Succession and Indigenous Australians: Addressing Indigenous customary law notions of 'property' and 'kinship' in a succession law context

Lidia Xynas[*]

The purpose of this article is to critically evaluate the existing capacity of Indigenous people to exercise succession rights against their estate. This article begins with a discussion of the sources of the general succession laws in Australia, noting that they have derived from UK law, where the common law notions of property, property rights and family, including the expectational right to succeed to property, are all important factors. These common law notions do not easily fit within the spectrum of Indigenous customary law. Generally, many Indigenous Australians will die without executing a valid will (ie, they die intestate) and it is here that this article undertakes an examination of the general intestacy laws in all Australian jurisdictions noting the inadequacy of the provisions to recognise Indigenous persons' spiritual and cultural obligations to property, land or otherwise, together with a failure to distinguish extended Indigenous kinship relationships under Indigenous customary law. It is argued that Indigenous people who die intestate should be supported by a flexible and adaptive intestacy framework, responsive to the full customary and cultural responsibilities of the deceased, thus promoting an organic and developmental approach to succession entitlements.

Introduction

The purpose of this article is to critically evaluate the existing capacity of Indigenous people to exercise succession rights against their estate.[1] This article argues that in a pluralist democracy where succession rights play a crucial role in the acquisitive activities of all individuals, it is vital to ensure that the legal framework supporting succession rights is both accessible and accommodating for all of its members.[2] This should also apply to Indigenous Australians.

* BEc, LLB (Hons), LLM, GDLP, GCHE, Australian Lawyer, Supreme Court of Victoria, Lecturer, School of Law, Faculty of Business and Law, Deakin University Burwood, Victoria.

1 P Malaurie, 'Successions and Donations under French Civil Law' (1990) 5 *Tulune Civil Law Forum* 5. Where he notes that 'succession' generally is concerned with a 'conveyance from generation to generation'.

2 For a discussion of the ethics of inheritance, see J Nathanson, 'The Ethics of Inheritance' in E Cahn (Ed), *Social Meaning of Legal Concepts*, New York University Law School, New York, 1948, p 76 where the author argues that the ethical criteria which we bring to bear on the question of inheritance include an obligation to ensure that every human being, whatever their cultural background, be given the same opportunity to develop their individual and community interests. See also P Vines, 'When Cultures Clash: Aborigines and Inheritance in Australia' in G Miller (Ed), *Frontiers of Family Law*, Ashgate Publishing Ltd, Surrey, 2003, pp 98–119 where the author notes, 'Aboriginal people need property in order to live their lives which move in and out of urban, non-Aboriginal society'.

In Part 1, the article notes that succession laws in all Australian jurisdictions today are embodied predominately under legislation and the common law, as derived from UK common law and statutes.[3] These laws cover situations of will-making,[4] intestacy[5] and claims for family maintenance[6] where property, property rights and family, including the expectational right to succeed to property, are all important factors. These factors are first examined under the common law and are then compared with Indigenous customary law notions of 'property', 'property rights' and 'kinship'. It is noted that with respect to 'property', spiritual and cultural connections to land and cultural heritage[7] under Indigenous customary law do not easily equate with 'common law ownership' of property.[8] In addition, Indigenous persons' concepts of family or 'kinship' relationships are in direct divergence with western notions of family, in particular noting that Indigenous 'kinship' relationships do not necessarily follow common law notions of blood line.

Property and 'kinship' relationships as understood under Indigenous customary law are further examined in Part 2 of the article in the context of their current embodiment under existing succession laws in Australia. When examining Indigenous communities and people, it is noted that because will-making is not an established part of the cultural or spiritual constitution of Indigenous communities,[9] most Indigenous Australians will die 'intestate'. Therefore the most significant 'succession' concerns for Indigenous communities lie in the recognition of customary law in an intestacy context.[10] Here an examination of the succession laws that deal with intestacy in most Australian jurisdictions highlights the inadequacy of the provisions to recognise Indigenous persons' spiritual and cultural obligations to property,

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3 On the arrival of the First Fleet in 1788, Australia was immediately considered 'terra nullius'. terra nullius is a doctrine of European International Law which considered the position of land that was unoccupied. See H Reynolds, *The Law of the Land*, Penguin, Melbourne, 1987, p 7 for a discussion.

4 See below for a discussion.

5 See below for a discussion.

6 See below for a discussion.

7 T Janke, *Our Culture: Our Future — Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel & Co, Sydney 1999, pp 11–12: 'These heritage rights, as recognised under Indigenous customary law, encompass tangible and intangible aspects of Indigenous cultural practices which have been passed on from generation to generation by Indigenous people 'as part of their cultural identity.'

8 For an Indigenous person, their connection to the land is not measured in the same way as the common law recognises 'ownership' such as in fee simple (this refers to an estate in land, a form of freehold ownership), or in alienability terms; it is something closer to a spiritual and cultural connection. In terms of cultural heritage it is also noted that common law notions of rights attaching to intellectual property do not sit easily under customary law. Indigenous 'heritage rights' are generally managed in line with customary law where the underlying knowledge of any artwork or image itself may belong to a clan communally and not to just one individual.

9 P Vines, 'Drafting Wills for Indigenous People: Pitfalls and Considerations' (2007) *Indigenous Law Bulletin* 10 where the author outlines the difficulties of encouraging effective will-making within a customary context. See also 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.

10 For a discussion on the difficulties associated with Indigenous intestacy generally, see 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.

land or otherwise together with the failure to recognise extended Indigenous 'kinship' relationships under Indigenous customary law.[11] While the Northern Territory, Queensland and Western Australia have introduced specific legislative provisions which are directed at promoting a greater awareness of customary practices in the regulation of Indigenous intestacy, these provisions too are ultimately inadequate.[12]

It is argued that if the intestacy legislation is to support cultural diversity and the distributional entitlements of Indigenous next of kin, it must also accommodate not only the custodial responsibilities of Indigenous people, but also their inter-cultural placement.[13] In an intestacy context, this respect is best achieved through the implementation of a uniform, legislative framework which is receptive to the distributional rights that may flow from broader spiritual or kinship responsibilities to Indigenous 'property' and cultural heritage and which is devoid of cultural presumptions.[14]

Part 1: Succession laws in Australia: A conveyance of property from 'generation to generation',[15] but what does this mean for Australian Indigenous people?

1.1 What is succession law and from where did it derive?

The laws of succession in essence attempt to deal with the transmission or redistribution of a deceased private property[16] upon their death, where the effect is broadly the 'conveyance (of that property) from generation to

11 For an interesting discussion on the difficulties that can flow from the construction of cultural barriers, see C G Weeramantry, 'The Quest for Congruence between Culture and Legal Systems in Recently Liberated Societies' (1987) 65 *Washington University Law Quarterly* 890 esp at 897 where the author suggests that in examining the quest for congruence between culture and legal systems, it is important to examine the extent to which the legal system truly commits itself to the principle of acceptance.

12 The legislation and specific provisions are outlined in detail below.

13 See Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol 1, 1991, p 39 where it is noted that Indigenous people are not divided into traditional and non-traditional and that often, they lead a mixture of both lifestyles. This point is also made by Vines, 'Drafting Wills for Indigenous People', above n 9, at 5.

14 For a general discussion of customary 'kinship' obligations, see I Keen, 'Kinship' in R M Berndt and R Tonkinson (Eds), *Social Anthropology and Australian Aboriginal Studies, A Contemporary Overview*, Aboriginal Studies Press, Canberra, 1988, p 988.

See also the Western Australia Law Reform Commission, *Chapter 4, 'Recognition of Aboriginal Customary Law'*, 2009, p 66, at <http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/FR/Chapter_4.pdf> (accessed 7 September 2010), where the authors comment on the importance of kinship stating:

> Kinship is at the heart of Aboriginal society and underpins the customary law rules and norms . . . Importantly, kinship governs all aspects of persons social behaviour and prescribes the obligations or duties a person has towards others as well as the activities or individuals a person must void . . . It is important to note . . . that while the kinship system was an undeniable part of traditional Aboriginal society . . . it is also strongly instilled in contemporary Aboriginal society, including urban Aboriginals . . . certain kinship obligations, such as the duty to accommodate kin, are taken very seriously regardless of urban or remote location.

15 Malaurie, above n 1.

16 This would include both rights to real and personalty as recognised under the common law.

generation'.[17] Succession laws in all Australian jurisdictions today have derived from UK law. On settlement in 1788, it was assumed by the British settlers that Australia was 'terra nullius'[18] and that the laws of England would therefore apply to the extent that they applied to the circumstances of the new colony.[19] In this regard, there was no acknowledgment or recognition of any cultural system or law of Indigenous Australians already occupying the land.

With respect to succession laws, the applicable laws in 1788 were the Statute of Wills (1540) UK[20] and the Statute of Distributions (1670) UK,[21] and

17 Malaurie, above n 1.

18 Reconciliation Australia, Council for Aboriginal Reconciliation, *Documents for Reconciliation*, 2000, at <http://www.austlii.edu.au/au/orgs/car/docrec/policy/brief/terran.htm> where it is noted:

> British colonisation policies and subsequent land laws were framed in the belief that the colony was being acquired by occupation (or settlement) of a terra nullius (land without owners). The colonisers acknowledged the presence of Indigenous people but justified their land acquisition policies by saying the Aborigines were too primitive to be actual owners and sovereigns and that they had no readily identifiable hierarchy or political order which the British Government could recognise or negotiate with. The High Court's *Mabo* judgment in 1992 overturned the terra nullius fiction. In the same judgment, however, the High Court accepted the British assertion of sovereignty in 1788, and held that from that time there was only one sovereign power and one system of law in Australia.

19 W Blackstone, *Commentaries on the Laws of England*, 1st published 1765, 18th ed, Clarendon Press, Oxford, 1826, Bk I, 111.

20 Under the Statute of Wills (1540) UK, land could be devised by anyone who was siesed in fee simple of land held in common socage, unless they were femes covert, idiots, infants or insane. Land at this time could be devised by individuals not companies and such dispositions were to be made in writing. Of course fraud became a problem and so stricter formalities in will making were introduced. It is these strict formalities that are still prevalent in current succession laws today in the United Kingdom and also in all Australian jurisdictions, eg, see s 7(1)(a)-(d) of the Wills Act 1997 (Vic).

21 The rules governing the distribution of an intestate estate have their origins in the English Statute of Distributions of 1670. See 22 & 23 Charles II c 10 s 5-7 as amended in 1685 by 1 James II c 17 s 7. For a discussion of how the statute dealt with intestacy, refer to *Uniform Succession Laws: Intestacy*, Law Reform Commission, NSW, Issues Paper 26, 2005, at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ip26chp02>, where it is noted that:

> Distribution under this statute was complex, at least so far as it involved distributing to the next of kin. Once the 'surplusage' of the personal estate was determined, a surviving husband would take the whole of his deceased wife's remaining estate. A widow, however, would take one third of her husband's estate if he left issue, the remainder passing to the children, with the share of any child who predeceased their father going to their descendants; but a widow would take one half if her husband left no issue, the other half passing, in such cases to the next of kin of the deceased who were in 'equal degree'. Degrees of relationship were determined in accordance with the civil law progression, that is, essentially the order established late in the development of Roman law, by counting up the number of generations from the intestate to the nearest ancestor held in common with the claimant and then counting down the number of generations from the nearest common ancestor until the claimant was reached. Relatives who were separated from the intestate by a smaller number of steps, those who were of a higher degree, took to the exclusion of those of a lower degree, that is who were separated from the intestate by a greater number of steps. Those who were the same distance, or number of steps, from the intestate took equally. Subject to the spouse and descendents exercising their rights, the father of the intestate was next in line, then the mother, brothers and sisters — on an equal footing (although the children of brothers and sisters could take their deceased parent's share, grandchildren could not), grandparents (in the absence of brothers and sisters), nieces and nephews, and so on. Although the Crown was ultimately

it was these laws that applied to the colonialists of the first settlement in New South Wales. In 1828, the Australia Courts Act (1828) NSW recognised that all the Laws of England that pertained to the colony, did indeed apply.

1.2 Succession law in Australia today

It was not until the 1992 case of *Mabo*, that the stance of 'lack of law' of the Indigenous occupiers was finally rejected and recognition of Native Title entitlements to land was made.[22] In this manner, the courts identified a link between the common law and Indigenous customary law. Despite this recognition however the concept of terra nullius is still reflected in many Australian laws, either under the common law or under state and federal statutes. With regards to succession law, UK authority in Australia has continued to have an influence well into the twentieth century, where 'most of this ... has appeared in the form of common legislation and a view that the English cases were the most persuasive precedents for Australian courts to follow'.[23]

The following discussion outlines how Indigenous persons' inheritance rights are even today almost totally governed according to statute based on English law where Indigenous cultural law for the most part is ignored under the inheritance laws of most Australian jurisdictions.

1.2.1 Forms of succession laws in Australia

Australia's current succession laws are embodied in state laws and Australian and UK case law. Succession laws in all Australian jurisdictions encompass situations of will-making,[24] intestacy[25] and claims for family maintenance.[26] Wills are a major legal means of dealing with the transmission and redistribution of a person's property, real and personalty after death in Australia and other common law countries. A will is a legal document which a person (the testator), draws up during their lifetime, that deals with the transfer, transmission and redistribution of their property after their death to their named beneficiaries. The will allows a person to deal with his or her own property after death with what is known as 'testamentary freedom'.[27] In contrast, intestacy occurs when a person dies without a will, or where not all of their property is effectively dealt with under a will. In such circumstances,

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entitled to take the personal estate if no other relatives were entitled, the extent of the civil law list of distribution and the fact that executors could take as against the Crown, suggests that this was not common.

22 R Croucher and P Vines, *Succession, Families, Property and Death, Text and Cases*, 3rd ed, Lexis Nexis Butterworths, Sydney, 2009, p 30.

23 Ibid, p 31.

24 For an example of the legislative scheme that applies to Wills in Victoria see Wills Act 1997 (Vic).

25 For an example of the legislative scheme that deals with intestacy in Victoria refer to Administration and Probate Act 1958 (Vic) Div 6.

26 For an example of the legislative scheme that deals with Family Maintenance in Victoria, see ss 91(1)–99 of the Administration and Probate Act 1958 (Vic).

27 Testamentary Freedom ensures that a testator's expressly documented wishes (testamentary) as to how their property should be distributed upon death, are upheld giving a testator the ability to deal with the property he or she amassed during his or her life time according to his or her own formally documented wishes.

the deceased's property, real and personal, is distributed according to statutory schemes of distribution, which nominate the beneficiaries of the intestate's estate. Both wills and situations of intestacy are subject to what is known as family maintenance legislation, which may allow eligible applicants (family or otherwise) to challenge a distribution of an estate on the basis that they are a person for whom the 'deceased has responsibility to make provision'.[28]

1.2.2 The legal status of succession rights under Australian law

The legal status of succession rights under the common law and statute is not entirely clear; they have been described variously as natural rights,[29] civil rights and even proprietary entitlements.[30] Nevertheless when examining succession rights it becomes apparent that they encompass two types of rights: the right to pass property and the right to inherit property. The competing tensions between the right to pass property and the right to inherit the same has seen succession laws in the United Kingdom and Australia over the last three centuries change with the times, depending on the underlying social norms and views of the period. 'The way society perceives the relationship between family members and the way society perceives property itself also profoundly affects the rules we use for distribution of property on death . . . Succession law can be seen as a reflection of societies theories about (property) family, and its members',[31] where they 'act as a kind of pattern or template through which society reproduces itself each generation . . . they may be described as the genetic code of a society'.[32]

With regards to the right to pass property, Blackstone has argued that succession rights make intuitive sense because a society that respects the property rights of an owner during his or her lifetime necessarily expects a reallocation of those rights when that owner dies.[33] Succession rights to property as recognised by the common law would thus be lost if they could not be passed on after the death of their 'owner'. This sentiment is acknowledged also by Miller who further notes that any impediment on the transfer of property whether it be real or personalty after the death of an individual could lead to 'property either to be destroyed on the deceased's death or considered

28 See s 91(1) of the Administration and Probate Act 1958 (Vic).

29 John Locke in his *Two Treatises of Government, History of Political Thought*, 1690 Bk 1 at s 88, P Haslett (Ed), Columbia University Press, New York, 1988, pp 206–7 argued that inheritance was the natural right of children.

30 See Blackstone, above n 19, pp 11–12 where he states: 'A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They became, therefore, generally the next immediate occupants, till at length, in the process of time, this frequent usage ripened into general law.' Thomas Jefferson in a letter to James Madison dated 6 September 1789 asserted that 'the earth belongs in usufruct to the living . . . the portion occupied by an individual ceases to be his when himself ceases to be, and reverts to the society . . . If [society has] formed rules of appropriation, those rules may give it to the wife and children . . . But the child, the legatee, or creditor takes it, not by any natural right, but by a law of the society.'

31 Croucher and Vines, above n 22, p 16.

32 J C Fleming, 'Changing Functions of Succession Laws' (1978) 26 *American Journal of Comparative Law* 233.

33 D J Kornstein, 'Inheritance — A Constitutional Right' (1984) 36 *Rutgers L Rev* 741 at 750.

vacant and so capable of being asserted by the first taker'.[34] If property is to be destroyed as Miller suggests, this would arguably be an extreme waste of resources and may have other social and economic consequences within the society itself.[35] As to his second notion that property could be left vacant and available to the 'first taker', the question needs to be asked whether this could have an impact on the nature of the society itself. It could be feasible that the Crown could be considered as the 'first taker'. If so, then as Atkinson notes:

> if a system of state or common ownership is desired, the abolition of inheritance would be a very effective device in the accomplishment of a socialistic scheme. Except for the possibility of gifts in the owners lifetime, all private ownership in land and the bulk of other private wealth would soon disappear.[36]

If this were the case, as noted by Tay, the very nature of common law society would change and we would see a divergence towards a different society similar to that of Soviet Russia in the early twentieth century.[37] Thus, in the United Kingdom and Australia, for its society to remain as it is, there is an entrenched social perception that the community expects that property which they have acquired during their lifetime is to be passed on to future generations.[38]

'It is also possible to argue that family and next of kin also have an expectational right to inherit, which is separable from the right to pass on property.'[39] According to Blackstone, succession is, in essence, an ingrained custom which has become a part of positive law in order to prevent the 'endless disturbances' that would ensue in the absence of clear and established rules setting out entitlement to a descendant's property.[40] It is this expectational right to entitlement which is also encompassed under the current

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34 G Miller, *The Machinery of Succession*, 2nd ed, Dartmouth Publishing Co Ltd, Dartmouth, 1996, pp 2–3.

35 For example, there may be no incentive to acquire property or to even be responsible for property during one's life time. This would arguably be viewed as an extreme waste of resources.

36 T Atkinson, *Handbook of the Law of Wills*, 2nd ed, West Publishing, Minnesota, 1953, pp 30–6.

37 See A Tay, 'The Law of Inheritance in the nee Russian Civil Code of 1964' (1968) 17 *International and Comparative Law Quarterly* 472. In 1918, a decree promulgated in the Soviet Republic of Russia effectively provided that inheritance, both testate and intestate was abolished and the property of the deceased became the property of the state on death.

38 For a discussion on the proprietary foundations of inheritance rights, see J Locke, *Two Treatises of Government* in Haslett, above n 29, pp 206–7 where he states:

> the right to take property by inheritance or will has existed in some form among civilized nations from the time when memory of man runneth not to the contrary, and so conclusive seems the argument that these rights are part of the inherent rights . . . that we feel entirely justified in rejecting the dictum so frequently asserted by such a vast array of courts, that these rights are purely statutory and may be wholly taken away by the legislature.

Also refer to J Locke, *The Second Treatise of Civil Government*, Ch 5 of Property, Awnsham Churchill, London, first published in 1689, at <http://www.constitution.org/jl/2ndtr05.txt> where Locke advanced the theory that when one mixes one's labour with nature, one gains a relationship with that part of nature with which the labour is mixed, subject to the limitation that there should be 'enough, and as good, left in common for others'.

39 Croucher and Vines, above n 22, p 16.

40 Blackstone, above n 19.

application of succession law in western societies such as Australia and the United Kingdom. This is true whether the deceased left behind a will to deal with his or her property, or they died intestate.

This right to inheritance of property however is not absolute. In both circumstances, legislation in all Australian jurisdictions allow for a court to exercise their discretion when considering applications for a distribution of the deceased estate to eligible applicants under the family maintenance provisions.[41] The legislation in Victoria for example provides for even those persons who are not necessarily family members to make a claim against the estate of the deceased where they can satisfy the court that they are a person for whom the deceased had responsibility to make provision for them from their estate after the testator's or intestate's death.[42]

The social utility of succession rights, in promoting family maintenance and inter-generational equity, has meant that succession rights have developed to be fundamental constituents in the 'bundle of rights' metaphor, where succession rights are seen to be created by the same regulatory framework that recognises and enforces proprietary entitlements.[43] However, the right of a transferee to pass on property and the correlative right of a recipient or eligible beneficiary to enforce a transfer or distribution, while having a strong connection to the ownership web, is probably best articulated as a social or civil entitlement. This characterisation is consistent with the strong resistance to any attempt to curtail or remove inheritance rights of family members who have an expectation that they are to be provided for by the deceased family member.[44]

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41 For example, see s 91(1)–(4) of the Administration and Probate Act 1958 (Vic).

42 See s 91(1)–(4) of the Administration and Probate Act 1958 (Vic).

43 See R Epstein, *Takings: Private Property and the Power of Eminent Domain*, Harvard University Press, Cambridge, 1985, p 304: 'The conception of property includes the exclusive rights of possession, use, and disposition. The right of disposition includes dispositions during life, by gift or by sale, and it includes dispositions at death.' It has, however, been argued that the historical assumption that succession rights are components of the bundle of rights does not necessarily make such rights a theoretical component. In this respect, a distinction may be drawn between the 'bundle of rights' analysis and the 'rule-governed' entitlements analysis. The bundle of rights analysis can be broken down into eight normative modalities of rights and their correlatives. Each right is defined by a different form of social organisation and relationship with the land; each social agent has a different bundle-of-rights and it is not the 'resource' that dictates the form of property rights, but rather the type of owner. The 'rule-governed' entitlements analysis describes the interconnections between property, tort, and contract and takes into account distributional and efficiency considerations.'

Also refer to L S Underkuffler, 'On Property: An Essay' (1990) 100 *Yale LJ* 127 at 143 where the author emphasises the importance of inheritance rights as social constructions. See also G S Alexander, 'Takings, Narratives and Power' (1988) 88 *Columbia Lrev* 1752 at 1760 where the author notes the distinction between 'historical descriptions' of property rights and 'conceptual normative' outlines. See also M L Ascher, 'Curtailing Inherited Wealth' (1990-1991) 89 *Michigan L Rev* 69 at 83 where the author suggests that inheritance and bequest are positivistin origin and therefore not a necessary part of the institution of private property.

44 The introduction of family maintenance legislation in the early twentieth century in Australian jurisdictions, the United Kingdom and New Zealand, has ensured that those who are entitled to take under an estate, have a legal ability to enforce those rights. For example, see s 91(1)–(4) of the Administration and Probate Act 1958 (Vic). With respect to wills, this legislation tempers a testators testamentary freedom to deal with his or her property

The ensuing discussion below will demonstrate that these common law notions of succession rights are also relevant when dealing with Indigenous succession rights and obligations under Indigenous customary law.

1.3 'Property' and 'family' for the purposes of succession under the common law and in an Indigenous context

Broadly, Indigenous succession rights must be first examined within the context of Indigenous customary law, followed by an examination of the extent to which customary law has been recognised by the Australian legal system in its succession laws. An understanding of what is meant by 'property' and 'family' or 'kinship' relationships under Indigenous customary law is highly relevant, as Indigenous Australians' notion of 'succession', 'property' and 'family' or 'kinship' differs significantly from what is understood under the common law and the state and territory legislatures.

1.3.1 Property: Common law vs Indigenous customary law

In western societies such as the United Kingdom and Australia, succession law is generally concerned about the transmission of property. The concept of what is meant by property including rights to land, resources and other property based rights is a common law notion. To apply such notions to the understanding of what is meant by Indigenous land rights in particular is a difficult and arguably divisive task. What is at issue is how do such common law notions fit into the succession law spectrum, 'when Indigenous peoples' conception of land is somewhat different from common law legal, political thought and practice?'[45]

Property rights under the common law is understood to be those that attach to property where it can be alienated and owned or have title to. Isaacs J, in *Commonwealth v New South Wales*,[46] explained that a property right to land

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according to his or her own desires to the extent that they must make provision for those that they had amoral responsibility to do so. Also see *Allardice v Allardice* (1910) 29 NSLR 959 which focused on the moral duty when analysing jurisdiction. The court commented that it should place itself in the 'position of the testator and to consider having regard to all existing facts and surrounding circumstances whether or not the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or children as the case may be. Where there is such a breach of moral duty, then it is the duty of the court to make such an order as appears to be sufficient, but no more than sufficient to repair it.' The discretion given to the courts in making such distributions sees them balancing competing objectives where their aim is to try and respect the 'dead hand from the grave' while at the same time giving due consideration to the continuing family responsibilities of a testator. The reference to succession rights as 'dead hand control' was first coined by Sir Anthony Hobhouse, *The Dead Hand*, Chatto & Windus, Piccadilly, 1880, pp 183–5. It was then quoted by J Dukeminier and S M Johanson, *Wills, Trusts and Estates*, 4th ed, Little Brown & Co, Boston, 1990, pp 19–20.

45 C Yates, 'Conceptualising Indigenous Land Rights in the Commonwealth' (2004) 19 *Australian Indigenous Law Reporter*, at <http://www.austlii.edu.au/au/journals/AILR/2004?19.html#Heading44>.

46 See *Commonwealth v New South Wales* [1923] HCA 34; (1923) 33 CLR 1 (9 August 1923) where Isaacs J notes:

> in the language of the English law, the word fee signifies an estate of inheritance as distinguished from a less estate . . . A fee simple is the most extensive in quantum, and the most absolute in respect to the rights, which it confers, of all estates known to the law.

which is held in fee simple[47] 'confer(s) an absolute right, both of alienation inter vivos and of devise by will'.[48] He further noted that ownership of land held in fee simple is comparable to the 'absolute dominion' ownership rights a person has over chattels (personalty).[49] These notions of property and property rights are also exemplified under the Property Law Act 1958 (Vic). Under this Act property is defined under s 18 to 'include(s) any thing in action, and any interest in real or personal property'.[50] The corresponding right to dispose of property (with respect to land) is provided for under s 19 of the same Act.[51]

In a succession context, property refers to both land and personalty, including intangible property rights.[52] Typically (but by no means invariably) the 'owner' of such property can by will gift such property to their nominated beneficiary, or if they die intestate, such property can form part of the intestate's estate. The Wills Act 1997 (Vic) for example defines property as 'any property to which the person is entitled at the time of his or her death, whether or not the entitlement of the person did or did not exist at the date of the making of the will'.[53] When dealing with intestacy, the Administration and Probate Act 1958 (Vic) for example further defines property to 'include(s) a thing in action and any interest in real or personal property'.[54] The legislative provisions, dealing with both wills and intestacy thus assume that property for the purposes of succession law encompasses that private property (real or otherwise) which a person amasses during their lifetime where their entitlement to it allows them 'the ability to pass on property at the time of one's death as a right which is inherent in the nature of property'.[55]

What is understood by 'property' and associated 'property rights' under Indigenous customary law does not equate easily with common law notions of

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It confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination, including the right to commit unlimited waste; and, for all practical purposes of ownership, it differs from the absolute dominion of a chattel, in nothing except the physical indestructibility of its subject.

47 Fee simple refers to an estate in land, a form of freehold ownership.

48 *Commonwealth v New South Wales* (1923) 33 CLR 1; [1923] HCA 34; (9 August 1923).

49 Ibid.

50 Section 18 of the Property Law Act 1958 (Vic).

51 Section 19 of the Property Law Act 1958 (Vic) states:

(1) All rights and interests in land may be disposed of, including —

(a) a contingent, executory or future interest in any land, or a possibility coupled with an interest in any land, whether or not the object of the gift or limitation of such interest or possibility be ascertained;

(b) a right of entry, into or upon land whether immediate or future, and whether vested or contingent-but no such disposition shall defeat or enlarge an estate tail.

(2) All rights of entry affecting a legal estate which are exercisable on condition broken or for any other reason may, after the commencement of this Act, be made exercisable by any person and the persons deriving title under him, but, in regard to an estate in fee-simple (not being a rent charge held for a legal estate) only within the period authorized by the rule relating to perpetuities.

52 For example, intellectual property rights may be covered under the Copyright Act 1968 (Cth); Patents Act 1990 (Cth); Trademarks Act 1995 (Cth) and Designs Act 2003(Cth).

53 Section 4 of the Wills Act 1997 (Vic).

54 Section 5(1) of the Administration and Probate Act 1958 (Vic).

55 Croucher and Vines, above n 22, p 16.

property and property rights. In this regard, it will be seen that Indigenous customary law has a broader approach, dealing with all things spiritual and sacred, including a connection with the land and family.[56]

1.3.1.1 The land

When examining land as property, for Indigenous Australians, the land is not an inanimate thing, which can be bought and sold; it is alive and sacred because of its interconnectiveness with Indigenous Australians religious deities:

> sacred because the deities shaped it, humanised it and put within it the resources it now contains. Moreover the presence of deities in the land is symbolised by the sites; sites which are spiritually alive, a constant source or protection and reassurance for the future — no matter how difficult the present may appear to be. They represent a spiritual resource. It is that land which Aborigines held in trust for the deities and for future generations. They did this by spreading responsibility for it among people who are attached to specific territories, bound to them by strong ties of descent and in many cases regarded as living representatives of the deities.[57]

For Indigenous Australians 'life came from and through the land, and was manifested in the land'.[58] As such, Indigenous Australians see themselves as having a strong obligation resting upon them as custodians of the land to ensure harmony between the land, its people and the deities. Bell writes:

> the responsibility for the maintenance of land and it sites in accordance with the dictates of the law established by the ancestral pioneers, falls to the descendants of that era. For example, in living in and using the land through thousands of years, the Arandic people continually reaffirm and reassert the relevance of the law to present and future generations . . . The significance of sites is both enhanced and reinforced through use, and as knowledge is passed from generation to generation . . . Because the Arandic people trace their very identity to the land bequeathed by their ancestors it is not merely an economic resource, it is life itself. Any threat or challenge to relationships to land become a threat to social existence and to the well being of the custodians.[59]

Berndt further notes that land is a spiritual resource where it is held in trust by Indigenous Australians for 'the deities and for future generations'[60] where the responsibility for this is spread amongst people 'who attached to specific

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56 S Cane, *Pila Nguru: The Spinifex People*, Fremantle Arts Centre Press, Fremantle, 2002, p 82. Cane argues that Indigenous customary law is a combination of the components of law, spirituality and ceremony or business and by its 'nature, philosophy and psychology . . . it . . . provides an explanation of nature, establishes a social code, creates a basis for prestige and political status within the community, acts as a religious philosophy and forms a psychological basis (if not psychological controls) for life.' According to Cane, customary law can be held to be akin to the European concept of tradition. For Indigenous Australians, this notion of tradition is interconnected with land, their cultural heritage and their notions of family or kinship.

57 R M Berndt, 'Traditional Concepts of Aboriginal Land' in R M Berndt (Ed), *Aboriginal Sites Rights and Resource Development*, University of WA Press, Perth 1982, pp 2, 9. Writing about the Southern Pitjantjatjara land laws.

58 Ibid.

59 D Bell, 'Sacred Sites: The Politics of Protection' in N Peterson and M Langston (Eds), *Aborigines, Land and Land Rights*, Australian Institute of Aboriginal Studies, Canberra 1983, pp 282–3.

60 Berndt above n 57, pp 2, 9.

territories, bound to them by strong ties of descent, and in many cases regarded as living representatives of the deities'.[61]

Therefore, to an Indigenous person, their connection to the land is not measured in terms of fee simple, or in alienability terms, but it is something closer to a spiritual and cultural connection. For example, in living in and using the land for thousands of years, the Indigenous Arandic people of South Australia continually reaffirm and reassert the relevance of their spiritual and cultural connection to the land to present and future generations:

> The significance of sites is both enhanced and reinforced through use, and as knowledge is passed from generation to generation . . . Because the Arandic people trace their very identity to the land bequeathed by their ancestors it is not merely an economic resource, it is life itself. Any threat or challenge to relationships to land become a threat to social existence and to the well being of the custodians.[62]

The Indigenous persons custodial view of connection to the land under Indigenous customary law is thus in stark contrast to western notions of 'ownership' of land as property.

It is important to note that the recognition of Native Title under Australian common law[63] and statute[64] has gone some way in addressing the cultural and spiritual connection of Indigenous persons to the land. However, while Native Title recognises Indigenous persons customary land interests and rights, the recognition of these rights has been limited by their sui generis[65] nature. In particular, Native Title cannot be alienated,[66] and this has important ramifications for Indigenous transmission and succession entitlements. Native Title and its associated rights cannot be the subject of a will nor can it form part of any priority rights under state intestacy laws.[67] The sui generis nature of Native Title also cannot allow for the transmission of any cultural connection to land subject to Native Title to form part of the bundle of

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61 Ibid.

62 Bell, above n 59.

63 *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1; 66 ALJR 408; BC9202681.

64 Native Title Act 1993 (Cth).

65 'Sui generis' is a latin term which means 'of its own kind', ie, unique and individual, in its own class.

66 See Native Title Act 1993 (NTA) (Cth) s 56(5)(a)–(e). Native Title rights, at common law and under the NTA cannot be assigned, restrained, garnisheed, seized or sold, or made the subject of a charge or interest as a result of any debt incurred or act done by the body corporate holding the Native Title.

Also refer to *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 65; 107 ALR 1; 66 ALJR 408; BC9202681. Brennan J argued that alienability is an entitlement which is inextricably attached to institutionalised common law interests. He noted that Native Title, while recognised by the common law, is not regarded as an institution of the common law and therefore, cannot automatically attract alienability. Rather, as a sui generis form of customary land interest, the rights and interests that Native Title attracts are derivative of the traditional laws and customs practised and recognised by pre-sovereignty communities. In this context entitlements that are derivative of the private property institution are therefore, inappropriate for native title interests.

67 See, eg, the comments of Gummow J in *Yanner v Eaton* (1999) 201 CLR 351; 166 ALR 258; [1999] HCA 53; BC9906413 at [72] 'native title does not exhibit the uniformity of rights and interests of an estate in land at common law and "ingrained habits of thought and understanding" must be adjusted to reflect the diverse rights and interests which arise under the rubric of native title.'

succession rights for Indigenous people.[68] This can be problematic for succession purposes where, for example, the last of an Indigenous clan die out and as such Native Title is extinguished and thus reverts back to the Crown.[69] This limitation in particular impacts on the expectational succession rights of those Indigenous persons who have an obligation under customary law to act as custodians of the land of their ancestors together with the spiritual and cultural obligations attached to it.

1.3.1.2 Cultural heritage

How Indigenous cultural heritage fits into the spectrum of common law property rights is also an important factor when considering Indigenous succession rights. Under the common law, cultural property is distinguished from intellectual property, where 'cultural property is regarded as being the tangible aspects of culture whereas intellectual property refers to the intangible aspects'.[70] Western societies such as the United Kingdom and Australia have developed laws to afford protection to those who wish to protect their own individual innovative creations and inventions (as intellectual property), where:

> such laws are based on the notion that innovation is the product of the creative, intellectual and applied concepts and ideas of individuals. The state grants specific economic rights to inventive people to own, use and dispose of their creations as a reward for sharing their contributions and to stimulate inventive activities.[71]

While such rights form part of the broad spectrum of property rights as recognised by succession laws, the exploitation[72] of these protected rights by an Indigenous intellectual property owner may however be in conflict with Indigenous customary law.

Under Indigenous customary law, Indigenous intellectual property and

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68 See in particular W F Flanagan, 'Piercing the Veil of Real Property Law: *Delgamuukw v British Columbia*' (1998) 24 *Queens LJ* 279 at 324 where the author notes:

> The goal of the law should be to restore to Aboriginal communities a broad spectrum of property rights over Aboriginal lands, in order to permit these communities to develop and use these lands to their full potential, consistent with the operation of a modern society and a modern economy. Aboriginal communities should not be locked in time, with undue restrictions on the extent to which they can develop and enjoy their lands in order to adapt to the challenges and opportunities of modern society.

Alienability includes the right to exercise rights of succession and there are clear social and cultural benefits associated with the exercise of such rights. See the discussion by R C Ellickson, 'Property in Land' (1992-1993) 102 *Yale LJ* 1315 who at 1374 notes that consensual alienability includes the exercise of succession rights.

69 For a discussion of the inalienability of Native Title, refer to the judgments of *Ward v Western Australia* (2002) 213 CLR 1; 191 ALR 1; [2002] HCA 28; BC200204355 and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; [2002] HCA 58; BC200207517, where in both cases the High Court of Australia insisted on the view that Native Title is not ownership but a bundle of rights, each severable and vulnerable to extinguishment by official action of even a most transitory kind.

70 G Mead, *A Royal Omission: A critical summary of the evidence given to the Hindmarsh Island Bridge Royal Commission with an alternative report*, Greg Mead, Adelaide, 1995.

71 Janke, above n 7, p 1. Also refer to s 51(xviii) of the Australian Constitution 1901 (Cth) which gives the Commonwealth the power to make special laws with respect to 'copyright, patents of inventions and designs, and trade marks'. Also see Copyright Act 1968 (Cth); Patents Act 1990(Cth); Trademarks Act 1995 (Cth) and Designs Act 2003 (Cth).

72 For example, s 13 of the Copyright Act 1968 (Cth).

cultural property are intertwined and are referred to collectively as 'Indigenous heritage rights'.[73] These heritage rights, as recognised under Indigenous customary law, encompass tangible and intangible aspects of Indigenous cultural practices which have been passed on from generation to generation by Indigenous people 'as part of their cultural identity'.[74] Under Indigenous customary law, the 'heritage of an Indigenous people is a living one and includes items that may be created in the future based on that heritage'.[75] In many cases, Indigenous cultural and intellectual property or 'Indigenous heritage rights' are managed in line with customary law where the underlying knowledge of any artwork or image itself may belong to a clan communally. As such, the rights to such artwork arguably cannot be exploited in the same way as ordinary intellectual property can.[76] This of course has consequences with respect to Indigenous succession rights. The questions as to which and to whom intellectual property rights should vest, and whether such rights should be recognised under common law and state legislatures with respect to succession is problematic and needs further consideration.

1.4 Family under the common law and Indigenous customary law concept of kinship

The kinship relationship systems in Australian Indigenous societies are important concepts to understand for the purpose of Indigenous succession. This is because they do not follow the same familial concepts as understood under the common law. In western societies such as the United Kingdom and Australia, family for the purposes of succession has been generally lineage in its application where the line of descendants runs from one person through to

73 Janke, above n 7, pp 11–12, where she notes Indigenous intellectual property and cultural property encompass Indigenous cultural expressions such as songs, dance, sacred sites, ancestral remains, objects and drawings. They also cover 'Indigenous ecological knowledge of biodiversity, medicinal knowledge, environmental management knowledge and cultural and spiritual knowledge and practices'.

74 McRae et al, *Indigenous Legal Issues, Commentary and materials*, 4th ed, Lawbook Co Casebook, Sydney, 2009, p 392.

75 Janke, above n 7.

76 This restriction was illustrated in *Milpurrurru v Indofurn Pty Ltd* (1994) 54 FCR 240; 130 ALR 659; 30 IPR 209; BC9400232. The case concerned the importation of carpet which incorporated Indigenous designs. One of the Aboriginal artists involved, Ms Banduk Marika, expressed her concern that others of her clan, the Yolngu, may see or learn of the carpets and question her involvement in their manufacture. Also refer to T Janke, 'The Carpets Case; M*, Payunka, Marika v Indofun' in *Minding Culture: Case studies on intellectual property and traditional cultural expressions*, Prepared for World Intellectual Property Organisation, Geneva, 2003, pp 8–27, where customary laws and regimes are discussed.

> Under Aboriginal law, the right to create artworks depicting creation and dreaming stories, to use pre-existing designs and totems of the clan, resides with the traditional owners as custodians of the images. The traditional owners have the collective authority to determine whether these images may be used in the artwork, by whom the artwork may be created, by whom it may be published, and the terms, if any, on which the artwork may be reproduced . . . If a story or design is reproduced without the permission of the traditional custodians, it is the responsibility of the traditional custodians (or owners) to take steps to preserve the dreaming and to punish those responsible for the breach.

their children.[77] It has also been generally based on blood line. Under Indigenous customary law, most Indigenous persons and communities view family or kinship without the need of a blood tie, and adopt a non lineage viewpoint of descent.[78] This is in direct contrast to non Aboriginal adoption of what is meant by kinship or family.

The common law has not been able to grasp the concept of what is meant by Indigenous family or kinship easily. For example, while the recognition of Native Title (discussed above) acknowledges customary law to a degree in relation to Indigenous persons' connections to land (despite it not being available for Indigenous succession purposes), its application is nonetheless limited by the common law and legislative refusals to acknowledge extended Indigenous or Aboriginal kinship relationships. For example, Native Title claimants or even those Indigenous clans who seek alternative agreements over land, must show under the common law and the Native Title Act[79] that they are the 'traditional owners' of the subject land, where they must establish that they as 'a particular Indigenous group are the right people to engage in discussions about a particular area'.[80] Indigenous persons thus carry a heavy burden to show that they or their clan are the ones who practiced the traditional laws and customs at the time of sovereignty in order to make such claims to the land.[81] Of course this is problematic for many Indigenous persons or clans because after over 200 years, their assimilation with the land and other Indigenous persons has either been diluted or changed since the time of sovereignty.

Other legislative schemes with respect to Indigenous land rights in differing Australian jurisdictions have also attempted to define what is meant by 'traditional Aboriginal owners'. For example, Commonwealth legislation which deals with Aboriginal claims on unalienenated Northern Territory land, defines traditional Aboriginal owners as:

> a local descendant group of Aboriginals who (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land and (b) are entitled by Aboriginal tradition to forage as a right over that land.[82]

A further example is contained under the Land Rights Act in South Australia which states that:

> traditional owner in relation to land means an Aboriginal person who has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them.[83]

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77 In this context family lineage refers to the descendants of a common ancestor considered to be the founder of the line.

78 Keen, above n 14, p 988.

79 Native Title Act 1993 (Cth).

80 Attorney-General, 'Opening Address', Speech delivered at the Native Title Consultative Forum, Old Parliament House, Canberra, 4 December 2008, at <http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FourthQuarter_4December2008-NativeTitleConsultativeForum>.

81 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; [2002] HCA 58; BC200207517.

82 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 3(1).

83 Anangu Pitjantjatjara Yankunytjatjana Land Rights Act 1981 (SA) s 4.

All these legislative schemes, including Native Title legislation 'appear to formulate a hierarchy of associations to land with the recognition of "higher" or "primary" rights holders as traditional owners to the exclusion of others who lack these associations'.[84] In essence there seems to be the notion that an Indigenous person or clan is either a practicing 'traditional' or 'non traditional' Indigenous person or clan and that only those that fall under the 'traditional' definition may lay claim to land under the legislative schemes.

The constraints in the recognition of extended Indigenous or Aboriginal kinship connections to the land under Native Title and other legislative schemes that deal with Indigenous land rights have not allowed a fully cohesive assimilation of customary law by failing to recognise a broader spiritual connection that many Indigenous persons (not only those that are entitled to claim under the legislative schemes) have with the land. As noted above by Berndt, the land is a spiritual resource where it is held in trust by Indigenous persons for future generations where the responsibility for it rests with those who are attached to certain territories.[85] In some circumstances this may well equate with those that are recognised as Native Title holders or under other legislative Indigenous land provisions, however in other circumstances it may not, especially where an Indigenous person or clan have not been able to make that connection of traditionality as required under these laws.

Turning to what is understood by kinship or family in Indigenous societies, it is important to note that while they may vary between clans and Indigenous groups, nevertheless all view kinship as providing the social basis which in turn underpins Indigenous peoples' connection with each other, within their clan and also with those outside of it where:

> Kinship is at the heart of Aboriginal society and underpins the customary law rules and norms . . . Importantly, kinship governs all aspects of persons social behaviour and prescribes the obligations or duties a person has towards others as well as the activities or individuals a person must avoid . . . It is important to note . . . that while the kinship system was an undeniable part of traditional Aboriginal society . . . it is also strongly instilled in contemporary Aboriginal society, including urban Aboriginals . . . certain kinship obligations, such as the duty to accommodate kin, are taken very seriously regardless of urban or remote location.[86]

Importantly, an Indigenous 'kin' society, is one where their social relationships are not solely defined by reference to biological status:

> The system of kin relatedness largely dictates the way people behave towards one another, prescribing dominance, deference, obligation or equality as the basis of the relationship. . . . Aborigines employ what is known as a 'classificatory' kinship system; that is, the terms used among blood relatives are also used to classify or group more distantly related and unrelated people.

Kinship or family under Indigenous customary law is thus based on two principles. First, siblings of the same sex are classed as equivalent in the

84 D Edelman, 'Broader native title settlements and the meaning of the term "traditional owners"', Paper presented at the AIATSIS Native Title Conference, Melbourne, 4 June 2009.

85 Berndt, above n 57.

86 Western Australia Law Reform Commission, above n 14, p 66.

reckoning of kin relationships. Second, in theory this social web can be extended to embrace all other people with whom one comes into contact within a lifetime. In this manner, Indigenous persons 'family' connections are not limited to blood relatives. The broad recognition of what is meant by family or kinship under Indigenous customary law thus becomes problematic when considering succession rights of Indigenous persons under the Australian intestacy provisions in particular which generally follow a narrow Eurocentric based concept of family (discussed below).

Part 2: Indigenous Australians — the inadequacy of Australian Intestacy provisions

2.1 General intestacy provisions

Intestacy legislation is important because it operates by design, and can apply to most Indigenous Australians, as most Indigenous Australians or Aboriginals die 'intestate', that is without a valid will, primarily because will-making is not an established part of the cultural or spiritual constitution of Indigenous communities.[87] Intestacy laws are important because they offer a legally recognisable right to succession of property, not just a mere expectational right that must be then proved.[88]

All jurisdictions in Australia adopt their own legislative provisions which deal with an individual who dies 'intestate',[89] In most states of Australia, the legislative provisions adopt a narrow, Eurocentric focus and the differing perspectives between western and Indigenous understandings of family and kinship are often misconceived. In the context of Indigenous persons and their communities, this invariably has resulted in intestacy distributions which fail to properly address the full customary responsibilities of the deceased.[90]

In those jurisdictions in Australia where no specific 'cultural' provisions have been enacted with respect to Indigenous persons, the general intestacy provisions generally require that the property of a person who dies without a valid will is to be distributed in accordance with a per stirpes distribution,[91] scheme. This means that the person who takes under intestacy is based on a

87 Vines, above n 2, where the author outlines the difficulties of encouraging effective will-making within a customary context. See also 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.

88 For example, under family maintenance legislation. See s 91(1) of the Administration and Probate Act 1958 (Vic).

89 For a general definition of 'intestate' see s 51 of the Administration and Probate Act 1958 (Vic).

90 See generally 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.

91 'Per stirpes' denotes a method used in dividing the estate of a person. A person who takes, sometimes called by right of representation, does not inherit in an individual capacity but as a member of a group. In a per stirpes distribution, a group represents a deceased ancestor. The group takes the proportional share to which the deceased ancestor would have been entitled if still living. See, eg, Administration and Probate Act 1958 (Vic) s 52(1)(f)(ii). In cases where the issue includes the grandchildren of an intestate, the legislation provides that the grandchildren are only entitled to a per stripes share of the estate. This means that the issue of the deceased child of an intestate must share equally between themselves the share

remoter generation representing the ancestor, ie, it is the group closer to the intestate that defines the proportions.[92] Thus succession rights in these circumstances is on the immediate family of the deceased or, if none, then the next of kin. Under all Australian state jurisdictions, this next of kin distribution is dealt with generally on a lineal or blood relation line where rights flow to the next of kin[93] of the intestate who are in equal degree and their representatives.[94] While the broad family maintenance provisions (discussed above) can to a degree address kinship relationships of Indigenous persons, the many general intestacy provisions, based on the per stirpes distribution broadly follow western 'family' principles and protocols and, in many instances, may be inappropriate in the context of broader, Indigenous families. They do not provide for specific attention to be given to the extensive cultural responsibilities of Indigenous persons and as such broader kinship obligations are generally ignored.[95]

2.2 Specific intestacy provisions for Indigenous Australians

Given the high volume of Indigenous persons dying intestate, and the fact that intestacy is an important issue for the Indigenous community, the inadequacy of the general intestacy provisions has prompted some states to introduce specific provisions. These provisions are aimed at promoting a greater awareness of different cultural practices in the distribution of Indigenous estates. Queensland, Western Australia and the Northern Territory have each

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of the estate that would have been distributed to their deceased parent under the intestacy. In this way the grandchildren do not share in equal shares with the surviving children of the intestate (ie, their aunts or uncles).

92 For example under the Victorian legislative scheme the surviving spouse and/or children and/or proximate relatives are to take the estate in defined shares: s 52(1)(f)(ii) of the Administration and Probate Act 1958 (Vic). In cases where the issue includes the grandchildren of an intestate, the legislation provides that the grandchildren are only entitled to a per stirpes share of the estate. This means that the issue of the deceased child of an intestate must share equally between themselves the share of the estate that would have been distributed to their deceased parent under the intestacy. In this way the grandchildren do not share in equal shares with the surviving children of the intestate (ie, their aunts or uncles). Note however that this is still subject to family maintenance provisions under Administration and Probate Act 1958 (Vic) s 91(1).

93 'Next of kin' is not defined under the common law, however in the Victorian jurisdiction, next of kin under the intestacy provisions puts relatives into categories of the first degree, the second degree and so on. See s 52 (1)(f) of the Administration and Probate Act 1958 (Vic).

94 See, eg, s 55 of the Administration and Probate Act 1958 (Vic). Where there are no eligible relatives under the schemes of distribution on intestacy, all jurisdictions in Australia provide that the Crown will have a right to claim the estate. This right of *bono vacantia* stems from the old common law right of the Crown to the goods of the person who died intestate and without relatives entitled to succeed to the personal estate.

95 Administration and Probate Act 1958 (Vic) s 52 which deals with persons who have died interstate. Under this section recognition is given to the family relationships recognised under western notions of family, eg, s 52(1)(a)–(ea) deals with the distribution of an intestate's property according to the following order: (a) If the intestate leaves a partner she or he shall be entitled if the intestate leaves any issue to one-third of such estate; (b) If the intestate leaves a father and a mother but no partner or issue such estate shall be distributed equally between the father and the mother; (e) If the intestate leaves a father but no partner or issue or mother the father shall be entitled to such estate; (ea) If the intestate leaves a mother but no partner or issue or father the mother shall be entitled to such estate.

introduced such provisions aimed at tackling this issue with each state adopting a slightly different approach.[96] Despite the shortcomings of these provisions, outlined in more detail below, they nevertheless represent an important initiative as they replace the expectational assumptions of members of a broader Indigenous family with clearer and more definitive legal rights.

The state of Queensland has attempted to address particular Indigenous intestacy issues. The Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984 (Qld) attempts to provide an Indigenous cultural perspective by setting out that in circumstances where it is impracticable to determine the person or persons legally entitled to succeed to the estate of an Indigenous person, the power to administer the estate may be given over to the Chief Executive.[97] Where such power is transferred, the Chief Executive will be obliged to make a decision as to who should succeed to the estate of the deceased.[98] If no suitable person can be found, the estate will automatically vest with the Chief Executive, who is then obliged to use that estate for the benefit of Aboriginals or Torres Strait Islanders generally.[99]

These provisions however make no mention of what the Indigenous 'estate' is comprised of nor does the vesting power with the Chief Executive specifically guarantee consideration of extended Indigenous or Aboriginal kinship obligations in the distribution of the estate of an intestate Indigenous person. Rather, it actually ensures that such an estate will be controlled by an officer of the Commonwealth who, in turn, may determine how and to whom the estate should be distributed. While the aim of the introduction of this provision was to encourage broader consideration of Indigenous issues in the distribution of intestate estates, the substantive effect is essentially a promotion of cultural paternalism.[100] This is apparent in the implicit assumption that an officer of the Commonwealth, rather than members of the Indigenous community, is the person best equipped to determine how the estate should be distributed. Further, the Queensland legislation does not expressly mandate account to be given to different customary practices and cultural perspectives in the actual distribution and thereby it in reality precludes members of the broader Indigenous community from asserting their legal rights. Consequently, the substantial effect of the Queensland provisions is an externalisation of the intestacy process, resulting in the revesting of control over intestate property from Indigenous Australian or Aboriginal next of kin to government officials.

The state of Western Australia has also attempted to legislatively deal with

96 Legislation has been introduced in three states purporting to deal expressly with the issue of Indigenous Intestacy. See Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984 (Qld); Aboriginal Affairs Planning Authority Act 1972 (WA) and Administration and Probate Act, 1979 (NT).

97 The Chief Executive in this context, is appointed under the Aboriginal and Islander Affairs Corporation, a statutory body. See Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984 (Qld) ss 5, 6, 7, 8, 56 and 60.

98 Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984 (Qld) ss 60, 71(2)(i).

99 Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984 (Qld) s 56.

100 See, generally, P Vines, 'When Cultures Clash: Aborigines and Inheritance in Australia' in G Miller (Ed), *Frontiers of Family Law*, Ashgate Publishing Ltd, Surrey, 2003, pp 99–102.

intestacy as it applies to Indigenous persons. The Aboriginal Affairs Planning Authority Act 1972 (WA) adopts a similar framework to the Queensland model in that it sets out that the estate of the intestate Indigenous person must vest with the Public Trustee, and it is the Public Trustee, rather than the Indigenous community, who must determine how the estate should be distributed.[101] Once it is determined that a person is entitled under the legislation to a distribution from the intestate's property,[102] the Public Trustee must, so far as lies in his or her power, manage, control and administer the estate or share in the estate for the personal benefit and advancement of the entitled person.[103] Unlike the Queensland legislation, however, the WA provisions do attempt to give express recognition to Indigenous customary perspectives by imposing an express mandate upon the distributing party to take into account Aboriginal customary law. Section 35(2) of the WA Act specifically states that, 'a regulation made for the purposes of this section shall, so far as is practicable, provide for the distribution of the estate in accordance with the Aboriginal customary law as it applied to the deceased at the time of his death'. The imposition of this positive obligation goes a lot further than the Queensland provisions as it appears to compel a consideration of any customary responsibilities the Indigenous intestate may have had at the time of his or her death. Unfortunately however, the regulations that support s 35(2) undermine its potential by making it clear that the provision is only applicable where the deceased had not entered into a marriage recognised under either the Marriage Act 1961 (Cth) or any other Commonwealth law.[104]

This regulation significantly diminishes the scope of s 35(2) of the WA Act because it endorses what might be described as an 'all or nothing' approach to the attribution of customary law within an intestacy distribution. Where an Indigenous intestate was not in a recognised marriage under Commonwealth legislation, the specific Indigenous intestacy provisions mandating cultural diversity are directly applicable and distributional rights may be conferred on each and every customary spouse. By contrast, where an Indigenous intestate was in a recognised Commonwealth marriage, the specific Indigenous intestacy provisions become inapplicable, even if a customary marriage had also been entered into. The existence of a Commonwealth marriage appears to automatically deny recognition of customary law and distributional rights for customary spouses. The rationale for this seems to be premised on the assumption that customary law and responsibilities are only accountable on intestacy where the intestate has led a pure and unadapted customary lifestyle. Interactive or inter-cultural behaviour involving the acquisition of a non-customary spouse is effectively deemed by the legislation to constitute a denial of customary responsibilities.

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101 Aboriginal Affairs Planning Authority Act 1972 (WA) s 35.

102 Aboriginal Affairs Planning Authority Act 1972 (WA) s 33 provides a description to whom this Part applies where: 'The provisions of this Part apply to and in relation to a person of Aboriginal descent only if he is also of the full blood descended from the original inhabitants of Australia or more than one-fourth of the full blood.'

103 Aborigines Affairs Planning Authority Regulations 1972 (WA) reg 9(2).

104 Aborigines Affairs Planning Authority Regulations 1972 (WA) reg 9(1)(b). The regulations take a very definite approach. If a person does not fall within the category of a defined beneficiary, as prescribed, the estate must vest with the Public Trustee.

In addition, the applicability of the legislation is further limited to those Indigenous persons or Aboriginals who not only are persons of Aboriginal descent[105] but must also be of the full blood descended from the original inhabitants of Australia or be more than one-fourth of the full blood. This is a much more onerous burden than the general common law recognition of Aboriginality.[106] With respect to property rights and obligations as recognised under Indigenous customary law (as discussed above), once again, no formal recognition is made in the WA legislation or its regulations.[107]

The Northern Territory has also adopted legislation which deals specifically with an Indigenous intestate. In the Northern Territory, the Administration and Probate Act 1979 (NT) sets out that an interested person may make an application to the court for an order for distribution. That person must, however, at the time of the application, submit a plan of distribution which has been prepared in accordance with the traditions of the community or group to which the intestate Aboriginal belonged.[108] In making an order for distribution, the court must take into account this plan for distribution as well as the traditions of the relevant community or group to which the intestate belonged. Where an intestate Aboriginal is survived by more than one spouse, the estate and chattels may be equally divided between each spouse.[109] However, like the WA provisions, the NT legislation only confers distributional rights upon customary spouses, setting out that such spouses may only be taken into account where the marriage accords with customary practices.[110] Hence, where an Aboriginal has entered into a marriage that is a valid marriage under the Marriage Act 1961 (Cth) and dies after the commencement of the Act, the specific Indigenous intestacy provisions will be inapplicable.[111] The general intestacy provisions of the NT Act also make it clear that where an intestate, Indigenous or otherwise, is survived by a spouse and a de facto partner, the distribution of the estate will depend upon the nature of the relationship between the intestate and the de facto at the time of the intestate's death.[112]

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105 Aboriginal Affairs Planning Authority Act 1972 (WA) s 4 provides that a 'person of Aboriginal descent means any person living in Western Australia wholly or partly descended from the original inhabitants of Australia who claims to be an Aboriginal and who is accepted as such in the community in which he lives'.

106 Under the common law, there are three components to the Commonwealth definition: descent, self- identification, and community acceptance. This test was laid down by the High Court in *Commonwealth v Tasmania* (1983) 158 CLR 1 at 551; 46 ALR 625 at 817; [1983] HCA 21; BC8300075 where Dean J said 'By "Australian Aboriginal" I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal'.

107 Aboriginal Affairs Planning Authority Act 1972 (WA) and Aborigines Affairs Planning Authority Regulations 1972 (WA).

108 Administration and Probate Act, 1979 (NT) s 71B.

109 Administration and Probate Act, 1979 (NT) ss 6(4), 67A. Under this Act, where an Aboriginal enters into a relationship which is recognised by the community or group to which the Aboriginal belongs, that Aboriginal is to be recognised as married to the other Aboriginal.

110 Administration and Probate Act 1979 (NT) s 67A.

111 Administration and Probate Act 1979 (NT) s 71(1)(a).

112 Administration and Probate Act 1979 (NT) s 67. This section provides that the defacto

Unlike Queensland, the WA and NT legislative provisions do endorse a more directed approach to Indigenous intestacy, providing express recognition for the distributionary rights of customary spouses. However, underlying these provisions is a polarised perspective of custom and traditionality which once again fails to capture the diversity of Indigenous lifestyles within a contemporary inter-cultural society. With respect to which bundle of property rights (as recognised under customary law) are encapsulated under the succession laws relating to an intestate Indigenous person, the NT provisions also fail to address this in any form.

Conclusion

Following the naturalist tradition, succession rights are constituents of a broader category of civil rights that attach to all property interests.[113] Property owners within western societies increasingly expect that rights acquired during the lifetime of a person or community will carry on after their death or cessation.[114] Inheritance, that is, the right to transmit and receive property at death, has thus been characterised as a fundamental personal freedom.[115] This article has argued that the cogency of inheritance, as a civil right, should not be diminished by the cultural differences of certain members or groups in a society.

The focus of this article has been on Indigenous intestacy. Given the fact that most Indigenous people do not execute wills, legislative endorsement of culturally intuitive intestacy distributions is vital. Only three jurisdictions to date have attempted to deal with Indigenous intestacy under their legislatures, and while the Indigenous intestacy provisions in Queensland, Western Australia and the Northern Territory are important initiatives, they are ultimately inadequate. Full legal and moral credence must be given to the distributional rights of Indigenous communities following intestacy and the

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partner will be entitled to the personal chattels if they were the defacto partner for a continuous period of not less than 2 years immediately preceding the intestate's death and the intestate did not live with the person to whom he or she were married or they were survived by issue of the intestate and the defacto partner. If this is not the case, then the spouse is entitled to the personal chattels absolutely. Schedule 6 Pt III of the Act has similar provisions in relation to the intestate's estate, entitling the defacto partner to the estate as if they were a 'spouse' if they were the defacto partner of the intestate for a continuous period of not less than 2 years immediately preceding the intestate's death and the intestate did not live with the person to whom he or she were married or they were survived by issue of the intestate and the defacto partner. Otherwise, the intestate will be treated as having been survived by the spouse and not by the defacto partner.

113 See the discussion by F Bosselman, 'Four Land Ethics: Order, Reform, Responsibility, Opportunity' (1994) 24 *Environmental Law* 1439 esp at 1490 where the author suggests that the land ethics of opportunity, inheritance and economic utility may be applicable to all forms of ownership, irrespective of their cultural foundations because of their derivation as natural, civil rights. Cf D J Kornstein, 'Inheritance — A Constitutional Right' (1984) 36 *Rutgers L Rev* 741 at 769 where the author suggests that inheritance may be better regarded as an ancillary civil right of property which ceases naturally upon the death of the holder.

114 1 For a discussion on the expectational rights underlying ownership, see the American Supreme Court judge, Justice Antonin Scalia who, in *Lucas v South Caroline Coastal Council* 112 S Ct 2886 (1992) at 2894 talks about 'expectation' entitlements that underlie all land interests. For a discussion on this judgement, see R A Epstein, '*Lucas v South Carolina Coastal Council*: A Tangled Web of expectations' (1993) 45 *Stanford L Rev* 1369.

115 Kornstein, above n 114, at 743.

implicit notion that these rights become irrelevant where an Indigenous intestate has engaged in non-traditional practices should be discarded.[116]

If intestacy legislation is to effectively support cultural diversity and the distributional rights of members of the broader Indigenous community, it must not only accommodate the broader custodial responsibilities of Indigenous people, it must also accept the contextualisation of those responsibilities within a contemporary social framework.[117] This is best achieved through the introduction of uniform legislation, mandating a liberalised assessment of customary responsibilities. This would encourage an acceptance of the fact that most Indigenous people today lead a life that is interconnected by a blend of both traditional and non-traditional practices.[118]

By explicitly recognising the role that culture plays in structuring institutional approaches to the regulation of property entitlements, we can have a better contextual understanding of how governance structures should be implemented. Patterns of succession are intricately interwoven in the fabric of western and Indigenous societies and the ontological differences that inform property, family, kinship and custodial responsibilities should not preclude their equalised acceptance and recognition. Indigenous people are entitled to expect that the ownership rights they have acquired and the cultural responsibilities they have assumed will be properly respected after their death. The extent to which a social framework can support these expectations is, ultimately, reflective of its cross-cultural potential.

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116 See the discussion by R Chester, *Inheritance, Wealth and Society*, Indiana University Press, Bloomington, 1982, pp 34–5 where the author talks of succession rights both in terms of rights of transmission and rights of receipt. See also R Tsosie, 'Tribalism, Constitutionalism and Cultural Pluralism: Where Do Indigenous Peoples Fit within Civil Society' (2002-2003) 5 *University of Pennsylvania Journal of Constitutional Law* 357 where the author notes: 'The tensions wrought by multiculturalism in the contemporary world often manifest themselves in tribal wars and nationalistic fervor, leading to uncertainty about how the legal and moral claims of Indigenous peoples should be adjudicated within modern pluralistic democracies.'

117 For a discussion on the problems of contextualising customary practices and liberalising entrenched conceptions of tradition, see R J Coombe, 'Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy' (1993) 6(2) *Canadian Jnl of Law and Jurisprudence* 266.

118 See Commonwealth, *Royal Commission into Aboriginal Deaths in Custody, National Report*, Vol 1, AGPS, Canberra, 1991, p 39 where it is noted that Indigenous people are not divided into traditional and non-traditional and that often they lead a mixture of both lifestyles. This point is also made by P Vines, 'Drafting Wills for Indigenous People: Pitfalls and Considerations' (2007) 6(25) *Indigenous Law Bulletin* 6 at 7.