



**MANY LAWS,
ONE LAND:**
LEGAL AND
POLITICAL
CO-EXISTENCE



*National
Native Title
conference
2018*



**25 YEARS
OF THE
NATIVE TITLE
ACT 1993
(CTH)**



Native Title *Newsletter*



AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL
AND TORRES STRAIT ISLANDER STUDIES

Issue 2 | 2018

Welcome!

to the Native Title Newsletter 2018

This year marks the 25th anniversary of the development of the *Native Title Act 1993* (Cth) and the AIATSIS Native Title Research Unit (NTRU). Since then the NTRU has focused on maximising the recognition of native title through improving information and coordination, actively engaging in law and policy reform and strengthening the voice of native title holders.

Over two editions, AIATSIS celebrates 25 years of native title law, policy and research by providing you with information on important updates and topics this year, including the amendments to the Native Title Act, funding and training opportunities for native title holders and research developments in the areas of land management and renewable energy.

We will feature interviews, research articles, youth perspectives and community interviews.

Stay in the loop by subscribing to the Newsletter online or if you would like to make a contribution, please contact the NTRU for further information.

Image: Youth delegates visiting Didirrgun cultural heritage site.
Credit: Amy Williams.



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ntru@aiatsis.gov.au

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Cover: A camel train at Cable Beach, Yawuru Elder Di Appleby, Senator Pat Dodson, Gail Mabo with Michael Lavarch AO and AIATSIS CEO Craig Ritchie, sunset at Cable Beach

Photographer: Amy Williams.

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NATIONAL NATIVE TITLE
CONFERENCE 2018





The 25th anniversary OF THE NATIVE TITLE ACT 1993 (CTH)

CEDRIC HASSING AIATSIS

ON THE 22 DECEMBER 1993, THE *Native Title Act* was passed by the Australian Parliament 'after one of the longest and most divisive parliamentary debates in the nation's legislative history.'¹ The legal recognition of Aboriginal and Torres Strait Islander peoples' land based on the recognition by the common law was confronting for the Australian nation state.

The *Native Title Act 1993* (Cth) (the NTA) was introduced in response to the landmark High Court decision in *Mabo* that overturned the myth that by virtue of European people's arrival on this continent the consequence was that the prior occupation of Indigenous political communities could be disregarded. This was one of the legal fictions that grounded 'radical title' to land for Europeans who arrived in 1770 and some have described this as the overturning of the doctrine of terra nullius. After the Court had recognised that native or Aboriginal title formed a part of the common law, legislation was seen as an opportunity 'to do justice to the

Mabo decision in protecting native title and to ensure workable, certain, land management'.²

Broadly the NTA sought to achieve four things: (1) it validated past grants and legislation to give full effect to Crown grants made before 1 January 1994 or legislation passed before 1 July 1993 (2) it enacted a 'future acts regime (3) it gave effect to state and territory jurisdiction; and (4) it vested powers to determine native title in the Federal Court and the new National Native Title Tribunal.³

This year, 2018, marks the 25th anniversary of the passage of the NTA. It is important to note that numerous native title decisions of the Federal Court of Australia refer to the preamble to the NTA:

in enacting the law, the people of Australia intend to rectify the consequences of past injustices for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders, and to ensure that

Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.⁴

The NTA was clearly:

intended to achieve rectification of past injustice and current disadvantage so as to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

The NTA operates within Australia's federal system of government with divided, but at times overlapping, spheres of legislative powers and executive responsibilities between the Commonwealth and state and territory governments. This means



that as a consequence: the powers to grant interests of land in the tenure-based system of land law rests with state governments, as the inheritors of the colonial land law structures.⁵ This is an extraordinary delegated responsibility in the federalist structure that Indigenous political communities simply have to endure and it means that whilst the Commonwealth seeks to set the policy environment in native title matters,⁶ states and territories exercise extraordinary delegated responsibility in the administration of Crown Land law.

In conjunction, state and territory governments have extensive land management, environmental protection, infrastructure provision, land use planning and other responsibilities that interface with native title rights and interests.⁷ The cooperation of the states and territories and their obligations to behave as model litigants in reaching negotiated settlements as primary respondent parties to native title claims is a consideration of

Justice Jagot's decision in *Western Bundjalung v Attorney General of New South Wales*.⁸ If states and territories do not behave as model litigants and if they do not seek to achieve the interests of all Australians then they fail in the discharge of their duty with respect to model litigant obligations pursuant to Federal Court of Australia practice notes and their positive legislative responsibilities.

Whilst the *Mabo* decision established a movement towards a sui generis or unique concept of Indigenous land rights, many Indigenous leaders and activists criticised the High Court for not going far enough in recognising the inherent rights of Indigenous people. Michael Mansell stated that the High Court did not overturn anything of substance but merely propounded white domination and superiority over Aboriginal people by recognising such a meagre Aboriginal form of right over land.⁹ Professor Irene Watson's view was that in *Mabo (No 2)* the rights recognised in that decision, being phrased and produced in the name of the coloniser, always limited the possibility of justice: 'the powers of the coloniser to land and sovereignty were never challenged by the settler society for the scenario is constructed never to be challenged.'¹⁰

During its 25 years of operation the NTA underwent numerous reviews and amendments. The ten point plan introduced in response to the *Wik* decision resulted in the *Native Title Amendment Act 1998 (Cth)*.¹¹ In the Human Rights and Social Justice Commissioner's Native Title Report of 1998, the Commissioner stated that one of the primary provisions of the NTA was that it enabled the validation of all non-Indigenous interests in land resulting from past acts by the Crown and that this principle of extinguishment was extended via these amendments following the decision in *Wik*.¹² The only live issue in *Wik* was whether or not the original native title to the land was completely extinguished, or whether native title could in some way survive the grant of a pastoral lease. The potential co-existence of native title with pastoral interests was a modest recognition and

realignment of interests, with limited potential for Indigenous interests to impede the use of the land for pastoral purposes.¹³

The 1998 amendments provided a significant problem which remains from an Indigenous perspective; in that they set out a process of notification and registration which is entirely focused on ensuring the validity of future acts and development. The provisions did not provide any additional support for obligations of non-Indigenous parties and government to Indigenous parties. The extinguishment of native title pervaded the 1998 amendments to the NTA.¹⁴ Where native title had not been extinguished, the amendments to the Act substantially altered the framework against which negotiation took place, with the potential to significantly reduce the scope for agreement making.

According to the Australian Human Rights and Equal Opportunity Commission, the 1998 amendments 'seriously undermined the protection and recognition of the native title rights of Aboriginal and Torres Strait Islander peoples'.¹⁵ The amendments were also criticised by the United Nations Committee on the Elimination of Racial Discrimination as racially discriminatory,¹⁶ with Professor Larissa Behrendt reflecting that the 1998 amendments proved that: 'the days of Government truncating and extinguishing Indigenous rights are far from over.'¹⁷

In the period 1998 to 2013 subsequent to the amendments in 2010 which created a new future act process, 'no changes were made to the NTA despite a great deal of law reform activity. The explicit incrementalism of the Commonwealth Attorney-General's Department was apparently intended to achieve certain and lasting changes in contrast to the risk of large-scale reforms either being defeated in Parliament or repealed later.'¹⁸ It appears that the racialised, hateful and protracted debates of the original NTA bills and subsequent legislation could not be repeated.

HREOC and AIATSIS have both submitted that substantive legislative reform must be in accordance



with the preamble of the NTA and the United Nations Declaration on the Rights of Indigenous Peoples; which forms a part of customary international law.¹⁹ However reforms to the native title system have been relatively *ad hoc* and have not applied a holistic approach. Professor Mark McMillan has commented that this leaves Indigenous peoples feeling that the NTA and its associated jurisprudence has moved far away from the hope of law and far away from the intentions of the original legislation.²⁰

The Australian Law Reform Commission's 2015 report and inquiry into native title law was tabled on 4 June 2015.²¹ The bulk of the 30 recommendations for reform have not been implemented by 2018. This has re-enforced a legal system that has created limited opportunities for Aboriginal and Torres Strait Islander communities which remains slow and cumbersome in the delivery of outcomes.²²

Five years ago in providing his advice to government on native title law, the former Social Justice Commissioner,

Mick Gooda, stated that the promise of the Mabo decision and the NTA as drafted in 1993 has not been fully realised.²³ In 2018 the Commonwealth Attorney General released a discussion paper on proposed reforms to the NTA.²⁴ It is anticipated that an exposure draft bill will be prepared in late 2018 on the basis of the submissions received.

The *Native Title Act* in its current form does not provide for a just and equitable native title system, which is consistent with international human rights standards, in particular the United Nations Declaration on the Rights of Indigenous Peoples.²⁵ Although the system goes some way to upholding the rights of Aboriginal and Torres Strait Islander peoples, it also creates significant obstacles to the full realisation of these rights, including, the onerous burden of proof, the injustices of extinguishment, and the weakness of the good faith requirements.²⁶

Professor Mick Dodson in his address marking the 40th anniversary of the Federal Court of Australia stated that:

“ We need to move beyond thinking native title is the only solution. The increasingly legalistic nature of the native title system and limitations on outcomes achievable within it have prompted indigenous organisations, the Law Reform Commission and some governments to take action to find a better way. Recent focus is on new frameworks, alternative land justice processes and improved cohesion between different land management systems to provide practical benefits for Indigenous people. This will require the leveraging of the growing Indigenous estate in Australia into meaningful outcomes for Indigenous people.”²⁷

The developing common law of native title has recognised that the native title estate is not fragile.²⁸ However, major progress is unlikely to be achieved unless legislative amendments revisit core issues that address the relationship of Aboriginal and Torres Strait Islander peoples' relationship to their lands and water. These issues include the burden of proof placed upon native title holders to prove their connection to their lands and waters, the expensive nature of contested litigation and negotiating agreements, the governance challenges that result from the forced incorporation of native title rights and interests and the right to resources.

- 1 See 'The 2018 Mabo Lecture': 8 June 2018-AIATSIS National Native Title Conference Broome 2018: Emeritus Professor Michael Lavarch AO.
- 2 Commonwealth, Parliamentary Debates, House of Representatives, 16 November 1993, 2878 (Paul Keating).
- 3 See Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2018) 14–15.
- 4 *Western Bundjalung v Attorney General of New South Wales* [2017] FCA 992 at [13] per Justice Jagot as cited in AIATSIS 2018 Submission: Reforms to the Native Title Act 1993 Cth p6.
- 5 Lisa Strelein, *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2013).
- 6 Noting that by virtue of section 109 of the Australian Constitution:

Above: Joe Edgar and Tran Tran (Karajarri country).

Credit: Trinity Handley.



- Commonwealth legislation prevails over state and territory laws.
- 7 Australian Law Reform Commission Connection to Country Report Number 126: Framework for Review: Historical and International Perspectives: The Native Title Act.
 - 8 *Western Bundjalung v Attorney General of New South Wales* [2017] FCA 992, see paragraphs [10]–[22] and see also 2018 AIATSIS submission in response to the *Reforms to the Native Title Act 1993 (Cth) Options Paper* available at <https://aiatsis.gov.au/publications/products/reforms-native-title-act-1993-cth-options-paper>
 - 9 Mansell, Michael 'The Court gives an inch but takes another mile (1992) 2(57) *Aboriginal Law Bulletin* 4 at 6, cited in *Indigenous Australians, Social Justice and Legal Reform: Honouring Eliot Johnson* (Editors Esmaili, H, Worby, G. and Tur, S. (Federation Press, 2016, Sydney) p7.
 - 10 Watson, I. 'From a hard place: negotiating a softer terrain'(2004) 7 *Flinders Journal of Law Reform* 7, reproduced in *Indigenous Australians, Social Justice and Legal Reform: Honouring Eliot Johnson* (Editors Esmaili, H, Worby, G. and Tur, S. (Federation Press, 2016, Sydney) p111.
 - 11 *Wik and ors v State of Queensland* (1996) 187 CLR 1 and Nettheim, G. *The search for certainty* (1999) Volume 22(2) 1999 UNSW Law Journal.
 - 12 HREOC, *Native Title Report 1998* p3.
 - 13 *Ibid.* p3.
 - 14 This focus on extinguishment has been criticised extensively. See for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1996–97, HREOC, Sydney 1997, chapters 3 and 4.
 - 15 *Ibid.* pp 73–116; Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 2009, HREOC, pp 4–7.
 - 16 McRae, H. Nettheim, G. et al, *Indigenous Legal Issues: Commentary and Materials* (Thomson Reuters, 2009) p315.
 - 17 Behrendt, L. 'Power from the People: A Community based approach to Indigenous Self-Determination' (2003) 6 *Flinders Journal of Law Reform* 135: reproduced in *Indigenous Australians, Social Justice and Legal Reform: Honouring Eliot Johnson* (Editors Esmaili, H, Worby, G. and Tur, S. (Federation Press, 2016, Sydney) p90.
 - 18 Duff, Nick 'Reforming the Native Title Act: Baby steps or dancing the running man?' (2013) (17) (1) *Australian Indigenous Law Reporter* 56-58, 59.
 - 19 AIATSIS 2018 submission in response to the *Reforms to the Native Title Act 1993 (Cth) Options Paper*, p2.
 - 20 McMillan, M 'Holding on to the hope of law' (2014) 16 *Flinders Journal of Law Reform* 251 as reproduced in *Indigenous Australians, Social Justice and Legal Reform: Honouring Eliot Johnson* (Editors Esmaili, H, Worby, G. and Tur, S. (Federation Press, 2016, Sydney) 279 at 283.
 - 21 Connection to Country: Review of the Native Title Act 1993 (Cth).
 - 22 Behrendt, L. 'Power from the People: A Community based approach to Indigenous Self-Determination' (2003) 6 *Flinders Journal of Law Reform* 135: reproduced in *Indigenous Australians, Social Justice and Legal Reform: Honouring Eliot Johnson* (Editors Esmaili, H, Worby, G. and Tur, S. (Federation Press, 2016, Sydney) p9.
 - 23 Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report, HREOC, 2013 p76. See also Senator Patrick Dodson ' No one can ever take your land away': key note address to the 2018 AIATSIS national native title conference.
 - 24 The Options Paper and the 46 submissions received are available at: <https://www.ag.gov.au/Consultations/Pages/Reforms-to-the-Native-Title-Act-1993.aspx>
 - 25 United Nations General Assembly: *Declaration on the Rights of Indigenous People*. 2007 A/RES/61/295 (UNDRIP). See also, United Nations General Assembly International Convention on the Elimination of All Forms of Racial Discrimination 1966, Treaty Series 660, 195; United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, 1966, United Nations, Treaty Series 993, 3.
 - 26 HREOC submission to the *Reforms to the Native Title Act 1993 (Cth) Options Paper* 28 February 2018; See also Burnside, S, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' *Land Rights Laws: Issues of Native Title*, AIATSIS Research Publications, Canberra, Volume 4(3) 2009.
 - 27 Professor Mick Dodson: 40th Anniversary of the Federal Court of Australia Special Ceremonial Sitting of the Court Sydney, 7 February 2017, p5. See also Justice Griffiths endorsing Professor Dodson's comments in *Lyndon on behalf Budina People v State of Western Australia* [2017] FCA 1214 at [3] and The Environmental Significance of the Indigenous Estate: Natural Resource Management as Economic Development in Remote Australia' Altman, J.C; Buchanan G.J; Larsen, L. (CAEPR Discussion Paper No.286/2007) p5.
 - 28 Justice Michael Barker 'Not so 'fragile' a thing: The evolving character of native title, 1993 to 2018': Presentation to the National Native Title Conference 2018, Broome, Thursday 7 June 2018.

Above: Injudine Creek (Karajarri country).

Credit: Tran Tran.

AIATSIS RESEARCH

MAPPING LIVELIHOOD VALUES OF INDIGENOUS CUSTOMARY FISHING

The primary objective of this project was to document the ways in which fishing and related activities were important and beneficial to Aboriginal people and communities, as well as existing barriers to customary fishing and fishing-related aspirations. The project was funded by the Indigenous Reference Group of the Fisheries Research and Development Corporation. AIATSIS partnered with three Aboriginal organisations to conduct regional case studies: the NSW Aboriginal Fishing Rights Group on the NSW South Coast, the Far West Coast Aboriginal Corporation on the Far West Coast of SA, and the Crocodile Islands Rangers in northeast Arnhem Land, NT.

A total of 169 Aboriginal people took part in interviews. There were some regional differences, but the broad fishing values identified were

remarkably consistent both within and across case studies. The interview results show that fishing and related activities were of significant and multifaceted value to the participating communities, providing a number of cultural, social, economic, physical and mental health benefits.

These benefits included opportunities to practise and pass on culture, reduced financial stress for low income families,

healthier diets, stronger family and community ties through sharing fish, better mental health, and much else besides.

The final project report and community reports for each of the case studies are available on the project page on the AIATSIS website: <https://aiatsis.gov.au/research/research-themes/land-and-water/livelihood-values-indigenous-customary-fishing>.



The Livelihood values of Indigenous customary fishing project team and case study partners at the 2017 National Native Title Conference.

Credit: Liz Koschel.

YOUTH ENGAGEMENT IN NATIVE TITLE

Following discussions at the youth forums held at the 2016 and 2017 National Native Title Conferences, the NTRU embarked upon the Youth Engagement in Native Title project. The research investigated the experiences

of young Aboriginal and Torres Strait Islander people involved in native title throughout Australia. By telling these stories, it is hoped that PBCs, NTRBs and other organisations will be better able to support young Aboriginal and Torres Strait Islander people

who are, or may want to become involved, in native title.

The findings of the research are captured in *What do young fellas reckon: exploring the experiences of Aboriginal and Torres Strait Islander youth in native title*, available on the AIATSIS website.



Youth forum delegates at the National Native Title Conference 2018. Credit: AIATSIS.

PROJECTS UPDATE

PRESCRIBED BODIES CORPORATE WEBSITE REDEVELOPMENT

AIATSIS officially launched the redeveloped Prescribed Bodies Corporate (PBC) website on 16 August 2018. AIATSIS has been working in partnership with the Department of the Prime Minister and Cabinet since 2017 to make improvements to the website. The new nativetitle.org.au is easier to use and contains more information specifically for PBCs. The website is intended to assist PBCs to better understand their rights, obligations and functions, as well as containing useful information, including links to grant funding, training opportunities, fact sheets and templates.

The next stage of the PBC website redevelopment involves creating specific content by PBCs for PBCs. This has already begun,

as AIATSIS has interviewed PBC staff and members from around Australia about how they manage their native title rights and govern their PBC. AIATSIS is looking for other PBCs that would like to be interviewed and share their stories through the website. The interview could discuss a specific issue faced by your PBC and how they have or are overcoming it. Alternatively, it could discuss tourism ventures or business development projects your PBC is involved in or how your PBC conducts its meetings. The website has a collection of interviews that may provide some inspiration on possible topics such as dispute management, carbon farming and setting up a PBC.

If your PBC is interested in being involved or would like to know more you can contact Belinda.Burbidge@aiatsis.gov.au.

ETHICAL RESEARCH

The AIATSIS Research Ethics Committee is responsible for reviewing all AIATSIS research projects involving Aboriginal and Torres Strait Islander participants to ensure the appropriate ethical standards have been met. The committee also welcomes applications from external organisations. The committee holds six meetings per year during which ethical clearance proposals are reviewed.

You can find the up to date meeting schedule on our website: <https://aiatsis.gov.au/research/ethical-research>.

A new flow chart is available on the website to provide a better understanding of the ethics process and the new fee structure for external applications: <https://aiatsis.gov.au/research/ethical-research/application-process>.



The PBC website project team: Nadja Mack (PMC), Belinda Burbidge (AIATSIS), Iain Johnston (AIATSIS). Credit: AIATSIS.

NATIVE TITLE LAW DATABASE

The NTRU is launching a new online Native Title Law Database, to capture the legal summaries previously published in What's New in Native Title.

The native title related case and legislation summaries are now located in a database designed to enable searches by key subject

terms, jurisdiction, forum, and year. Each summary contains a link to the original judgement or piece of legislation.

This resource represents the most comprehensive collection of publically available native title law summaries in Australia. It will be available on the AIATSIS website in October 2018.

REVIEW OF THE GUIDELINES FOR ETHICAL RESEARCH IN INDIGENOUS STUDIES

For twenty years AIATSIS has provided national and international guidance in the ethical practice of research concerning Indigenous peoples. AIATSIS is committed to improving the standards of engagement and the benefits that research can offer Aboriginal and Torres Strait Islander peoples. As part of this commitment, AIATSIS is reviewing its *Guidelines for Ethical Research in Australian Indigenous Studies*. Due to be released in the first half of 2019, the revised guidelines will be informed by targeted consultation and submissions from the public.

Photo: Sunset at Cable Beach, Broome. Credit: AIATSIS.

Native title SNAPSHOT 2018

BELINDA BURBIDGE AIATSIS

25 YEARS OF THE NTA

This year we celebrate 25 years since the development of the *Native Title Act 1993* (Cth), which established a statutory regime for claiming and recognising native title land in Australia. Over the last 25 years the native title system has experienced various changes, challenges, pitfalls and successes. In its first 8 years there were few native title determinations, however due to a number of changes to legislation, state policy and native title practice the number of native title determinations increased after 2000.

By 2018 there were 353 positive determinations over 2,661,279km² of land and waters in Australia.

PBCs play a vital role in the native title system in managing and protecting native title rights and interests following a successful claim determination. The first PBC – the Dunghutti Elders Council (Aboriginal Corporation) RNTBC – was registered with ORIC in April 1997.

The PBC sector is fast expanding with 185 PBCs registered by 2018.

NATIVE TITLE AT A GLANCE

Each year we compile native title determination information from the National Native Title Tribunal's register and Native Title Vision, available [here](#). This information provides you with a snapshot of how many native title determinations and Prescribed Bodies Corporate (PBCs) there are to date and how much of Australia's land and waters have been successfully determined to be native title land.

*Note that the land mass of claims cannot be sorted from total amount of land and waters within claim boundaries – this information is not included in native title vision. The calculations in this article should be read as an approximate percentage of native title land and waters to Australia's total area.

This data was collated as of August 2018.

HOW MUCH OF WA IS UNDER NATIVE TITLE?

In Western Australia (WA) there have been 78 positive determinations of native title over 1,390,457km² of land and waters.

	Land (km ²)	Land (%)
Total land mass	2,529,875	
Land/waters under native title	1,390,457	55
Land not under native title	1,139,418	45
Exclusive native title	878,409	35
Non-exclusive native title	512,048	20

	Total PBCs	Small	Medium	Large
WA	46	26	16	4



- Exclusive Native Title
- Non-exclusive Native Title
- Land not under Native Title

HOW MUCH OF SA IS UNDER NATIVE TITLE?

In South Australia (SA) there have been 26 positive determinations of native title over 522,750km² of land and waters.

	Land (km ²)	Land (%)
Total land mass	983,482	
Land/waters under native title	549,859	56
Land not under native title	433,623	44
Exclusive native title	6,084	0.7
Non-exclusive native title	543,775	55.3

	Total PBCs	Small	Medium	Large
SA	15	7	6	2



- Exclusive Native Title
- Non-exclusive Native Title
- Land not under Native Title

HOW MUCH OF NT

In the Northern Territory (NT) there have been 29 positive determinations of native title over 1,390,457km² of land and waters.

Total land mass
Land/waters under native title
Land not under native title
Exclusive native title
Non-exclusive native title

	Total PBCs
NT	29

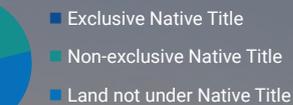


NT IS UNDER NATIVE TITLE?

In Northern Territory (NT) there have been 99 determinations of native title over 310,712km² of land and waters.

	Land (km ²)	Land (%)
Total land mass	1,349,129	100
Land/waters under native title	310,712	23
Land not under native title	1,138,417	77
Exclusive native title	8,268	0.6
Non-exclusive native title	302,445	22

	Small	Medium	Large
Total PBCs	27	2	0



HOW MUCH OF QLD IS UNDER NATIVE TITLE?

In Queensland (QLD) there have been 133 positive determinations of native title over 490,130km² of land and waters.

	Land (km ²)	Land (%)
Total land mass	1,730,648	
Land/waters under native title	490,130	28
Land not under native title	1,240,518	72
Exclusive native title	38,062	2
Non-exclusive native title	452,068	26

	Total PBCs	Small	Medium	Large
QLD	84	64	19	1



HOW MUCH OF NSW IS UNDER NATIVE TITLE?

In New South Wales (NSW) there have been 13 positive determinations of native title over 4,860km² of land and waters.

	Land (km ²)	Land (%)
Total land mass	800,642	
Land/waters under native title	4860	0.6
Land not under native title	795,782	99.4
Exclusive native title	685	0.08
Non-exclusive native title	4175	0.52

	Total PBCs	Small	Medium	Large
NSW	7	5	2	0



HOW MUCH OF AUSTRALIA IS RECOGNISED NATIVE TITLE ?

Year	% of Australia under Native Title
2000	<1
2005	7.9
2010	12.6
Currently	35

AUSTRALIAN CAPITAL TERRITORY AND TASMANIA

To date, there have not been any successful native title determinations in the ACT or Tasmania. Both the ACT and Tasmania do, however, have land co-management plans with Aboriginal representative organisations.

HOW MUCH OF VIC IS UNDER NATIVE TITLE?

In Victoria (VIC) there have been 4 positive determinations of native title over 15,171km² of land and waters.

	Land (km ²)	Land (%)
Total land mass	227,416	
Land/waters under native title	15,171	7
Land not under native title	212,245	93
Exclusive native title	0	0
Non-exclusive native title	15,171	7

	Total PBCs	Small	Medium	Large
VIC	4	2	2	0



NATIONAL

	Total PBCs	Small	Medium	Large
National	185	129	50	6

	Land (km ²)	Land (%)
Total land mass	7,692,024	
Land/waters under native title	2,661,279	35
Land not under native title	5,030,745	65
Exclusive native title	931,508	12
Non-exclusive native title	1,829,682	23



NATIONAL NATIVE TITLE CONFERENCE 2018

LUKE SMYTH **AIATSIS**

AIATSIS HAS BEEN ORGANISING and hosting the National Native Title Conference every year since 2001. The 2018 National Native Title Conference was co-convened by AIATSIS and the Kimberley Land Council (KLC) on 5-7 June, and hosted by the Yawuru people on their country in Broome, Western Australia.

This was the first time the National Native Title Conference had come to the Kimberley, coinciding with the 40th year since the founding of the KLC. In 1978 representatives from Aboriginal communities across the Kimberley met at Noonkanbah to discuss working together to stand up for their rights as traditional owners and Australian citizens, and the KLC was born.

The theme for this year's conference – *Many Laws, One Land: Legal and political co-existence* – recognised this

fundamental fact of life in Australia; in any given place there are multiple systems of law. For 25 years, the *Native Title Act 1993* (Cth) has acted as an interface between Indigenous laws and non-Indigenous laws.

This conference was an opportunity to celebrate the legal pluralism at the heart of native title, and reflect on how we can achieve a just and truly mutually beneficial form of co-existence.

The conference was held at the Cable Beach Club Resort and AIATSIS and the KLC created a temporary outdoor venue with marquees on the lawns of the resort, overlooking the stunning Cable Beach. Just over 800 delegates attended, including 86 Indigenous youth delegates. More than half of all conference delegates identified as Indigenous, representing 143 different nations and groups. The conference program featured 69

presentations by 167 speakers, more than half of whom were Indigenous.

The first day of the conference as always was the NTRB and PBC Program, reserved for native title holders and staff of Prescribed Bodies Corporate, Native Title Representative Bodies and Native Title Service Providers. The conference opened with a smoking ceremony conducted by Yawuru Elders. Anthony Watson, Chairperson of the KLC, and Dr Lisa Strelein, Executive Director of Research and Education at AIATSIS, welcomed delegates to the 2018 National Native Title Conference and acknowledged this year was the 25th anniversary of both the *Native Title Act 1993* (Cth) and the NTRU at AIATSIS.

Yawuru Elder Diane Appleby welcomed delegates to country in her Yawuru language. She spoke of the continued strong connection

Above: Karajarri dancers at the welcome reception.

Credits for all images: AIATSIS.



Gail Mabo with Professor Michael Lavarch AO and AIATSIS CEO Craig Ritchie.

her people have with their lands and waters and the strong bonds that exist between the political communities of the native title holders of the West Kimberley despite the violent disruption of colonisation.

The NTRB and PBC keynote address was delivered by Natalie Rotumah, a Bundjalung woman and CEO of NTSCorp, and the only female Indigenous CEO of an NTRB/NTSP. Natalie spoke about the need to work within the existing law to secure rights and simultaneously advocate for law reform to attain land justice.

Senator the Hon. Nigel Scullion, Minister for Indigenous Affairs, announced that he would be

supporting the National Native Title Council to run PBC regional forums and develop an educational course for PBC directors, staff and native title holders. The Minister also announced \$40 million towards securing Indigenous water rights in the Murray Darling Basin, \$5 million for targeted capability development for PBCs, and \$600,000 to increase communities' understanding of their native title rights and determinations.

Yawuru Elder Senator Patrick Dodson used his address to argue that urgent reforms are needed to protect and recognise native title for the benefit of Aboriginal and Torres Strait Islander peoples, including ending the common practice of using

Indigenous Land Use Agreements to extinguish native title. He also called for clarification from governments on crucial native title issues like compensation.

Many speakers in the NTRB and PBC Program were PBC directors and staff, and this was reflected in a focus on real-world challenges that PBCs face. Major themes included experiences of native title, the intersection of cultural and corporate governance, dispute resolution, regional co-ordination and native title rights and development. UNSW Pro Vice Chancellor Megan Davis, and Alwyn Lyall and Terry O'Shane of the North Queensland Land Council also provided an update on the outcome



Women's Talking Circle participants



Ninielia Mills.



Pinai Byrne, May Byrne and Jane Hyland.

of the First Nations Regional Dialogues and discussed the next steps following the adoption of the Uluru Statement from the Heart.

The welcome reception followed the afternoon close of the NTRB and PBC Program. Sarah Parriman, Deputy CEO of the KLC, hosted the event on the foreshore of Cable Beach. Elder and Nyamba Buru Yawuru cultural co-ordinator Dianne Appleby welcomed delegates to Yawuru country. Dance groups who had travelled from across the Kimberley treated delegates

to a medley of captivating cultural performances.

The first day of the Public Program opened with a welcome to delegates from AIATSIS Deputy CEO Letitia Hope. The 2018 Mabo Lecture was given by Professor Michael Lavarch AO, who was attorney-general in the Keating Labor government. Prof Lavarch spoke of how the native title system, while a great achievement, is in many ways flawed and cannot adequately address all the wrongs and harm caused by colonisation. He called for the Commonwealth

to accept the demands of the Uluru Statement from the Heart and to begin its own treaty negotiations.

Legal pluralism and Indigenous empowerment were common threads throughout the entire public program. The first day included sessions dealing with securing Indigenous water rights, asset management for PBCs, return of native title materials, native title and economic development, and the interaction between Indigenous and non-Indigenous legal systems.



Delegates walking through the smoking ceremony.

The keynote speaker for the second day of the public program was Peter Yu, Yawuru Elder and CEO of NBY. Peter spoke of NBY's vision of realising the economic potential of the Yawuru native title estate in a way that meets the social and cultural needs of Kimberley communities, and is guided by the Yawuru values of mabu liyan, mabu buru and mabu ngarrangunil – strong/healthy spirit, country and community.

Ninielia Mills, a Yawuru woman and manager of NBY's Community Development Unit, delivered an inspiring youth keynote address that drew on her own experiences to explain mabu liyan and the importance of culture, country and community to Kimberley peoples' identity and wellbeing. Ninielia paid tribute to the love, support and mentorship she has received from her family, community and



Youth Forum chair Wynston Shovellor being interviewed for ABC.

Elders, and counselled that just as proverbially it takes a village to raise a child, 'it also takes a community to develop and support leaders'. She urged Indigenous people to identify and nurture the young leaders in their communities, and urged non-Indigenous people working in native title to consider what they can do personally to help grow the capabilities of and create opportunities for young Indigenous leaders.

The second day featured a full stream of sessions dedicated to the examination of recent legal developments relevant to native title, including a presentation from the Hon. Ben Wyatt, Minister for Aboriginal Affairs, on policy approaches to PBC development and native title compensation in WA. The program was rounded out with presentations of innovative new approaches to joint land and water management, Indigenous-led and co-operative research and evaluation, and family engagement in traditional owner organisations.

In addition to the keynote speakers and presentations, Indigenous-only forums ran through all three days of the conference. Discussions in the Indigenous Men's and Women's Talking Circles both emphasised a need for more resources for communities to tackle gendered social and health issues and to support the growth of strong and diverse leaderships. This year focuses in the Youth Forum included succession of native title rights and governance structures that promote both Youth and Elders' councils to support PBC boards. Three Federal Court judges – Justice Barker, Justice Murphy and Justice Mortimer – attended the Youth Forum to engage with delegates.

At a sold out 'A Taste of Broome' gala dinner, delegates and guests celebrated the end of the conference. Held under the stars at Goolarri Media's amphitheatre, the event featured special performances by Neil McKenzie, the Yardoogarra dancers, Jarndu Yawuru choir and Broome rock legends Puertside.



The Hon. Justice Michael Barker, Greg McIntyre and Anthony Watson.



Lauren Heinritz and Peta Gooda.



Yawuru dancers at the welcome reception.



AN INTRODUCTION TO

Indigenous data sovereignty

AUSTRALIAN INDIGENOUS GOVERNANCE INSTITUTE
 MAIAM NAYRI WINGARA INDIGENOUS DATA SOVEREIGNTY COLLECTIVE

ON 20 JUNE 2018, THE MAIAM nayri Wingara Indigenous Data Sovereignty Collective and the Australian Indigenous Governance Institute convened the National Indigenous Data Sovereignty Summit. The Summit brought together over 40 Indigenous delegates including representatives from peak bodies, the public service and academia as well as community leaders. Delegates came from every state and territory in Australia and were joined by four representatives of Te Mana Raraunga Māori Data Sovereignty Network and the Data Iwi (Tribal) Leaders Group.

WHAT IS DATA SOVEREIGNTY?

Indigenous data sovereignty is a global movement concerned with the right of Indigenous peoples to govern the creation, collection, access, ownership, management and application of their data. This means data pertaining to the Indigenous peoples from whom it has been derived or to whom it relates.¹ Indigenous data sovereignty in Australia is derived from Aboriginal and Torres Strait Islander peoples inherent right to govern our peoples, Country (including lands, waters and sky) and resources as outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), for which Australia has declared its support.²

Data is a cultural, strategic, and economic asset for Indigenous peoples.³ Indigenous Australians have always been active in what is now known as 'data'. Yet in modern times we have been isolated from the language, control and production of data at community, state and national levels. This has resulted in data that are overly focused on Indigenous peoples as the problem. Existing data and data infrastructure does not recognise or privilege our knowledges and worldviews nor meet our current and future needs.

The Summit delegates asserted that in Australia, Indigenous peoples have the right to:

- Exercise control of the data ecosystem including creation, development, stewardship, analysis, dissemination and infrastructure.
- Data that is contextual and disaggregated (available and accessible at individual, community and First Nations levels).
- Data that is relevant and empowers sustainable self-determination and effective self-governance.
- Data structures that are accountable to Indigenous peoples and First Nations.
- Data that is protective and respects our individual and collective interests.

WHERE CAN I GO FOR MORE INFORMATION?

You can contact Bhiemie Williamson at the Australian Indigenous Governance Institute for further information on bhiemie.williamson@anu.edu.au.

And you can have a look at the following resources, all freely available online.

- Australian Indigenous Governance Institute and Maiam nayri Wingara Indigenous Data Sovereignty Collective. 2018 Briefing Paper: Indigenous Data Sovereignty, available on the Maiam nayri Wingara website.
- Kukutai, T. and J. Taylor. 2016. Indigenous Data Sovereignty: toward an agenda. Research Monograph 38, available through ANU Press.
- Te Mana Raraunga Māori Data Sovereignty Network website.

- 1 Kukutai & Taylor, 2016.
- 2 UN Declaration on the Rights of Indigenous Peoples articles 3, 4, 5, 15(i), 18, 19, 20(i), 23, 31, 32, 33, 38 and 42.
- 3 The term 'Indigenous' refers to the First Peoples of (what is now known as) Australia; Aboriginal and Torres Strait Islander peoples.

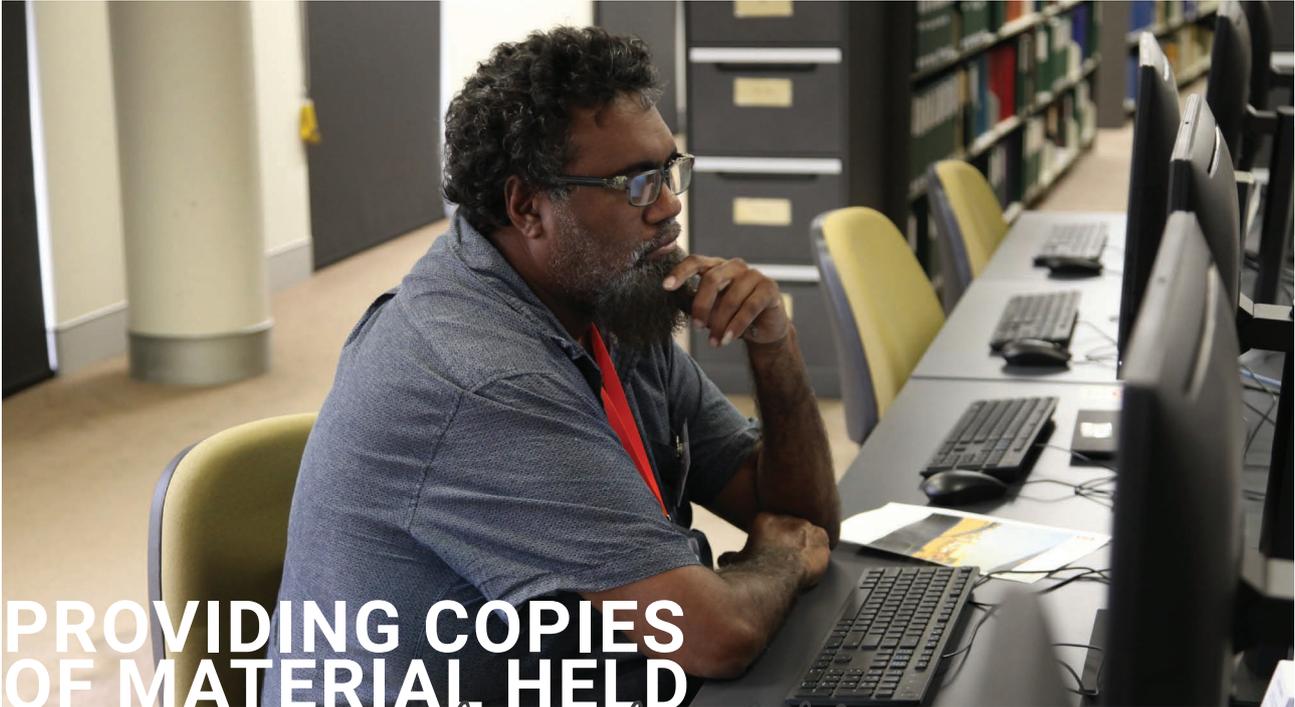


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Maiam nayri Wingara

Above: Delegates at the 2018 National Indigenous Data Sovereignty Summit, Canberra.
 Credit: Bhiemie Williamson.



PROVIDING COPIES OF MATERIAL HELD

by AIATSIS to native title groups

STACEY LITTLE AND THOMAS ALLEN **AIATSIS**

overview

AIATSIS's processes for providing material for native title research are informed by international statements, AIATSIS's enabling legislation, shortfalls in domestic legal recognition, and the role of protocols and ethical standards.

The AIATSIS collection

AIATSIS holds the 'most extensive and best contextualised collection of Indigenous Australia in the world.'¹ It comprises mainly unique or rare material, including over 685,000 still images, 12,000 manuscript titles, 40,000 books, 40,000 hours of recorded sound, 10,000 film titles, 9,500 video titles and 3,600 artworks and objects. Material held at AIATSIS is a significant resource to those researching native title claims and our Native Title Access Service processes on average 135 requests for material each year.

International statements

In accordance with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), AIATSIS recognises

the rights of Aboriginal and Torres Strait Islander peoples to maintain, control, protect, and develop their cultural heritage.² AIATSIS understands that the material it holds can be critical in asserting such rights. Therefore AIATSIS enacts processes, and allocates resources, to providing copies of material for native title research.

AIATSIS Act

The *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cth) confers functions on AIATSIS specific to a national collection of Aboriginal and Torres Strait Islander culture and heritage. Importantly, this includes making the collection available, using it to promote knowledge and understanding, and providing leadership in how material is used.

These functions are fettered by provisions restricting access to material held under restricted access, or where disclosure is inconsistent with the views of relevant Aboriginal or Torres Strait Islander persons.

These legislative provisions are reconciled by processes that generally facilitate access to material, but require permissions for material with cultural sensitivities, such as secret or sacred information.

Domestic legislation

Not all rights recognised in UNDRIP are protected by Australia's domestic laws. For example, the protection of expressions of culture is time limited under the *Copyright Act 1968* (Cth), and certain technologies require registration prior to being legally recognised.

In response, AIATSIS's protocols and processes ensure copyright and cultural rights associated with collection items are both recognised and upheld where possible.

Balancing competing interests

AIATSIS's Access and Use Policy (A&U Policy) is designed to balance these competing interests and was drafted and reviewed against the

Above: Mervyn Mulardy searching the catalogue at AIATSIS, Canberra.

Credit: Tran Tran.



Jess Bangu, Aunty Rosie Munro and Jacqueline Shovellor at the ranger office in Bidjyadanga looking over photos held in the AIATSIS collection. Credit: Tran Tran.

above background. The A&U Policy also recognises the diversity of conditions under which AIATSIS holds material. Importantly, different conditions of access apply to material requested and these conditions may be imposed by depositors, *Copyright Act* provisions, or Aboriginal and Torres Strait Islander individuals or groups. In these situations, processes that require permission may be applicable. Where material sought for native title research is unpublished, clients must sign a legal declaration that the material will only be used for the authorised purposes. Unless stated, such material may not be used publicly or further reproduced, which includes provision to third parties.

Once a native title claim has been finalised, the native title group may wish to receive copies of the material AIATSIS provided to researchers or their legal representatives. This material is extremely valuable and is used by traditional owners

for knowledge transmission to younger and future generations, cultural heritage protection, environmental conservation and land management, among other things. AIATSIS policy however, means that where the material has been provided to researchers or organisations, including consultant anthropologists and lawyers, native title representative bodies or service providers (NTRBs), it cannot be provided by them directly to the native title group.

Instead of a process that requires a new request, this may be achieved by contacting AIATSIS' Native Title Access Service to arrange for new forms to be executed (subject to the relevant conditions of access). Where the NTRB or other body has the necessary resources, this process can provide a streamlined alternative for the transfer of materials, avoiding the time and cost of lodging a new request. AIATSIS is seeking advice on ways of streamlining this process further.

Native Title Access Service

The Native Title Access Service provides access to items in the collection for use in native title proceedings. The service includes:

- Providing catalogue searches and listings of relevant items in the collection
- Arranging for research visits to AIATSIS
- Copying material.

For more information about the service, please visit the AIATSIS website. To access the service, please contact our team on (02) 6261 4227 or NTSS@aiatsis.gov.au.

- 1 V. Bullock, Whole AIATSIS Collection Statement of Significance (21 August 2014) Significance International <https://aiatsis.gov.au/collections/about-collections/statement-significance>
- 2 UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 107th mtg, (13 September 2007) article 31.

Current Project

SAVE THE DATE

INDIGENOUS YOUTH IN GOVERNANCE MASTERCLASS

TUESDAY 20 NOVEMBER 2018, MELBOURNE

Young Aboriginal and Torres Strait Islander people continue to play an integral role in the future of their communities, regions and Australia. Governance is but one way, albeit a critical one, in which young people will enter into leadership and decision-making roles. The time is now to prepare and train young people in the language, ideas, philosophies and practices of Indigenous governance.

In November 2018, the Australian Indigenous Governance Institute in partnership with the Australian Institute for Aboriginal and Torres Strait Islander Studies and Reconciliation Australia will convene an 'Indigenous Youth in Governance Masterclass'. This Masterclass will connect, educate and promote Indigenous people aged 18 to 35 years old who are, or hope to be, active in the business of governance locally, regionally and nationally.

Subscribe to the AIGI mailing list or check the native title website for updates including tickets. For more information please contact Bhiemie Williamson at the Australian Indigenous Governance Institute: Bhiemie.Williamson@anu.edu.au.



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RECONCILIATION
AUSTRALIA

SUBSCRIBE TO NTRU PUBLICATIONS AND RESOURCES

All NTRU publications are available in electronic format. This will provide a faster service for you, is better for the environment and allows you to use hyperlinks. If you would like to SUBSCRIBE to the Native Title Newsletter electronically, please go to:

www.aiatsis.gov.au/form/subscribe

For previous editions of the Newsletter, go to:

www.aiatsis.gov.au/ntru/newsletter.html

Native Title Research Unit

Australian Institute of Aboriginal and
Torres Strait Islander Studies

GPO Box 553

Canberra ACT 2601

Telephone: 02 6261 4223

Facsimile: 02 6249 7714

Email: ntru@aiatsis.gov.au



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