding norms' in Aboriginal societies in a way which moved towards recognising these as law which could be recognised by the common law.[24] Maddock ends his chapter by saying:

> [B]ut even if nothing emerges that we would want to call a system of Aboriginal law, pieces of the old, recast and reorganised in various ways, will remain. Australian law has ensured this by granting land to people traditionally entitled to it. The extensive powers they enjoy over its use because of their traditional relationships to it make it unimaginable that this branch of the law will fall. And, because relationships

23 K Maddock 'Aboriginal Customary Law' in P Hanks and B Keon-Cohen (eds), *Aborigines and the Law* (Allen & Unwin, Sydney, 1984), 213.

24 E Eggleston, *Fear, Favour or Affection* (Australian National University Press, 1976).



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> between people and land grow together with relationships among people, one may expect still more of the law to live.[25]

The Australian Law Reform Commission considered recognition of Aboriginal customary law in 1986.[26] The Commission noted that 'there are many indications that Aboriginal customary laws and traditions continue as a real controlling force in the lives of many Aborigines'.[27] Recognition of Aboriginal customary law as law was problematic because it created uncertainty in the common law but the Commission recommended that customary law should be recognised, subject to human rights, and within the background and general framework of the common law. In particular, they suggested that '[s]pecific, particular forms of recognition are to be preferred to general ones'.[28]

No doubt this recognition that Aboriginal customary law continued to apply to Aboriginal people and should be recognised by Australian law affected and was drawn on by the Court in *Mabo*. This was an example of a specific and particular form of recognition, which did not require the Court to make a decision which went beyond the particular issue, which here was native title. However, *Mabo* had a significant impact on the recognition of Aboriginal customary law precisely because it was the first major recognition of an area of customary law which could stand against the common law and apply despite the fact of colonial occupancy. Although *Mabo* only concerned land, its wholesale and comprehensive recognition of the fact that the existence of native title must be decided by the customary law was a major change to the level of recognition of customary law and gave momentum to later developments.

The next look at the need for recognition of Aboriginal customary law was the short report by the Northern Territory Law Reform Committee in 2003,[29] which concluded that Aboriginal customary law should be recognised as a source of law in the Northern Territory Constitution and noted that it was already recognised as a source in the *Aboriginal Land Rights Act 1976* (NT).

Then the Western Australia Law Reform Commission reported on the same subject in 2006.[30] The report, its discussion papers and background papers are a substantial resource on customary law in Western Australia. By the time the report was handed down, a more sophisticated appreciation of the nuances of the use of customary law by Indigenous populations as well as a more sophisticated consideration of the meaning of customary law as law had developed. The Commission concluded: 'The term "customary law" cannot be (and on some arguments should not be) precisely or legalistically defined. Instead the Commission favoured an understanding of the term that encompassed the holistic nature of Aboriginal Customary law.'[31]

They further noted that 'the issue of what constitutes Aboriginal customary law should be left to Aboriginal people themselves', and:

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25 Maddock, above n 23, 237.
26 Australian Law Reform Commission, *Recognition of Aboriginal Customary Law* (Report No 31, 12 June 1986).
27 Ibid [37].
28 Ibid [1005].
29 Northern Territory Law Reform Commission, *Aboriginal Customary Law* (Report No 28, 2003).
30 Western Australia Law Reform Commission, *Recognition of Aboriginal Customary Law* (Final Report No 94, September 2006).
31 Ibid 64–5.



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> The fact that many Aboriginal Customary Laws have developed and changed over time is noted throughout the Commission's Discussion Paper. It is the Commission's firm view that evolution – both in the substance of these laws and in their practice – is inevitable … With Aboriginal law change is unavoidable, both as a result of its oral tradition and the reality of over 200 years of colonial occupation.[32]

## V The Use of Customary Law in Succession in Australian Jurisdictions

Except for native title, the civil law needs of Indigenous people in Australia have been largely ignored until recently. The major focus has been on criminal law. Colin Tatz wrote in 1984 that civil law was completely overshadowed by criminal law in relation to Aboriginal people.[33] He noted that when Aboriginal people were wards of the state not one single action was brought on their behalf for lost wages and rations between 1954 and 1964. He could discover only one rare example of civil law in the form of an equity suit in which the Pitjantajatjara Council obtained an injunction to prevent the distribution of a book which they argued would reveal their secrets.[34] My own research into the succession law needs of Indigenous people in Australia only commenced in the 1990s, and since then a small number of surveys about the general civil law needs of Indigenous people have been carried out.[35]

In Australia, the civil law creates three difficulties for Indigenous people, in particular in the area of inheritance: (a) if they apply their own customary law this is not recognised by the common law or society at large and therefore may easily be disrupted; (b) the common law rules are not applied to them because civil law is based on two parties bringing a case to court; if resources are lacking this does not happen and therefore ad hoc solutions are used; (c) the common law rules which are applied to Indigenous people (for example, by government departments) tend to be applied in a way which brings disadvantage. The third problem has loomed large in relation to intestacy.

In intestacy, where there is no will, the common law applies a standard view of what the deceased would have wanted to happen to his or her property. The assumption is that it should go to family. However, who is regarded as part of the family can be very different in an Indigenous group from the common law assumptions about relationships. Each state in Australia has legislation which applies their assumptions about

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32 Ibid 65.

33 'Aborigines in Civil Law' in P Hanks and B Keon-Cohen, *Aborigines and the Law* (Allen & Unwin, 1984), 103. More recent discussions include P Ali et al, 'Consumer Leases and the indigenous Consumer' (2017) 20 *Australian Indigenous Law Review* 154.

34 *Foster v Mountford* (1976) 29 FLR 233.

35 F Allison, C Cunneen, M Schwartz, 'The Civil and Family Law Needs of Indigenous people 40 years after Sackville: findings of the Indigenous Legal Needs Project' in B Edgeworth, A Durbach and V Sentas (eds), *Law and Poverty in Australia: 40 years after the Poverty Commission* (Federation Press, 2017), 231–48; C Cunneen, F Allison, and M Schwartz, *The Civil and Family Law Needs of Indigenous People in Queensland* (The Cairns Institute, 2014); C Cunneen and M Schwartz, 'Civil and Family Law Needs of Indigenous People in New South Wales: The Priority Areas' (2009) 32(3) *University of New South Wales Law Journal* 725.



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family to inheritance.[36] This means that mainstream intestacy laws may be profoundly inappropriate.[37] Western kinship traditions as exemplified in the common law emphasise bloodlines, even to the extent of distinguishing between half blood and whole blood relatives. Adoption is complex and requires formal documents. Primogeniture of some kind is common, although now modified. The nuclear family – mother, father and children – are emphasised; collateral relatives are de-emphasised. By contrast, Indigenous Australian nations have kinship patterns which are not only different from the common law, but different from each other. Some common patterns[38] include less emphasis on blood and easier recognition of adoption; a view of time which is more circular than linear, meaning relationships may be repeated across different generations; and less emphasis on the nuclear family.[39]

This creates a significant problem for Indigenous people to whom the common law intestacy legislation applies. Recognition of this has finally led to provision for customary law being used in intestacy in the Northern Territory, New South Wales, and Tasmania.[40] This has been a major breakthrough. A similar problem exists when wills are made because the interpretation of relationships in wills is governed by the common law which assumes a western system of kinship. Drafting wills to prevent this problem is something that solicitors are only now beginning to learn how to do.[41]

## VI The Move to Recognition of Customary Law in Australian Inheritance Laws

I said earlier that some recognition of customary law existed in piecemeal fashion, including, for example, recognition of customary law marriage.

The 1970s and 1980s saw Queensland and Western Australia pass laws which ostensibly recognised customary law when an Indigenous person died intestate. However, they fell significantly short of doing so. The *Community Services (Aborigines) Act 1984*

36 *Administration and Probate Act 1929* (ACT); *Succession Act 2006* (NSW) Pt 4; *Administration and Probate Act* (NT); *Succession Act 1981* (Qld); *Administration and Probate Act 1919* (SA); *Intestacy Act 2010* (Tas) Pt 4; *Administration and Probate Act 1958* (Vic); *Administration Act 1903* (WA).

37 P Vines 'When Cultures Clash: Aborigines and Inheritance in Australia' in G Miller (ed), *Frontiers of Family Law* (Ashgate, 2008); P Vines, 'The NSW Project on the Inheritance Needs of Aboriginal People: Solving the Problem by Making Culturally Appropriate Wills' (2013) 16(2) *Australian Indigenous Law Review* 18; P Vines, above n 19, Consequences of Intestacy'; P Vines, 'Wills as Shields and Spears: The Failure of Intestacy Law and the Need for Wills for Customary Law Purposes in Australia' (2001) 5(13) *Indigenous Law Bulletin* 16.

38 I Keen, 'Kinship' in RM Berndt and R Tonkinson (eds), *Social Anthropology and Australian Aboriginal Studies* (Aboriginal Studies Press, 1988); D Bell, *Ngarrindjeri Wurruwarrin: A World That Is, That Was and That Will Be* (Spinifex Press, 1998).

39 In 2019 I was contacted by the Commonwealth Treasury Department and asked to discuss with them how superannuation legislation should be altered to accommodate Indigenous kinship ideas. This is a big step forward.

40 *Succession Act 2006* (NSW) Pt 4.4; *Intestacy Act 2010* (Tas); *Administration and Probate Act 1969* (NT) Div 4A.

41 See P Vines, *Aboriginal Wills Handbook: A Practical Guide to Making Culturally Appropriate Wills for Aboriginal People* (NSW Trustee & Guardian, 3rd ed, 2019); P Vines, 'Drafting Wills for Indigenous People: Pitfalls and Considerations' (2007) 6(25) *Indigenous Law Bulletin* 6.



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(Qld) and its counterpart the *Community Services (Torres Strait Islanders) Act 1984* (Qld) gave power to the Under-Secretary of the Department of Community Services to decide who would inherit from an intestate Indigenous person. If they could not identify a successor, the money was put into general departmental funds for Indigenous people. This mirrored the earlier legislation, the *Aborigines Act 1971* (Qld). The decision of the Under-Secretary was final. There was no requirement to use customary law. This legislation has now been repealed as it clearly did not respect or use customary law as it purported to do.

Section 35 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) applied to the property of any Aboriginal person who died intestate, so long as they were more than a quarter of the full blood and had not been married under the *Marriage Act 1961* (Cth). The property would vest in the Public Trustee who was to pay debts and distribute to persons under the 'usual' intestacy laws. 'Usual' here referred to the common law legislation which was clearly based on western kinship patterns. If that was not possible, the Public Trustee was supposed to consider applying customary law. The legislation contemplated regulations being made about customary law, but in fact the regulations merely recognised a 'traditional' marriage and legitimated the children of that marriage. In all other respects, the regulations simply applied the traditional common law intestacy pattern. To exacerbate the problem of lack of recognition of reality, if a person had been married under the *Marriage Act*, they would not be regarded as Aboriginal. This latter was based on the assumption that if a person was married under the *Marriage Act* they did not live a traditional life. In fact this was a massively wrong assumption because the one thing many traditional Indigenous people did, especially when they were living on missions on reserves in otherwise traditional lifestyles, was to get married under the *Marriage Act.* This was because so many reserves were administered by missionaries who were ministers of religion and who had the authority to perform marriages under the *Marriage Act* and its earlier equivalent. The stigma of illegitimacy was very great and so they encouraged Indigenous inhabitants to be married by them.

There was strong criticism of the Western Australian legislation and its regulations and the legislation was repealed by a bill passed in 2012 and given Royal Assent, but not proclaimed until 6 August 2013.[42] The repealing Act did not replace the legislation with anything allowing the use of customary law. As of July 2021, the *Aboriginal Affairs Planning Authority Act 1972* (WA) is missing ss 34 to 38.

The Northern Territory was the other jurisdiction to recognise Indigenous customary law in intestacy matters, the jurisdiction with the greatest proportion of Indigenous people in its population (30.3 per cent in 2016).[43] The Northern Territory legislation took the approach of asking for a distribution scheme to be submitted to the Court by persons who might be customary law beneficiaries.[44] Unfortunately, the legislation only applied to Indigenous persons if they had not been married under the *Marriage Act*, thus excluding many otherwise eligible Indigenous people, as in Western Australia. It has been rarely used.

42 *Aboriginal Affairs Planning Authority Amendment Act 2012* (WA).

43 Australian Bureau of Statistics, *Regional Population Growth, Australia, 2016* (Catalogue No 3218.0, 28 July 2017).

44 *Administration and Probate Act 1969* (NT) Div 4A.



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Of course, the major recognition of customary law in inheritance that existed before the Status of Children Acts[45] abolished the status of illegitimacy, was the recognition of traditional marriage. But as we saw above, in some situations this had the opposite effect to the one intended.

When the Uniform Succession Laws project came to intestacy, enough work had been done to show it was inappropriate to simply apply the general intestacy law to Australian Indigenous people. The New South Wales Law Reform Commission recommended[46] that the Northern Territory provision without the *Marriage Act* requirement be incorporated into the law. This would allow customary law to be considered in dealing with the death of an intestate Indigenous person. This gave rise to Part 4.4 of the *Succession Act 2006* (NSW) and its equivalent in Tasmania. Unfortunately, other States have not yet adopted this provision.

The problems created by the failure to be able to take customary law rules, including rules of kinship, into account in intestacy are illustrated in the Queensland case of *Eatts v Gundy*.[47] The deceased was an Aboriginal woman who died intestate with no natural children. The claimant was the natural child of her sister. In many Aboriginal groups same-sex sibling's children are regarded as the children of the person. Such children therefore have the same obligations to and are owed the same obligations by the parent as would the children of the body. Western kinship, on which most of our sense of family obligation and our intestacy legislation is based, regards such a child as a nephew or niece, with accordingly lesser reciprocal obligations. But in customary law, this was a mother-child relationship. The primary judge accepted the argument that because the claimant could make a claim to being a child under the *Status of Children Act 1978* (Qld) by drawing on s 4 of the *Acts Interpretation Act 1954* (Qld) recognition of 'Aboriginal traditions', definition of 'child' and 'Aboriginal descendant' could be accepted as a child under the *Succession Act 1981* (Qld) intestacy provisions.

The Court of Appeal rejected this ingenious argument. Overruling the primary judge's decision, Fraser JA (with whom Muir and Martin JJA agreed) said of the *Succession Act 1981* (Qld):

> [I]n the absence of any definition or even any reference in that Act to Aboriginal tradition, the well-understood terms 'child' and 'issue' are not open to a construction which comprehends a biological nephew of an intestate on the basis that, in accordance with an Aboriginal tradition, the nephew is treated as a child of the deceased. Assuming in the respondent's favour that the tradition which he invoked was relevant to succession of property upon intestacy (a topic which was not touched upon in the evidence), the tradition obviously differs radically from the scheme established by the *Succession Act*. … That tradition is not recognised by the common law of Australia because it does not concern a traditional Aboriginal right in relation to land or water of a kind which the High Court held in *Mabo v Queensland (No 2)*

45 Status of Children Acts: NSW 1996; NT 1978; Qld 1978; Tas 1974; Vic 1974; *Family Relationships Act 1975* (SA); *Parentage Act 2004* (ACT). Western Australia has similar provisions spread through legislation on specific topics.

46 New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy* (Report No 116, April 2007) Particular States took carriage of particular issues in the Uniform Succession Laws Project.

47 [2014] QCA 309.



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was recognised. For the same reason, the tradition is not recognised or protected by s 10 of the *Native Title Act 1993* (Cth). Whatever legal rights, if any, the respondent has to succeed on intestacy, depend upon the provisions of the *Succession Act*. Because the tradition that the respondent invoked is not recognised in the *Succession Act*, the court has no power to apply it.[48]

## VII The Introduction of Customary Law into the Intestacy Provisions

If *Eatts v Gundy* had been heard in New South Wales or Tasmania at the same time as it was heard in Queensland, it would have been covered by the customary law provisions and the young man would have been treated as the child of the deceased. In the following discussion of the customary law provisions, I concentrate on the New South Wales intestacy provisions, in Part 4.4 of the *Succession Act 2006* (NSW), because they have had the most judicial attention. Section 101 defines 'indigenous person' as a person who:

(a) is of Aboriginal or Torres Strait Islander descent, and
(b) identifies as an Aboriginal person or Torres Strait Islander, and
(c) is accepted as an Aboriginal person by an Aboriginal community or as a Torres Strait Islander by a Torres Strait Islander community.

This is currently the standard definition used across Australia to identify a person as an Aboriginal or Torres Strait Islander person. It requires descent, identification and acceptance by the relevant community.

The remainder of the scheme is set out in ss 133 to 135:

**133 Application for Distribution Order**

(1) The personal representative of an Indigenous intestate, or a person claiming to be entitled to share in an intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which an Indigenous intestate belonged, may apply to the Court for an order for distribution of the intestate estate under this Part.

(2) An application under this section must be accompanied by a scheme for distribution of the estate in accordance with the laws, customs, traditions and practices of the community or group to which the intestate belonged.

(3) An application under this section must be made within 12 months of the grant of administration or a longer period allowed by the Court but no application may be made after the intestate estate has been fully distributed.

(4) After a personal representative makes, or receives notice of, an application under this section, the personal representative must not distribute (or continue with the distribution of) property comprised in the estate until:

(a) the application has been determined, or
(b) the Court authorises the distribution.

48 *Eatts v Gundy* [2015] 2 Qd R 559, 571–2 [36] (citations omitted). Special leave to the High Court was refused.



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> **134 Distribution Orders**
> (1) The Court may, on an application under this Part, order that the intestate estate, or part of the intestate estate, be distributed in accordance with the terms of the order.
> (2) An order under this Part may require a person to whom property was distributed before the date of the application to return the property to the personal representative for distribution in accordance with the terms of the order (but no distribution that has been, or is to be, used for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate immediately before the intestate's death can be disturbed).
> (3) In formulating an order under this Part, the Court must have regard to:
>
> (a) the scheme for distribution submitted by the applicant, and
> (b) the laws, customs, traditions and practices of the Indigenous community or group to which the intestate belonged.
>
> (4) The Court may not, however, make an order under this Part unless satisfied that the terms of the order are, in all the circumstances, just and equitable.
>
> **135 Effect of Distribution Order under this Part**
> A distribution order under this Part operates (subject to its terms) to the exclusion of all other provisions of this Act governing the distribution of the intestate estate.

Reading the legislation, it is immediately apparent that the Court is empowered to consider the 'laws, customs, traditions or practices' of an Indigenous community from which the deceased person came in determining intestate estates. The phrase 'laws, customs, traditions or practices' is deliberately generalist and wider than simply 'law'. This partly reflects the difficulty which has been apparent when law reform bodies, anthropologists and lawyers have tried to categorise Aboriginal customary law. In *Mabo* we saw language such as 'traditional laws and customs'.[49] The formulation in the legislation adds 'practices' to this. Such a formulation removes the risk that it will be argued that something is not law because it is merely tradition or merely custom or practice. The provision is intended to allow for generous reading of the term.

The scheme is deceptively simple. A person who thinks they are entitled under customary law may apply to the Court for provision to be made that way, by putting to the Court a scheme for distribution which reflects the customary law. The Court may then make an order putting this into effect. However, the Court also must be satisfied that the terms of the order made are just and equitable.

I say the scheme is deceptively simple because although the process is relatively straightforward and the courts in the cases heard so far have made very great attempts to reduce procedural difficulties. For a number of reasons (some of them very good ones) this has not resulted in a simple application of customary law in the same way as, for example, one might apply French law if the choice of laws rules were used.

49 *Mabo* (1992) 175 CLR 1, 59–60 (Brennan J).



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## VIII Applying the Legislation

The first case using the New South Wales legislation was heard by Lindsay J in 2017.[50] Howard Wilson[51] had died intestate. He was an Aboriginal man who had been adopted by a non-Indigenous couple very early in his life. His natural mother was 18 when he was adopted and she went on to marry and have three daughters. She never forgot her son, and her daughters continued to look for him after her death. His adoptive parents divorced and Howard stayed with his adoptive mother. When Howard was about 20 his father remarried and had two daughters whom Howard may have seen once. He was estranged from his adoptive father. His natural sisters eventually found him and he became part of their family and community for the last 20 to 30 years of his life. When he died intestate his two adoptive sisters claimed the estate, as the only relatives entitled under the *Succession Act 2006* (NSW). His natural sisters brought an action under Part 4.4. The case is discussed at length elsewhere.[52] Lindsay J had no great difficulty in deciding that the sisters were the customary law heirs of Mr Wilson according to the Gunditjmara traditions. Evidence came from Gunditjmara elders and others about this, which was accepted. There was no argument about this.

However, Lindsay J took the view that justice and equity required him to consider more than this and he also awarded a small amount to the two adoptive sisters. It is clear, then, that customary law alone was not determinative in the case. Indeed, Lindsay J ultimately took the view that his role was to decide what the deceased would have done if he had made a will.[53]

In making his decision, Lindsay J was concerned not to make such cases too expensive by requiring a great deal of expert evidence. He wished to confine 'laws, customs, traditions and practices' to the context of the distribution of an intestate estate. He resisted a view of this customary law as 'a complete *system* of law with a field of operation beyond the particular subject-matter at hand'.[54] This raises issues about whether Part 4.4 is recognising customary law as law or not. When considering the point, Lindsay J said the 'laws, customs, traditions and practices' were 'manifestations of community'. Extra-judicially, he has said that the expression 'should be viewed *not as referring to a set of positivist rules* (such as found in Part 4.2 and Part 4.3 of the *Succession Act*) but as referring to a *general understanding, within community, of rights and obligations of an individual living, and dying, in the community*'.[55] This does not sound like enforceable legal rules, but like more amorphous culture. In his judgment

50 *Re Estate of Wilson* [2017] NSWSC 1 ('*Wilson*').

51 I am informed that the group to which Wilson and his sisters belonged is not one which rejects the use of the name of the deceased for a period after death, so I have not avoided his name or used a pseudonym.

52 P Vines: '*Re Estate Wilson, Deceased* (2017): The Last Frontier for Aboriginal Intestacy in Australia?' in B Sloan (ed), *Landmark Cases in Succession Law* (Hart Publishing, 2019); P Vines, 'Just and Equitable Distribution on Intestacy according to Aboriginal Tradition – the first use of the Succession Act 2006 (NSW) Part 4.4' (2017) 11 *Journal of Equity* 113.

53 *Wilson* [2017] NSWSC 1, [173].

54 Ibid [140].

55 Justice Lindsay, 'Indigenous Estate Distribution Orders', Paper given at 'Sorry Business and Wills' Seminar (Ngara Yura Program, Judicial Commission of NSW, 1 March 2018), [8] (emphasis in original).



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he also suggested that the *Succession Act* had an underlying theme relating to 'people living and dying in community'. This is a very strong version of purposive interpretation of a statute. It would be difficult to establish that Parliament intended the *Succession Act* to be read subject to some idea of people living or dying in community except at the highest level of generality. Neither that phrase, nor indeed anything cognate to it, appears in the Act, nor in the second reading speech.[56] At one stage Lindsay J said:

> Part 4.4 is full of conundrums insofar as it turns upon an elusive concept of Indigenous 'customary law' and identification of an Indigenous 'community or group' to which the deceased 'belonged' resident in an urban area geographically removed from the land of his traditional Aboriginal heritage.[57]

The interpolation 'resident in an urban area geographically removed from the land of his traditional Aboriginal heritage' is not part of the Act. That is Lindsay J's observation about the case before him. This particular articulation is problematic because there is a sense in which Lindsay J seems to be saying by his use of quotation marks that the belonging, the customary law, and the Indigenous community or group are not real. It is true that Howard Wilson lived in Sydney and his Gunditjmarra heritage lay in southwestern Victoria. However, to treat this as some failure of customary law is mistaken. Urban Indigenous people may be affected by the view of others that they have lost all their heritage because they have lost or moved away from their land. There is no basis for thinking this. It is clear that when one moves from one country to another one does not give up all the ways of thinking about kin, obligations and family that one had before. The burgeoning Indigenous middle class, people with degrees and professional occupations, are not people with no cultural heritage. Many continue to maintain their connection to country and customary law in a range of ways.

There are some very good reasons why Lindsay J managed the case the way he did. His care that this should not become an expensive jurisdiction is welcome. And since there was no real dispute about the customary law which applied, the case could be decided fairly easily. My concern is that in taking a looser approach to the customary law, Lindsay J left open the option of treating customary law as not really in existence. The cases which came afterwards took the same general approach as Lindsay J, but more emphasis on the identification of the relevant Indigenous community began to be given, so that the relevant customary could be ascertained.[58] It may be that the door is still open to a full-blown recognition of customary law in this context, but the way the statute has been interpreted in New South Wales remains short of this.

56 New South Wales, *Parliamentary Debates,* Legislative Assembly, 19 September 2006, 1858 (Bob Debus, Attorney-General).

57 *Wilson* [2017] NSWSC 1, [4].

58 *Estate of Mark Edward Tighe* [2018] NSWSC 163; *Re Estate Jerrard, deceased* [2018] NSWSC 781.



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## XI Conclusion

Dispossession of land was catastrophic for Indigenous people in Australia. This is well known. The link between land and culture was real. However, this did not mean that people who lost their land lost all their culture. Part of the culture which remains is customary law. When *Mabo* was decided it not only recognised native title, but also the culture that supported that native title in the form of customary law. This was a profoundly important part of the legacy of the Mason Court. Since *Mabo* was decided, we have come quite a long way in the recognition of customary law in civil law, but not quite all the way to the point where the common law legal system really recognises that customary law is law. We have made some progress, including, for example, the change to the Evidence Laws so that the hearsay and opinion rules do not apply to the admission of evidence about Indigenous laws, custom and practice[59] and the changes to the intestacy laws discussed in this chapter; but there is still a long way to go before the promise of *Mabo* of recognition as law of that Indigenous customary law which is still practised right across the Australian continent is truly realised.

59 Eg, *Evidence Act 1995* (NSW) ss 72, 78A (introduced into the Act in 2007).



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