AIATSIS

Native Title NEWSLETTER

Issue 1 | 2023

WELCOME
to the Native Title Newsletter Issue 1, 2023

For the past 30 years, the AIATSIS Native Title Research Unit (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.

The Native Title Research Unit has been renamed the Indigenous Country and Governance Unit in recognition of the support that we can provide native title organisations in the post-determination environment.

Stay in the loop by subscribing to the online Newsletter. If you would like to make a contribution, please contact us at nativetitleresearchunit@aiatsis.gov.au

Above: Smoking fire at Winton.
Photo: Tony Eales

Cover: Noosa River area Kabi Kabi.
Photo: Tony Eales

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Aboriginal and Torres Strait Islander people are respectfully advised that this publication may contain names and images of deceased persons, and culturally sensitive material. AIATSIS apologises for any distress this may cause.

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nativetitleresearchunit@aiatsis.gov.au

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Native Blue Banded Bee - Kabi Kabi Country

Native Title Snapshot 2023

Each year the Indigenous Country and Governance Unit (ICG) compiles information from a range of publicly available resources, including from the National Native Title Tribunal and the Office of the Registrar of Indigenous Corporations to provide a broad overview of the status of native title throughout Australia.

National

In Australia, there have been 471 positive determinations as at 1 January 2023:

	Land and waters (sq km)	Land and waters (%)
Total land and waters	**8,099,264*[1]**	**100%**
Exclusive native title	1,133,103	14%
Non-exclusive native title	2,186,695	27%
Native title does not exist	529,548	7%
Offshore – non-exclusive	91,125	1%
Undetermined area	4,158,793	51%

Australian Capital Territory and Tasmania

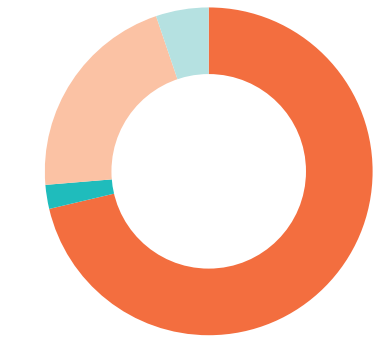
To date there has not been any determinations of native title in the Australian Capital Territory or Tasmania.

QUEENSLAND

In Queensland (QLD) there have been 166 positive determinations.

	Land and waters (sq km)	Land and waters (%)*
Total land and waters	**1,851,736**	**100%**
Exclusive native title	57,371	3%
Non-exclusive native title	512,080	28%
Native title does not exist	126,252	7%
Undetermined area	1,148,076	62%

*Percentages have been rounded to the nearest whole number



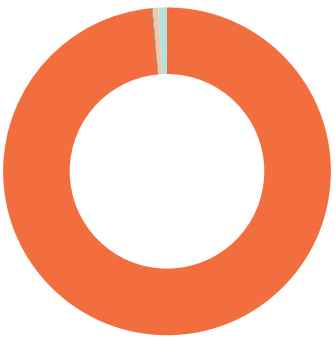
Exclusive native title Non-exclusive native title
Native title does not exist Undetermined area

NEW SOUTH WALES

In New South Wales (NSW) there have been 17 positive determinations.

	Land and waters (sq km)	Land and waters (%)*
Total land and waters	**809,952**	**100%**
Exclusive native title	685	Less than 1%
Non-exclusive native title	4,265	Less than 1%
Native title does not exist	6,927	Less than 1%
Undetermined area	798,075	>99%

*Percentages have been rounded to the nearest whole number



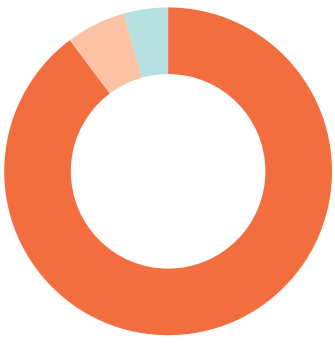
Exclusive native title Non-exclusive native title
Native title does not exist Undetermined area

VICTORIA

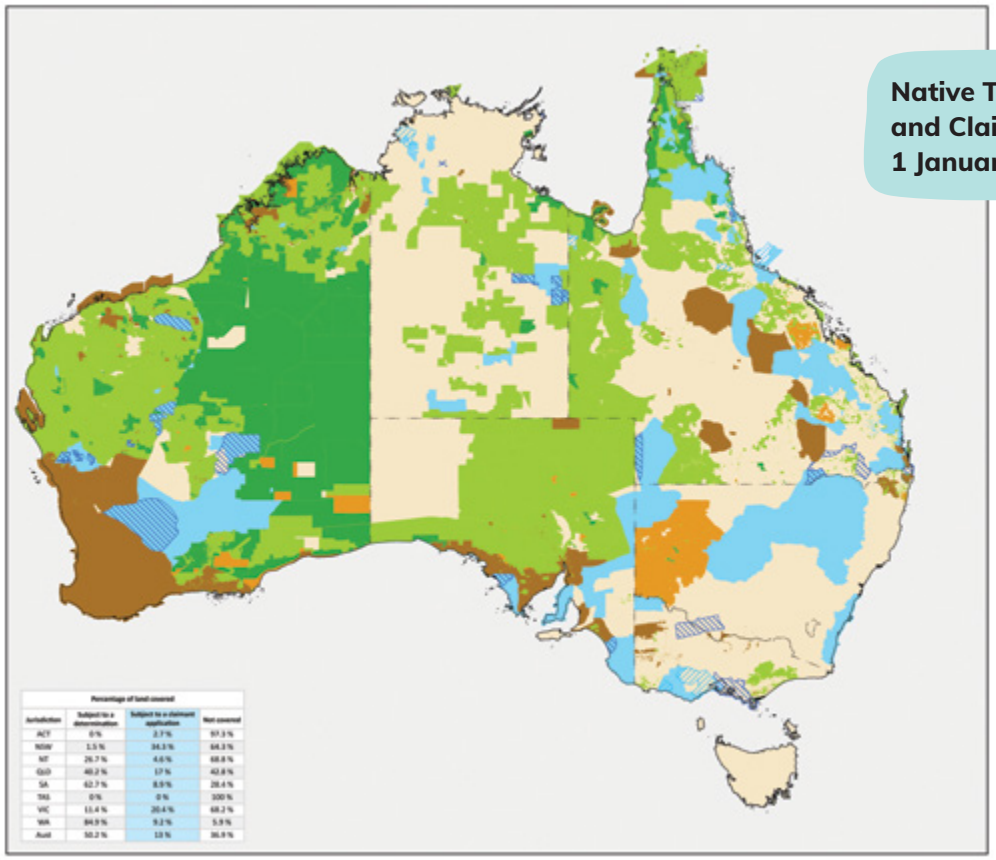
In Victoria (Vic) there have been 4 positive determinations.

	Land and waters (sq km)	Land and waters (%)*
Total land and waters	**237,657**	**100%**
Exclusive native title	0	0%
Non-exclusive native title	14,922	6%
Native title does not exist	11,008	5%
Undetermined area	211,647	89%

*Percentages have been rounded to the nearest whole number



Exclusive native title Non-exclusive native title
Native title does not exist Undetermined area



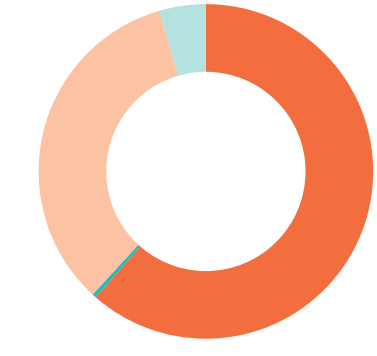
Native Title Determinations and Claimant applications at 1 January 2023

SOUTH AUSTRALIA

In South Australia (SA) there have been 35 positive determinations.

	Land and waters (sq km)	Land and waters (%)*
Total land and waters	**1,044,353**	**100%**
Exclusive native title	6,093	Less than 1%
Non-exclusive native title	539,232	52%
Native title does not exist	71,894	7%
Undetermined area	427,134	41%

*Percentages have been rounded to the nearest whole number



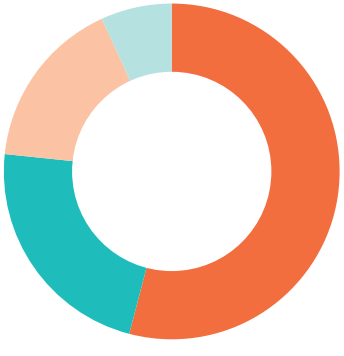
Exclusive native title Non-exclusive native title
Native title does not exist Undetermined area

WESTERN AUSTRALIA

In Western Australia (WA) there have been 131 positive determinations.

	Land and waters (sq km)	Land and waters (%)*
Total land and waters	**2,642,753**	**100%**
Exclusive native title	1,054,889	40%
Non-exclusive native title	771,829	29%
Native title does not exist	319,258	12%
Undetermined area	496,777	19%

*Percentages have been rounded to the nearest whole number



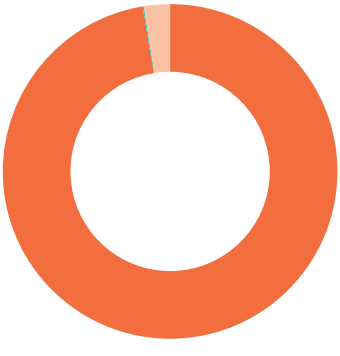
Exclusive native title Non-exclusive native title
Native title does not exist Undetermined area

NORTHERN TERRITORY

In Northern Territory (NT) there have been 119 positive determinations.

	Land and waters (sq km)	Land and waters (%)
Total land and waters	**1,406,243**	**100%**
Exclusive native title	14,055	Less than 1%
Non-exclusive native title	344,367	24%
Native title does not exist	927	Less than 1%
Undetermined area	1,046,894	74%

*Percentages have been rounded to the nearest whole number



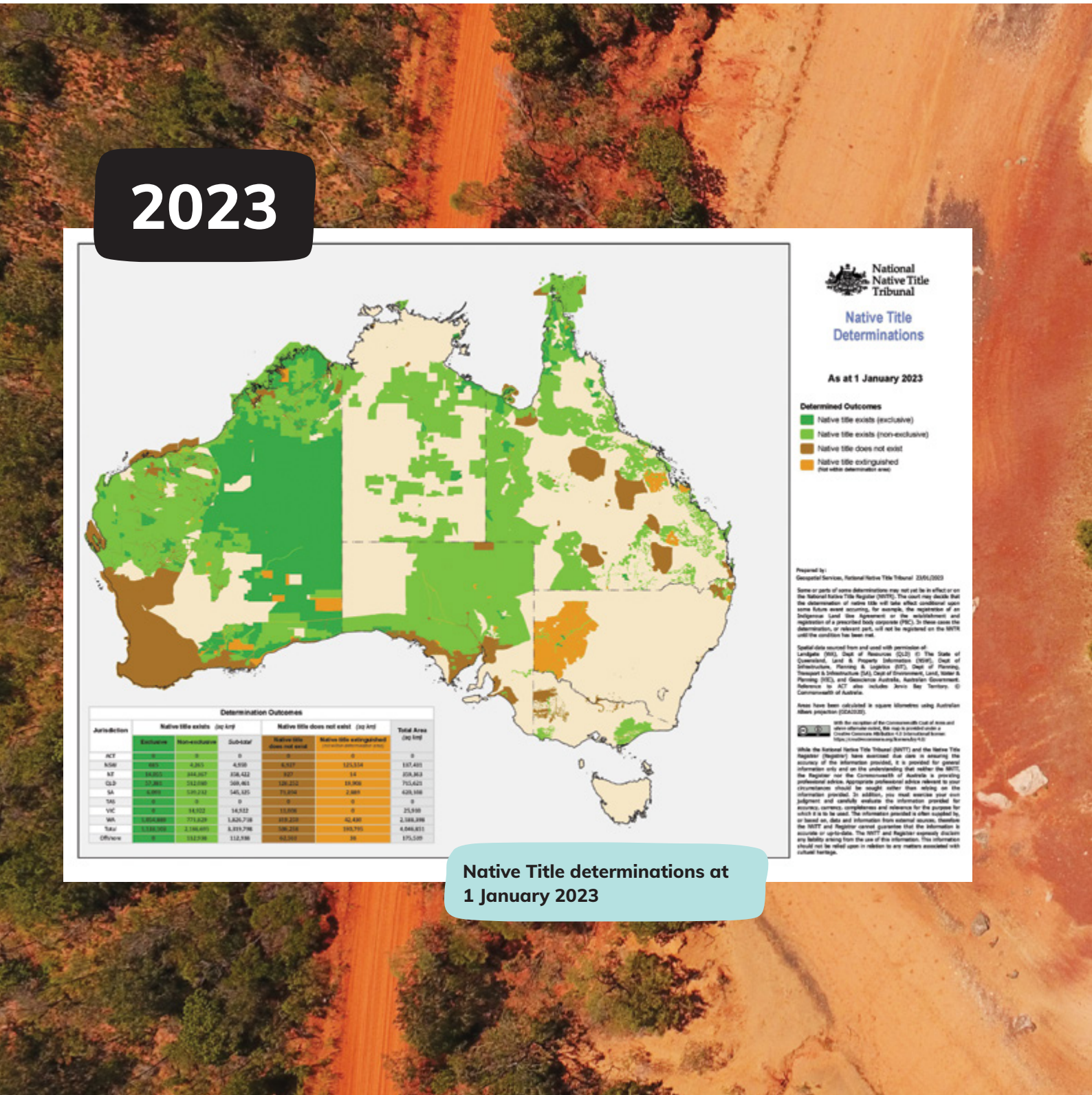
Exclusive native title Non-exclusive native title
Native title does not exist Undetermined area

[1] https://www.ga.gov.au/scientific-topics/national-location-information/dimensions/area-of-australia-states-and-territories.

Native Title in Australia

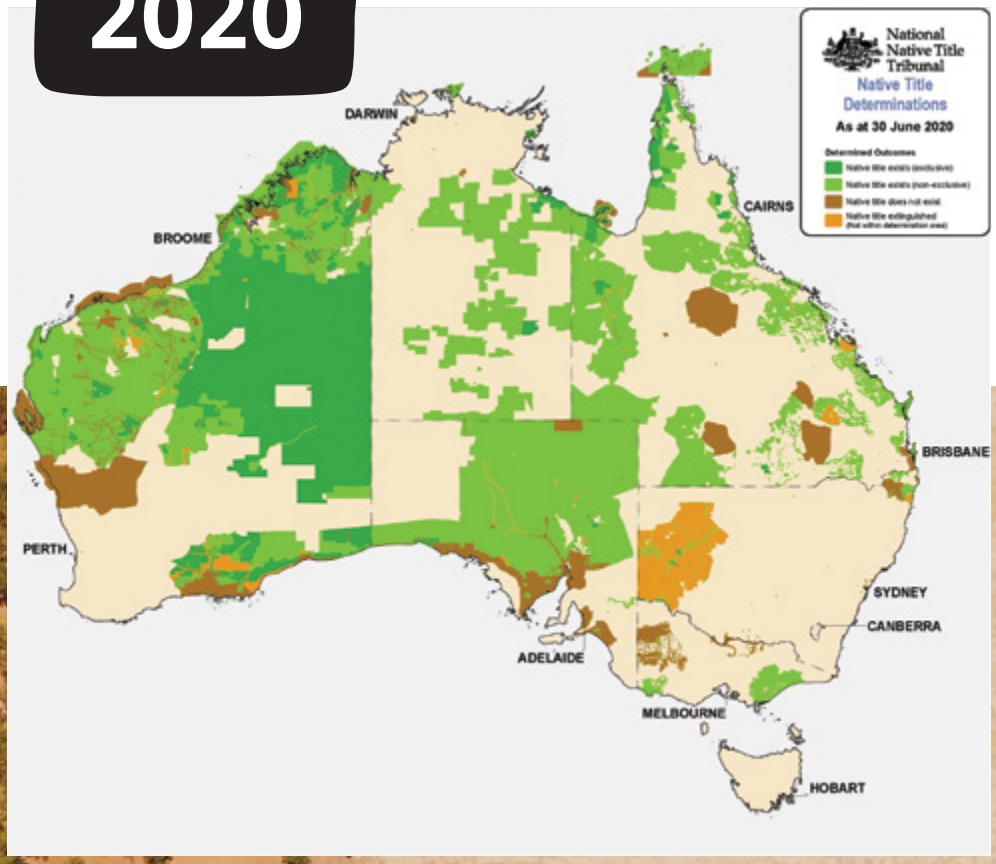
Percentage of the land and waters covered by a native title determinations

Year	Native Title determinations
2005	7.9%
2010	12.6%
2018	35%
2019	37%
2020	39.2%
2022	50.2%

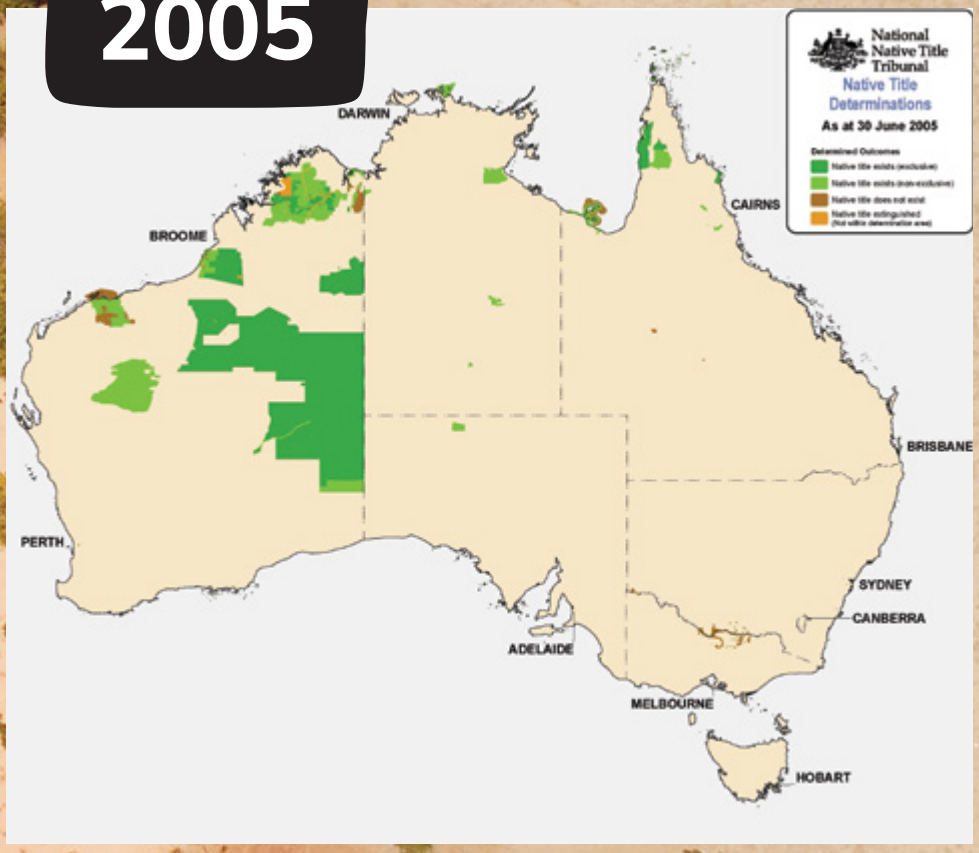


Native Title determinations at 1 January 2023

2020


National Native Title Tribunal
Native Title Determinations
As at 30 June 2020
DARWIN
CAIRNS
BROOME
BRISBANE
PERTH
SYDNEY
CANBERRA
ADELAIDE
MELBOURNE
HOBART

2005


National Native Title Tribunal
Native Title Determinations
As at 30 June 2005
DARWIN
CAIRNS
BROOME
BRISBANE
PERTH
SYDNEY
CANBERRA
ADELAIDE
MELBOURNE
HOBART

Prescribed Bodies Corporate (PBC) data

Total PBC's	Small*	Medium**	Large***
National 254	152	82	20

*__A small PBC__ is a corporation with at least two of the following in a financial year:[2] a gross operating income of less than $100,000; consolidated gross assets worth less than $100,000; and less than five employees.

**__A medium PBC__ is a corporation with at least two of the following, in a financial year: a gross operating income between $100,000 and $5 million; consolidated gross assets worth between $100,000 and $2.5 million; and between five and 24 employees.

***__A large PBC__ is a corporation with at least two of the following, in a financial year: a gross operating income of $5 million or more; consolidated gross assets worth $2.5 million or more; and more than 24 employees.

PBC constitution	Total	Average
Number of directors	2,309	9
Number of members	62,887	248

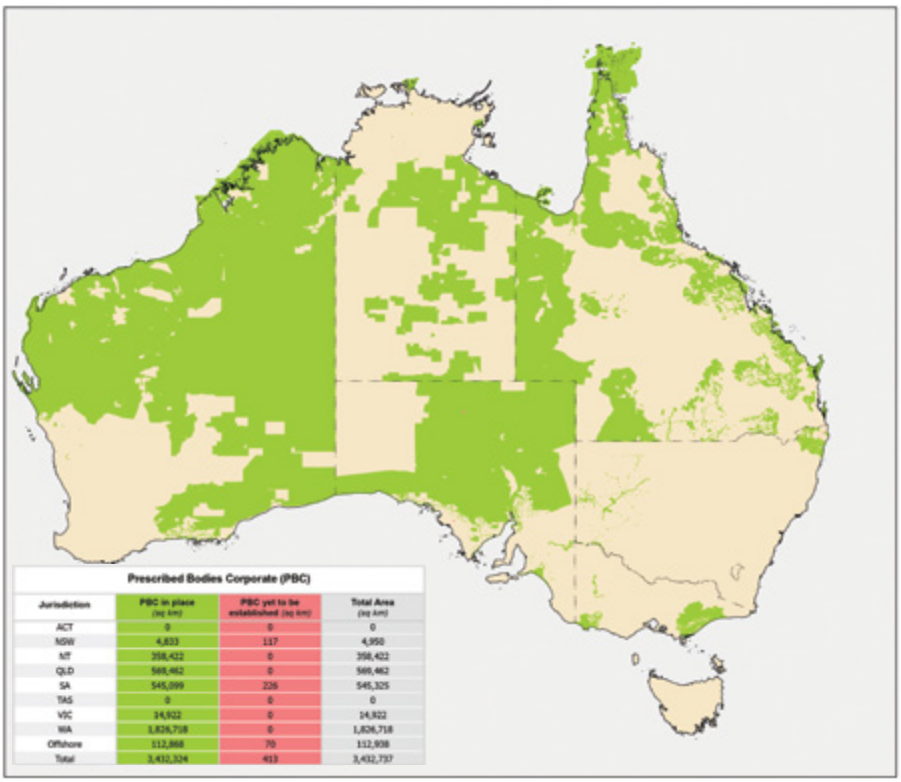
PBCs by representative body region

NTRB Region	Number of PBCs per region
Gur A Baradharaw Kod (Qld)	21
Cape York Land Council (Qld)	24
North Queensland Land Council (Qld)	35
Carpentaria Land Council Aboriginal Corporation (Qld)	6
Queensland South Native Title Services	33
Central Land Council (NT)	33
Northern Land Council (NT)	1*
Kimberley Land Council (WA)	33
Central Desert Native Title Services (WA)	26
Native Title Services Goldfields (WA)	5
Yamatji Marlpa Aboriginal Corporation	36
South West Aboriginal Land and Sea Council (WA)	2
South Australia Native Title Services	19
First Nations Legal and Research Services (Vic)	4
NTSCORP (NSW)	9
Unidentified	2

* *The Top End (Default PBC/CLA) Aboriginal Corporation RNTBC* (administered by the legal branch of the Northern Land Council) acts as PBC for all positive Native Title determinations in the Northern Land Council's region.

PBCs by State and Territory

State/Territory	Number of PBCs per State/Territory
Queensland	119
New South Wales	9
Australian Capital Territory	0
Victoria	4
Tasmania	0
South Australia	19
Western Australia	102
Northern Territory	34



[2] ORIC fact sheet (2016) https://www.oric.gov.au/sites/default/files/documents/05_2016/14_0171_FACT%20SHEET_corporation_size_and_reporting_v2-0_web.pdf (see also CATSI Act s 37.10 and *Corporations (Aboriginal and Torres Strait Islander) Regulations* 2017 (Cth), s 8)

AIATSIS Summit 2022 – *Navigating the Spaces in between*

In 2022, from 30 May to 3 June 2022, AIATSIS again combined the National Indigenous Research Conference (NIRC) and the National Native Title Conference (NNTC) under the banner of the AIATSIS Summit 2022, following the success of the AIATSIS Summit 2021 in Adelaide. Summit 2022 was co-convened with Queensland South Native Title Services (QSNTS) and hosted by the Kabi Kabi people on their country in south-eastern Queensland from 30 May to 3 June.

1229 delegates attended the Summit in person, and 120 presentations from 351 presenters given across the five days. Over 70 percent of the presenters were Aboriginal and/or Torres Strait Islander people.

The theme for Summit 2022 was 'Navigating the spaces in between' underscoring the Summit as an opportunity to explore the breadth of Indigenous ways of knowing, seeing and being – for exploring how Indigenous people belong, identify, connect, interact and become.

The NNTC opened on the third day of Summit, on 1 June 2022, with the final day on 3 June, Mabo Day, marking the 30th anniversary of the High Court decision in Mabo.

Below is an outline of the NNTC highlights, including with links to recordings of sessions where available.

NNTC highlights

1 June 2022

'Re-imagining Australia Through Fist Nations Leveraging Native Title and Broader Rights',

The NNTC opened with a plenary address from QSNTS CEO, Kevin Smith. Mr Smith's presentation, while acknowledging the shortcomings of native title, spoke also to the potential of native title as a means of engaging in and benefiting from broader political and policy imperatives, with native title holders rightfully involved in everything that happens on Country, including current moves to escalate recognition and protection of Indigenous rights and voices including through Voice to Parliament, Closing the Gap, the Makarrata Commission and cultural heritage reform.

Mr Smith's presentation is reproduced with permission at page 11 and available to view at aiatsis.gov.au/publication/117897

First Nations Heritage Protection Alliance

Rachel Perkins gave a keynote address which provided a retrospective in regard to the vast inadequacies of cultural heritage legislation at state/territory and federal levels and highlighted key achievements of Indigenous leaders in spite of ineffectual legislative regimes.

The Hon Linda Burney MP delivering her keynote speech.

AIATSIS CEO Craig Ritchie delivering the Summit Opening Address

Ms Perkins then spoke to the need for Indigenous heritage reform which needs to be done in partnership with Indigenous peoples, noting the formation of the peak body, the First Nations Heritage Protection Alliance.

Ms Perkin's presentation is accessible at https://aiatsis.gov.au/publication/117896

Concurrent sessions

Presentations throughout the day included considerations of sustainable development in the post-determination phase of native title, including with regard to how prescribed bodies corporate and native title representative bodies/service providers might work together to lead development at a regional level.

Another key theme of the day was cultural heritage, including the efficacy of protection provided by cultural heritage legislation at the state level; legislative reform at the federal level and the need for collaboration when managing country and heritage.

Representatives of the Yorta Yorta, Mirriuwung Gajerrong and Quandamooka peoples shared reflections on experiences of native title since the determination of their native title claims.

2 June 2022

Truth, Trauma and Triumph: Lessons from 30 Years of Native Title and the Path Ahead

The day's plenary, *Truth, Trauma and Triumph: Lessons from 30 Years of Native Title and the Path Ahead* was chaired by former Federal Court and now High Court Justice Jayne Jagot. The panel was comprised of Valerie Cooms, Monica Morgan, Dr Tony McAvoy SC, Anthony North KC and Ned David.

Ned David, Chairperson of Gur A Baradharaw Kod, spoke of the initial joys of the Akiba determination but noted that the current focus for native title holders was how to leverage that recognition to progress their economic, social, cultural, spiritual aspirations.

Yorta Yorta representative, Ms Morgan, spoke of the trauma faced by Yorta Yorta people during the hearing of their native title claim, with reference to an enormous number of respondents to the claim, in an environment of government-encouraged misinformation about native title and where Yorta Yorta elders were demoralised in cross-examination by counsel.

Dr Cooms, on behalf of Quandamooka, spoke about how the imposition of foreign governance structures upon communities have caused immense disputes within community.

Tony McAvoy SC spoke to the 'Townsville line', the unspoken State policy that any native title below Townsville would be litigated because of lack of prospects. He spoke of how Quandamooka were being forced to go to trial, in the wake of the Yorta Yorta and Larrakia negative determinations, having to face down the State. Eventually, the State changed its position, in the face of the strength and resilience of the Quandamooka people.

Mr McAvoy observed that everyone enters the native title process having already experienced a degree of trauma and expressed his disappointment at the failure to adopt into legislation, the former Chief Justice French's proposal for a presumption of continuity which could alleviate some of the trauma to which Indigenous peoples are subject to when pursuing recognition of native title and stating a civilised society would not subject Aboriginal people to such a processes.

The panel presentation is accessible at https://aiatsis.gov.au/publication/117898

A broad range of native title related presentations were delivered including how native title rights and interests may be leveraged for sustainable development opportunities; the role of the relationship between PBCs and NTRBs/SPs in driving that development, including on a regional scale; the relationship between cultural heritage and native title; developments in national cultural heritage reform at the Federal level (cultural heritage reform at the Federal level); compensation; developments in native title jurisprudence; the intersection of renewable energies projects and UNDRIP (free prior and informed consent) and native title governance; alternative settlement, land management and sea management; nation-building; community control and local decision-making.

Concurrent sessions

There was an array of excellent sessions focussing on legal developments in relation to the right to take for any purpose; further exploration on the assessment of cultural loss in compensation matters; the continuing pressures experienced by PBCs due to resource restraints; Indigenous fire management practices; sea management strategies; and renewable energy projects including carbon sequestration.

3 June 2022

2022 Mabo Lecture

The Hon Robert French AC provided introductory remarks to the 2022 Mabo lecture which was given by AIATSIS Council chairperson, Djap Wurrung and Gunditjmara woman, Ms Jodie Sizer.

AIATSIS Council Chairperson, Jodie Sizer, presenting the Mabo Lecture.

Among his opening remarks, Robert French noted importantly that the need for cultural change in Australia, that is:

> *the acknowledgement of Australia's First Peoples as the bearers of the great sweep of our continental history and the authors of the oldest stories of its land and waters and with that their status as the bearers of an authority over land and waters which is recognised morally and can be recognised legally.*

The Hon Robert French AC's remarks are accessible at https://aiatsis.gov.au/whats-new/news/mabo-lecture-2022

Ms Sizer, in presenting the 2022 Mabo Lecture, acknowledged the contributions of the speakers throughout the Summit and paid homage to the significance of Eddie Koiki Mabo's leadership in the continued fight. Ms Sizer noted the role of AIATSIS's Native Title Research Unit in advocating through research for the recognition and protection of the rights of Aboriginal and Torres Strait Islander people.

Considering the next 30 years, Ms Sizer proposed a "first cut" at seven principles to support a collective step forwards (which can be read in full at the link below):

- **Traditional owner leadership** – we must invest in it, we must recognise it. It won't be the only voice in the room, but we must ensure it has the authority. This is our business.
- **Unity** – we must respect our diversity, we must respect our different views, but when we face the white systems and structures we must be united as one.
- **Transparency** – we should share knowledge. We share our challenges, but we must engage inclusively and openly. We cannot restrict participation, it must be Free, Prior and Informed action.

- **Truth** – we do need to know the truth of the past, we do need to know the truth of the present.
- **Respect** – we all commonly state this underpins everything. That we need to ensure respect for our history, respect for our knowledge, respect for our autonomy, respect for ourselves, respect for each other, and respect for our partners that walk alongside us.
- **Intergenerational equity or sustainability** – where will this work leave our future generations to come? This should be our key accountability measure.
- **Relationships** – for us to be kind, to be human. This next chapter will be tough (or should I say it will continue to be tough). We know this work is hard at the local level, at the national level. But we must unlearn some of the bad practice of the past – not everywhere, but in some places – and not allow ourselves to get stuck in personalities.

The 2022 Mabo Lecture can be accessed here: https://aiatsis.gov.au/whats-new/news/mabo-lecture-2022

Youth Forum

The Youth Forum was chaired by ICG's Dora Bowles and was open to all Aboriginal and/or Torres Strait islander delegates between the ages of 18 and 35. It drew together native title holders, students, community organisers and advocates to reflect on individual and collective experiences of native title. Young mob with a shared interest in native title had the opportunity to form relationships and networks to support one another along the journey. ICG's Kieren Murray opened the Forum with a plenary addressing the challenges and opportunities created by the native title regime.

Concurrent sessions

The concurrent sessions again provided presentations on a rich array of topics including sea country management; supporting PBCs beyond corporate governance; sustainable development; economic development; Free, Prior and Informed Consent in action; the role of government agencies in supporting PBCs, including the Office of the Registrar of Indigenous Corporations and the Indigenous Land and Sea Corporation and legal pluralism in Australia.

Closing address

The Hon Linda Burney MP, having recently been appointed as Minister for Indigenous Australians, delivered the closing address focussing on nation-building.

Further reflections about Summit 2022 can be accessed here https://aiatsis.gov.au/publication/118114

Wagga Torres Strait Islander Dance Company performance.

Re-imagining Australia through First Nations leveraging native title and broader rights

Keynote speaker Kevin Smith AIATSIS Summit 1 June 2022

Kabi Kabi Country, Sunshine Coast, Queensland

Debi idem, Wabim[1]
(Good morning, everyone)

Au ka eswau wabim Kabi Kabi Le E kem ged ge (I pay respects to people of this land the Kabi Kabi People)

I acknowledge Kabi Kabi Country and pay my deepest respect to your Elders past, present and emerging. Thank you for the warm welcome to Country; it is a great honour for QSNTS to co-convene this important event with AIATSIS on your amazing Country and thank you so much for hosting all of us.

When I spoke with the Kabi Kabi Applicant last year, there was some trepidation expressed on hosting a major summit like this so close to the 'pointy end' of their native title claim. But with their usual flair to grasp the importance of a moment, they accepted the logistical challenge and the immense cultural obligation to keep us all safe while we discuss important business that will affect all of us for many years to come. That is the way this 'prapa deadly Mob' rolls and once again a big thank you.

There was also a shared ambition to have had a Kabi Kabi native title determination by this time. Despite great efforts, that important milestone has not been reached yet but this Mob has a steely resolve to get things done, and we are confident of an imminent positive resolution.

Like the Kabi Kabi People, every native title claimant and holder in this room knows the struggles associated with securing a positive native title determination. Every Traditional Owner in this room also knows that our sovereignty as First Nation Peoples is not dependent upon a court process. Our sovereignty springs forth from a deeper source – our land and sea Country, our Law and custom, our Ancestors and spiritual connections that simultaneously binds past, present and future; tangible and intangible in 'one indissoluble whole.'[2]

I want to make that point right up front. Thirty years into native title, some of us have tragically lost native title battles. Others are yet to bring a claim. Some of us believe a claim is antithetical to our sovereignty. Others who have native title may be bitter by the thousand cuts of historical extinguishment. Some of us shrug our shoulders and say limited access rights don't amount to much. Others are disappointed that the full mosaic of rights and interests over our sub-soil, water, resources and traditional knowledge is not recognised.

However, a broader 'integrated view of connection' to Country is beginning to be properly understood within the law and indeed across the nation. As much was stated very powerfully in the recent High Court judgment of *Love/Thoms*, where Justice Gordon observed:

'It is a connection with land and waters that is unique to Aboriginal Australians. As history has shown, that connection is not simply a matter of what the common law would classify as property. It is a connection which existed and persisted before and beyond settlement, before and beyond the assertion of sovereignty and before and beyond Federation. It is older and deeper than the Constitution. And the connection with land and waters that is unique to Aboriginal Australians does not exist in a vacuum. It was not and is not uniform. It was not and is not static; cultures change and evolve. And because the spiritual or religious is translated into the legal, the integrated view of the connection of Aboriginal Australians to land and waters is fragmented. But the tendency to think only in terms of native title rights and interests must be curbed.'[3]

While we should resist viewing connection solely through the distorted prism of native title so too must we not pass the opportunity to use native title to amplify its importance.

Keynote speaker Kevin Smith AIATSIS Summit

Indeed, connection that is recognised by domestic and international rights is a sturdy vessel to navigate other spaces or, if we are bold and imaginative, transform a nation. This paper and conference challenges us to go beyond our tendency to keep within our space. This presentation acknowledges the shortcomings of native title. However, because it is a legal right that deals with *connection* and *co-existence*, it can be a powerful tool in aid of a Country that needs to come to terms with its past to build a better future.

I confess upfront to the challenge of outlining the scale of transformation contemplated by this topic, keeping faith with the conference theme and doing justice to this thirty-year milestone.

This paper is about a **theory of change**, a **governance model** to drive it, the pressing issue of **resourcing** and an indulgence on my part to share a **personal reflection**.

Succinctly explaining a complex theory of change is a challenge. Being a tragic for metaphors and, sometimes, justifiably accused of horribly mangling them, I will navigate the task using four metaphors to explain the process **of re-imagining Australia using native title and other rights.**

Native title recognition is often depicted as the overlapping section of two circles in a Venn diagram.[4] It is a simple, accurate heuristic to explain great complexity. However, since we are at a location called, 'Twin Waters – where fresh water meets salt', brackish water is not a bad metaphor. That is where the reference to this place ends as I do not want to project the foibles of native title on important Kabi Kabi Country. It is only a metaphor to explain legal, political and intercultural complexity.

Native title is the overlapping section of two distinct worlds or ecosystems – where the rights and interests over land and waters based on traditional laws and customs are recognised by the common law or Australian legal system. Lawyers call native title *sui generis* (or unique) as might an environmental scientist say that brackish water produces a unique ecosystem; not quite fresh or salt but sustaining its own life forms.

Traditional Owners might see this particular brackish water as unclear and turbulent, intuitively knowing or hoping that it might also be a place of opportunity. It might be a place that dredges up intergenerational grief and trauma, where the apex predator of power and greed preys upon disadvantage and poverty.

Non-Indigenous Australia might see it as a barrier or buffer zone to ignore, provided it doesn't encroach, while also demanding that their interests permeate when it suits.

There might even be a shared view that it is a hermetically sealed space, protecting both broader worlds by avoidance. Where one world gets some respite by practising ways of knowing and being since time immemorial without the humbug of modernity. While the other world accommodates by blithely reaping the benefits of development via dispossession, where guilt and shame are conveniently compartmentalised and salved in a balm of restricted recognition.

While sounding harsh these are the honest renderings of observations and accounts of those who have been in this space for a long time. There is little benefit in sugar-coating.

The *Mabo*[5] judgment is often recalled as not only the start but also the highpoint of native title.

Maybe those frustrations come directly from our unrealised expectations or indeed, misunderstandings of the *Mabo* Judgment. As in the *Mabo* case and every case since, claimants have always borne the onerous burden of proof. We know that while inferences can be drawn there was never a presumption of continuity of connection[6] – despite wise, fair-minded people stating otherwise as a modest improvement.[7]

The *Mabo* Judgment did not recognise that our sovereignty was never ceded, such matters always being beyond the constitutional reach of the High Court.[8] Yet as we know, we have to prove with great detail, facets of our law and customs only to have the remnant rights and interests that survive extinguishment recognised.[9] While those laws and customs are capable of permissible adaption,[10] colonisation cannot be relied upon when there are breaks in continuity.[11] While Justice Brennan made the fair concession that modern Australia's prosperity is a direct result of Aboriginal dispossession, compensation for extinguishment is confined to post 1975 acts.[12] Although presented with the opportunity which Justice Toohey explored, the *Mabo* judgment did not clarify the relationship between the State and First Nations as to whether a fiduciary relationship existed – that may have created a completely different scenario.[13]

Many of these shortcomings have always been there and the past 30 years has but clarified them.

The *Native Title Act*[14] rarely gets a good rap. The legislative response to the *Mabo* Judgment, was always a compromise.

A compromise that needed to include structures and processes that would take time to work through. An Act that was intended to be administered by a tribunal through inquiry and mediation that fell over a constitutional hurdle very early.[15] The politics of multi-party, inter-cultural issues that span two hundred years don't fit well within court processes. It is, what it is though.

A compromise that was struck on the basis that it would take years to resolve even within a statutory code. A compromise that kept changing in response to court cases – some bad, some good. It has been a space of considerable power and capability differentials. It hasn't been an easy 30 years.

That is a short list of significant challenges and there are many others but those challenges are negligible compared to the untold damage inflicted by the legal fiction of *terra nullius*[16] that perpetuated for over 200 odd years.

The *Mabo* judgment blew away the grit that had blinded this country for too long rendering First Nation Peoples legally invisible. If it wasn't for the High Court saying 'enough', it is folly to think that the very institutions and the powerful interests that backed them, who promulgated racists laws and policies for two centuries that underwrote a perverse hegemony, would have spontaneously found a conscience and recognised First Nations. That is the way of settler-colonial power. But the co-plaintiffs[17] in that historic victory shouted truth to that power and prevailed. *That should be celebrated.*

Since that historic judgment there have been 456[18] positive native title victories over 42% of the area of Australia despite all the travails. *That should be celebrated.*

There have been countless agreements entered over this time; some very good, some very bad and others hideously ugly. The fact that we have a legal right to be at that negotiation table *should be celebrated.*

The fact that the *Mabo* judgment was informed by and in turn informed the development of international human rights that improves the lives of all Indigenous Peoples around the world *should be celebrated.*

It doesn't make sense to say these achievements would have occurred without native title or that those achievements are *illusory*. The tears of joy on the faces of Elders at determination hearings, are not *illusory*. The palpable rousing of Country when young people proudly sing and dance up Country is not *illusory*. The recognition of thousands of years of continuous connection is not *illusory*. The audible exhausted exhale of relief at these determinations by committed rep body employees and consultants, who genuinely believe in this cause and back up the following day for the next challenge, is not *illusory*.

All of this is so because terra nullius was found to be illusory.

That is what we acknowledge on 3 June 2022. It will be celebrated all around the Country and by our Indigenous Brothers and Sisters across the globe. Kabi Kabi have welcomed us here for that purpose and many of us have travelled from afar or are participating virtually. No doubt the greatest celebrations

will be rejoiced by Family in the Torres Strait and our thoughts and thanks are with them as we approach that big day.

It is right to celebrate these important milestones but there is much more work to be done. We need to finalise all outstanding native title claims[19], potentially a remaining few hundred. We need to advance the next phase of compensation.[20] There will also need to be variation claims[21] to tidy up matters that slipped through the hurly burly that is typical of this work as well as revise determinations in light of important changes in the law over recent years.

Despite the enormity of all of this unfinished business, when it is done in, twenty, thirty years... do we still want to be in 'brackish water'? With the benefit of 30 years and 20/20 hindsight do we want something more than a confined ecosystem or do we want to re-image native title as a vessel that is capable of navigating a course to different shores.

For the adventurous among us, we may want to go beyond the confined ecosystem and explore how native title, or to be more precise, the structures, processes and experiences developed, used and acquired in the native title space can be utilised for broader purposes. In other words, use native title as a **vessel** to land on 'different shores.' If that be the case, the risk of brave yet inexperienced exploration should be managed by finding friendly 'safe harbours' closer to home. This should be done by first exploring how *recognised rights* can be deployed within a broader *Indigenous policy landscape*.

As we know, the key to any successful journey into uncharted waters is good preparation and some historical reconnaissance may be useful by examining the forces and influences at play before native title came into existence. The Preamble to the *Native Title Act* is a good start. It succinctly outlines the historical, social, political and legal context and the powerful influences at play.

It reminds us that the 1967 Referendum was a watershed moment that was influenced by the developments in international human rights.

This brief reconnaissance tells us that those same influences and developments, especially the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP),[22] will be needed for the next journey.[23]

Many of these international influences paved the way for a national policy of self-determination and self-management in the 1970s.[24] Through powerful advocacy, steely-resolve and clear vision, our Elders and Leaders established an impressive network of community-based Aboriginal and Torres Strait Islander organisations across a suite of essential services to combat direct and indirect institutional racism.

In this reflective moment, we should acknowledge two key events immediately prior to the *Mabo* Judgment.

We must recall that the Royal Commission into Aboriginal Deaths in Custody (RCIADC) commenced in 1987.[25] Despite not one criminal charge being laid for the many deaths, the findings and recommendations published in 1991 remain the most authoritative source on the linkage between racism, dispossession and chronic disadvantage. The reports make for harrowing reading but they also prove the cathartic effect of a formal process to voice bottled-up intergenerational pain. The reports also provide laser-like insights into where the solutions lay; the two most important being the need for land rights and Indigenous Self-Determination.

During this same period, Aboriginal and Torres Strait Islander Commission (ATSIC) was established in 1990 as a political vehicle to deliver on the principle, process and outcome of Indigenous self-determination.[26]

It is poignant to recount that these two important events occurred at a time when the racist doctrine of *terra nullius* still prevailed. What a powerful moment in the transformation of this Country it would have been, if the triumvirate of Royal Commission into Aboriginal Deaths in Custody (RCIDAIC), native title rights and ATSIC was allowed to mature together; truth, legal recognition and self-determination.

Regrettably, there was only a very short period when the official government policy of self-determination and the reality of common law legal recognition coincided and they never had a chance to align. In fact, it was the threat of native title that spelt the death of self-determination as a policy. The Howard Government abandoned the policy of self-determination in response to the hyper-hysterical political reaction to the High Court's Wik Judgment in 1996[27] which eventually led to the abolition of ATSIC. It also stopped the social justice package, the third prong in a comprehensive response to the Mabo judgment, that

would have also addressed the RCIDAIC recommendations.

It is too expedient to blame the abolition of ATSIC on an internal implosion; although governance was an issue which we must heed. The policy ended within three short years of the *Mabo* Judgment, two years after the commencement of the *Native Title Act*, eleven years before UNDRIP was accepted by the General Assembly and 13 years before it was adopted by Australia in 2009.

This period tells us that policy is as fleeting and fickle as electoral cycles and that elected governments giveth and taketh away rights as they deem fit for their own self-serving narrative and survival. That is why the common law and constitutional and international rights are so important to hold policy-makers to account. They can also shape good policy.

Maybe the past thirty years was needed for a very young native title jurisprudence, policy and practice to form but in doing so it has largely stayed within its hermitically sealed, test-tube brine. It has suited governments and policy makers to not allow 'brackish water' to permeate their agenda – 'best keep these two things very deliberately apart.'

Possibly, we as native title claimants and holders have been complicit in this accommodation. Over the past thirty years, Native Title Holders and their PBCs have shown little appetite to venture into these broader policy spaces, understandably due to the pressures of prosecuting claims followed by the rapid and intense re-orientation and capacity-building required in a post–determination context. That is not a criticism, priority setting is important to success.

Although, recent 'green shoots' are appearing and native title has shaped that attitudinal shift. As has the rising prominence of UNDRIP that focuses upon the rights of Indigenous Peoples and the correlative duties of Nation States.

These 'green shoots' have received a healthy dose of sunlight and nutrients, as recently as a fortnight ago with the election of the Albanese Government. *Constitutional recognition* and *Voice to Parliament*, a commitment to a *Makarrata Commission* and the hope of a *Treaty making framework* contributed to its election – there is a mandate and a promise.[28] The People are mobilising. To be fair, a process of *national cultural heritage protection reform*[29] commenced in 2021 as a response to the disgraceful destruction of Juukan Gorge in 2020.[30] The promise of a much-need coordinated, inter-jurisdictional response to Close the Gap was also initiated in 2020 that actually involved peak Aboriginal and Torres Strait Islander organisations for the first time.

All five initiatives need to be prioritised in a coordinated manner because together they have the capacity to address the very issues raised over 31 years ago in the RCIADIC.

The question for this conference is what role do native title holders and PBCs have in this critical work. Unlike thirty-one years ago, there is the common law recognition of Traditional Owners and it presents a real opportunity to align broader policy aspirations, legal recognition and the traditional authority only 'grass roots' First Nations possess. Native Title Holders and PBCs have a vital role to play in this policy space.

Through the native title process, First Nations can utilise their cultural authority and legally recognised local structures to put flesh on the bones of any future *Voice to Parliament* model.

The native title connection process has curated many thousands of recorded and written testimonies of First Nations voices, hundreds of meticulously footnoted peer-reviewed expert reports, court

AIATSIS SUMMIT YOUTH FORUM

NOONGAR BOODJA PERTH

AIATSIS will be co-hosting a Youth Forum at the 2023 AIATSIS Summit. The Youth Forum is an opportunity for Aboriginal and Torres Strait Islander youth to come together to share their experiences and knowledge of native title, governance and nation-building and to discuss how opportunities for increasing youth participation in these processes might be harnessed.

The Youth Forum will be held on **9 June 2023 from 10:00 am to 3:00 pm** at the Summit (at the Perth Convention and Exhibition Centre) on Noongar Boodja. Further information about the Youth Forum is available on **AIATSIS's Summit webpage** AIATSIS Summit 2023 and on the PBC website **nativetitle.org.au**

Attendees AIATSIS Summit 2022 Kabi Kabi Country.

transcripts that could fill multi-story basements and millions upon millions of tax-payer dollars sensibly invested in an invaluable archive that chronicles the way this Country was "civilised." *Makarrata* has started, it has just been confined to the native title space. This body of credible evidence exists now and PBCs need to turn their minds to how it can be utilised in a broader truth-telling process.

A ***treaty process*** will be significantly enhanced in terms of design, process and outcomes if it is informed by almost three decades of complex, multi-party negotiation experience and expertise and improved by implementation insights with an eye to risk – there is significant native title sectoral capability that must be harnessed in this treaty process.

Cultural heritage protection is an existing native title right. It makes sense to draw upon the holders of those rights in the design and implementation of minimum national standards. Standards that are not confined to native title land and capable of covering the entire Indigenous estate unobstructed by settlor-colonial boundaries that carve up country under inconsistent regimes.

Closing the Gap statistics reveal the expanding chasm in many of the indicator areas. RCIADIC told us 31 years ago that there is a direct causal link between dispossession and disadvantage and surely putting Traditional Owners, through their own representative entities at the centre of developing and implementing place-based strategies, will make inroads.

Crucially, using native title to navigate these spaces does not mean PBCs have to fill them – co-opting and partnering with others, especially those areas requiring expertise, is vital. But for this to happen, First Nations and their PBCs need to forge constructive relationships with everyone on their Country and that includes Indigenous service providers who provide services for all Aboriginal and Torres Strait Islander people, who live and work on their Country.

First Nation self-determination is about being involved in everything that occurs on Country and that starts, importantly, within the 'safe harbours' of our broader Indigenous space. This shouldn't be perceived as a threat or radical disruption. Traditional Owners know they have a duty to care for everyone on their Country especially other First Nation Sisters and Brothers. The challenge for Indigenous service providers and organisations who answered the call to combat institutional racism and have done so tirelessly for decades, is to ensure that First Nations have a direct, formalised say in how those services are delivered in the future. In turn, First Nations need to be cognisant of the pressures exerted on those service providers by governments who have their own programme funding dictates.

Using native title as a vessel to navigate broader political and policy areas is obviously a choice but by actively engaging in these areas capability is built, opportunities are identified, efficiencies are gained, the respective systems are improved by lived experience, creating a multiplier effect in terms of outcomes, quality and scale.

If we successfully navigate those 'safer shores', this invaluable experience is portable to broader local and regional nation-building but that requires more permanent structures which brings me to the next metaphor.

If we engage in broader Indigenous politics and policy as Native Title Holders, why wouldn't we harness all those experiences and outcomes and

project it on a whole-of-Country basis. Self-determination is measured internally by how a First Nation governs itself and develops across a range of indicators as well as externally by how co-existing actors, be they governments or civil society interacts with First Nations.

Indigenous self-determination is defined and implemented internally but is reinforced externally. This is the duality recognised in international law where self-determining Nation States reinforce each other by respecting the territorial integrity of their counterparts. Because First Nations co-exist within a Federation involving three other levels of government, we need to appreciate and flexibly work with this duality, if we are to see ourselves and, they in turn us, as the fourth level of government.

Together, native title and UNDRIP can assist with nation building; they are pillars set deep in a foundation of traditional law and custom that in turn builds a strong house for a First Nation to sustain itself and interact with a broader community.

UNDRIP however is more than bricks and mortar, it is a *roadmap, a blue-print and a scorecard for nation building*. As stated earlier, native title is not a pre-requisite to access and activate the right to self-determination – that right is inherent and comes from our own traditional laws and customs but native title can be bonded with UNDRIP because they have common compatible active ingredients.

For instance, Article 33 of UNDRIP states it is up to the group to determine *their own identity or membership in accordance with their customs and traditions*. The first and second limb of the native title question as stated by Justice Brennan in *Mabo #2* and repeated in s223 of the Native Title Act talks about the same things.

The answer to the question in article 33 and native title points to who is the 'self' in self-determination.

As First Nations, we know that these questions are the correct ones because we came up with them long before they were recognised in the High Court Case and codified in UNDRIP.

We have always known when you are not on your own Country, you are always on someone else's and we are duty bound to find out who they are and what we must do.

This might sound like the bleeding obvious for people in this room but I know it is not that obvious to others outside of here.

It further follows that all the rights enumerated in UNDRIP are also possessed by those same people.

The answer to this question is fundamental to the right to freely determine political status and freely pursue economic, social and cultural development as per Article 2 of UNDRIP. Article 3 states, by virtue of that right, those Peoples also have the right to *autonomy or self-government* in matters relating to their *internal and local affairs*.

The answer to this question also gives rise to whom the concomitant duty of free, prior and informed consent is owed. If we can't answer this question ourselves with clarity, conviction and consistency, then we provide the Nation State with an excuse to wring its hands or twiddle its thumbs when it should be discharging its duty.

When the three other levels of government acknowledge that right and discharge their respective corresponding duties, the external reinforcement of the right to self-determination starts as does an important conversation about the layered territorial integrity that must occur.

While this might all sound very abstract to current native title law, practice and policy, it is the natural conclusion of the recognition and implementation of rights premised on the revocation of the doctrine of *terra nullius*. There is nothing frozen in time about these rights; dormant rights can be awoken.

We are already seeing state and territory governments gaining a better insight into these duties by enacting legislation and developing policies and procedures that are consistent with UNDRIP. The language of rights is gaining currency and this is our opportunity.

Upon this foundation of laws and customs, strong pillars fortified by the building blocks of the five initiatives, First Nations can achieve Indigenous self-determination. This also creates the opportunity for stronger working relationships between every level of government. When this occurs ancient governments are revitalised and reinforced by the three other tiers of government respecting and recognising co-existence.

This change imperative is not only about long-overdue justice for the denial of deeply-buried truth. Such changes liberate everyone from the burden of the past by empowering those who haven't had it and absolving the guilt of those who took it. This change also has an economic imperative and thus a time imperative. Strong First Nations

must play a critical role in the transition to a new economy – our competitive advantage as a Country will be defined by how we care for our environment, leverage regions and innovate through a blend of ancient knowledge and cutting-edge technology. First Nations have much to contribute to the design and transition but strengthening the framework of this nascent Indigenous governance architecture is critical.

Turning to the final metaphor. Governments, Indigenous or otherwise, are but institutions that exist as part of a social contract with and for the benefit of the people they serve. The fourth and final metaphor is the most transformative and it is not about governments, laws, policies, structures and processes but people with all the strengths and weaknesses, hopes and fears, resilience and fragility of our shared human condition. We know from organisational change theory that cultural transformation is hard to achieve and easy to lose. Because culture is both the glue that binds us together and the grease to keep the parts moving. The Uluru Statement from the Heart[31] provides the most apt metaphor. Native title is about co-existence. Indigenous self-determination involves co-existence. Cultural transformation is critical to harmonious co-existence. There is a line in the Uluru statement that sums up the collective desire of First Nations:

'*We believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.*'

A re-imagined Australia re-built for the future must have the oldest living culture at its beating heart.

So whether we want native title to remain **'brackish water'** kept in its small little ecosystem. Or whether we think it can be a ***vessel*** charting a course to navigate the spaces between the big policy issues of the next decade or so. Or indeed, **pillars** in conjunction with other rights building a firm foundation capable of forming a fourth level of government. Or something truly transformative where that ancient sovereignty becomes our ***beating heart***. It comes down to whether we want to embrace a theory of change that is aptly encapsulated by our Summit sub-themes: **Belonging and identity; Connection and Interaction, and Becoming.**[32]

It is up to us, but as Nelson Mandela said, "There is no passion to be found playing small – in settling for a life that is less than the one you are capable of living."

However, passion alone won't get us beyond **brackish water**, into **vessels**, putting on tool belts to **build** new paradigms or **inspiring** transformation. A theory of change needs a governance model to drive it. One that takes into the account the complexity of UNDRIP and native title. A model that comprehends that traditional law and custom is critical to traditional authority but also appreciates that other rights and interests need to be utilised. That moves away from inflicted deficits and re-focuses on inherent strengths. That appreciates that two-world governance operates in different domains and understanding those domains are critical to protecting and leveraging rights with sustainable, integrated development in mind. Finally, a model capable of scalability to deal with opportunities and challenges associated with co-existence; yet consistent with traditional laws and customs that unite regions. In summary, a governance model that encapsulates a rights-based, strengths-focussed, governance for development approach.[33]

There is not sufficient time to explore this approach but it is picked up in other conference presentations that underscores the close relationship between governance and self-determination.

This paper has outlined a theory of change that transforms Australia via First Nations' rights. The theory of change emphasises the importance of a governance framework that is based on those rights in line with inherent strengths of *People, Place and Partnership*.[34] The theory of change underscores the importance of five current initiatives previously outlined. It engages with the realities of a transitioning economy and that First Nations and the three other levels of governments will need to devise regional solutions. First Nations were left out of the old economy. The new economy will need the wisdom of First Nations.

All important, worthy pursuits but we can't avoid the elephant in the room – resources.

There are currently 243[35] PBCs that manage rights and interests over 42% of Australia. When native title claims resolve within the next decade or two, the number of PBCs are likely to peak at 300 with at least 60 to 65% of the land mass being subject to some form of Indigenous estate if not native title per se.

Native title is an *in rem* judgment and is inalienable therefore it has all the hallmarks of a perpetual title – it is technically forever.

The *Native Title Act* requires PBCs to be incorporated to hold native title. Those entities have no end date and are also technically forever.

The right to self-determination and its implementation is technically forever.

The structures underpinning Constitutional Voice and treaties will need to have strong connections to 'grass roots' First Nations; so too are these structures likely to be forever.

PBCs have an important role to play in all of these developments and their funding needs to move beyond the vagaries of electoral cycles. They also need to be funded to a level that builds capability to not only deal with regulatory compliance but also nation-building.

The workload is immense, the time short and the consequences of inaction dire.

While the benefits of transformation will be significant, exponential and enduring.

However, it is well documented that PBCs are poorly funded. ORIC reports that 70% of PBCs claim they have no income and many do this year after year. The 2019 AIATSIS survey of PBCs indicates 67% reported an absence or lack of funds as one of the key challenges they face to meet their goals. PBCs are eligible to receive approximately $70,000 in annual income from Federal grants and for the vast majority this is their only income with the bulk of it going towards compliance costs.[36]

In 2021, the National Native Title Council commissioned the Centre for Aboriginal Economic Policy Research (CAEPR) to independently examine this funding issue and offer some economic solutions. The paper is titled: *Towards a Perpetual Funding Model for Native Title Prescribed Bodies Corporate*.[37] It is essential reading.

The costings are based on general assumptions but CAEPR notes the combined costs of compliance, native title work and nation-building is approximately $1.2M per year. The expert report flags various funding models with the recommendation that a perpetual fund be set up similar to or indeed be managed by the Future Fund Board of Guardians who is responsible for commonwealth superannuation, NDIS, ATSI Land and Sea Future Fund and others.

Time and complexity does not permit further details but this fund is required to realise the potential of First Nations and their PBCs to build governance to implement a theory of change that will re-imagine Australia.

As we approach the 30th anniversary of the *Mabo* judgment, may I conclude on a very personal note. The 3rd of June each year – Mabo Day – is evocative. We might remember our own native title journey and through that journey we are all connected to the *Mabo* co-plaintiffs. I want to thank each of them and their families involved. I especially pay respects to the Mabo family for their determination and support over the many years of struggle during the court battles and acknowledge the deep personal jubilation and profound sadness that this day must bring each year.

Each Mabo Day takes me back to a day five months earlier in a room at the Royal Brisbane Hospital in January 1992. As a young trainee lawyer,[38] I was asked by my legal master to stop what I was doing and attend the hospital to take urgent bedside instructions to prepare a last will and testament. At the time I was frantically trying to finalise other matters before I went on leave as I was getting married the following week. As a young Torres Strait Islander at the beginning of his legal career and about to start a new life I dutifully attended and met a gravely ill Torres Strait Elder, an expert in his traditional law and custom and sadly approaching the end of his life.

Despite our shared heritage, the polarities in that small hospital room were stark:

- Cultural 'smol boi' meets revered Torres Strait Islander leader and legend;
- A strong young man sitting upright in a chair concealing his trembling confidence and a frail older man lying on a bed whispering with booming assuredness;
- Someone trying to explain the white man's very old law of wills and succession and an increasingly cranky man explaining Malo law[39] is much older than Kole law, 'so take the instructions – the High Court will work it out.'

Despite those differences, a personal conversation interspersed the professional one. He spoke of our giz (our root) to those ancestral Islands and that we remain connected to it no matter how far we travel. The point that we were two Torres Strait Islanders in Brisbane a long way from home was not lost on either of us nor that decisions were made about our Island homes with the stroke of a pen at Parliament House in nearby George Street.

We spoke about family and he scalded me several times on my own rendering as he had an encyclopaedic knowledge of family connections and he insisted upon accuracy even in my own family tree. It didn't occur to me until much later that he was teaching even at his most vulnerable and being so generous with his limited time to a virtual stranger made kin by deeper connections that I didn't understand at the time. He was being an Elder, duty-bound to explain family, traditional law and custom and spiritual connection to home that my prapa big-head white man's law training didn't comprehend at the time.

I found out later, that the genesis for Koiki's court action in the 1980's was because he was cruelly refused access to his home of Mer to pay respects to his father before he passed.

His father passed before Koiki was able to return home. Tragically, Koiki's fight for life was lost before he knew the outcome of his life's fight.

I recount this personal story because the word "home" is one of the most important in anyone's language. We all know this to be so from very recent times when homes became our sanctuary from a stalking invisible menace during the early stages of the COVID pandemic. We see its importance every night on television when a Nation State desperately fights for its home to repel a formidable invading enemy.[40] The *Mabo* judgment gave us a chance to say this was our home after it was denied for so long. A re-imagined Australia is one where all Australians live in peace, respect and dignity within a shared home. That is the true legacy of the *Mabo* judgment.

Meriba Mimi abe gab ge
(we walk this road together)
vAu ka eswau wabim
(thank you, everyone)[41]

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1 Meriam Mir language of the eastern Islands of the Torres Strait

2 *Milirrpum v Nabalco* Pty Ltd (1975) 17 FLR 141 per Blackburn J at [172].

3 Love Commonwealth of Australia; *Thoms v Commonwealth of Australia* [2020] HCA 3 (363).

4 Attributed to Noel Pearson in Mantziaris, C. and Martin, D. (2000). *Native Title Corporations: A Legal and Anthropological Analysis*. Sydney: Federation Press.

5 Mabo v Queensland (No 2) (1992) 175 CLR 1.

6 Noting in other common law jurisdictions a presumption of continuity was accepted; see *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 and *Calder et al. v British Columbia* (A-G) [1973] 34 DLR (3d) 145.

7 Justice Robert French, 'Lifting the burden of native title some modest proposals for improvement.' (Speech delivered in Adelaide on 9 July 2008). http://classic.austlii.edu.au/au/journals/FedJSchol/2008/18.html.

8 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Brennan J at [31] – [32].

9 See *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 for what is required to prove native title.

10 Ibid.

11 *Bodney v Bennell* [2008] 167 FCR 84.

12 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Brennan J at [82], 'As the Governments of the Australian Colonies and, latterly, the Governments of the Commonwealth, States and Territories have alienated or appropriated to their own purposes most of the land in this country during the last 200 years, the Australian Aboriginal peoples have been substantially dispossessed of their traditional lands. They were dispossessed by the Crown's exercise of its sovereign powers to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purposes. Aboriginal rights and interests were not stripped away by operation of the common law on first settlement by British colonists, but by the exercise of a sovereign authority over land exercised recurrently by Governments. To treat the dispossession of the Australian Aborigines as the working out of the Crown's acquisition of ownership of all land on first settlement is contrary to history. Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. **Their dispossession underwrote the development of the nation.**'

13 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Toohey at [77], 'The plaintiffs seek a declaration that: "the Defendant is under a fiduciary duty, or alternatively bound as a trustee, to the Meriam People, including the Plaintiffs, to recognize and protect their rights and interests in the Murray Islands." They argued that such a duty arises by reason of annexation, over which the Meriam people had no choice; the relative positions of power of the Meriam people and the Crown in right of Queensland with respect to their interests in the Islands; and the course of dealings by the Crown with the Meriam people and the Islands since annexation. However, while the plaintiffs claim the declaration just mentioned, the statement of claim does not seek any specific relief for a breach of fiduciary duty.'

14 *Native Title Act 1993* (Cth).

15 *Brandy v Human Right and Equal Opportunity Commission* (1995) 183 CLR 245.

16 See *Mabo (No 2) v Queensland* (1992) 175 CLR 1 per Brennan J at [33]–[34], [36], [39]–[41], [46].

17 Eddie Koiki Mabo, Celuia Mapo Salee, Father David Passi, Sam Passi and James Rice.

18 National Native Title Tribunal. (2022). *Statistics*. Available at: http://www.nntt.gov.au/Pages/Statistics.aspx.

19 See NNTT Register of Native Title Claims http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-Native-Title-Claims.aspx.

20 See *Native Title Act 1993* (Cth) s51 '...entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect...' and *Griffiths and Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7.

21 See *Native Title Act 1993* (Cth) s13(1) and (5).

22 United Nations. (2022). *General Assembly of the United Nations*. Available at: https://www.un.org/en/ga/.

23 See *Mabo (No 2) v Queensland* (1992) 175 CLR 1 per Brennan J at [32]-[34].

24 Jordan, K., Markham, F. and Altman, J. (2020). *Linking Indigenous communities with regional development: Australia overview*. Centre for Aboriginal Economic Policy Research. Australian National University.

[25] See National Report Royal Commission into Aboriginal Deaths in Custody.

[26] *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

[27] *The Wik Peoples v the State of Queensland & Ors* [1996] HCA 40.

[28] Australian Labor Party. (2022). First Nations Policy. Available at: https://web.archive.org/web/20220827103429/https://www.alp.org.au/policies/first-nations.

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[38] At the time the writer was an articled clerk with the firm Paul Richards and Associates, Solicitors based in Brisbane.

[39] 'Malo's Law' is the traditional law that underpins Meriam culture and specifically deals with property rights as follows: *Malo tag Mokai, Teter mokai mokai. Malo tag aorir, teter aorir aorir. Malo tag tupamait, teter tupamait tupamait* (Malo keeps his hands to himself, he does not touch what is not his. He does not permit his feet to carry him towards another man's property. His hands are not grasping; he holds them back. He does not wander from his path) as quoted Determination 134 Volume 2

[40] Russia's invasion of Ukraine

[41] Meriam Mir

Daintree rainforest on Eastern Kuku Yalanji country

Native title representative body (NTRB) legal workshop

AIATSIS has convened the NTRB Legal Workshop since 2017, providing a unique opportunity for legal staff from native title organisations to engage in a community of practice, sharing knowledge and experience and developing skills for the benefit of native title claimants and holders. The workshop program is designed so that native title lawyers are able to accrue most or all of their continuing professional development (CPD) points over the three days.

AIATSIS's Indigenous Country and Governance Unit, in partnership with the National Native Title Council (NNTC), convened the 2022 NTRB Legal Workshop from 30 August to 1 September, in Melbourne/ Naarm on Wirundjeri Country.

The workshop had the largest in-person attendance since the workshop was first held, with 77 staff from 14 native title organisations in attendance including NTRBs, native title service providers (NTSPs), Northern Territory Land Councils performing native title functions and for the first time in-house lawyers from Prescribed Bodies Corporates (PBCs). There was limited online attendance, based on feedback from participants at the previous years' workshop.

There were sixteen presentations over the first two days of the workshop, with the final day being focussed on advocacy training.

Noting that the NTRB Legal Workshop provides an opportunity for 'rep body' lawyers to have frank discussions about their unique area of practice, this article provides a broad overview of the workshop presentations only.

Day One Highlights

Panel Discussion: The Treaty-making process in Victoria

Day One of the program commenced with a panel discussion about the Treaty-making process in Victoria. The panel was chaired by Clinton Benjamin, Bardi, Yawuru, and Kija man and Senior Advisor at the NNTC. Joining the panel were:

- Jamie Lowe, Gundjitmara Djabwurrung man and CEO of the NNTC. Jamie is also an elected representative on

Barrister Tina Jowett Presenting at NTRB Workshop

the First Peoples' Assembly of Victoria.

- Karri Walker, a Nyiyaparli woman and Senior Lawyer at the Assembly.

The panel discussed how the representative model for negotiating a treaty evolved, settling on the elected representative model of the Assembly and the current role of the Assembly being to negotiate a treaty framework with the Victorian government. The future role of the Assembly will be to negotiate a treaty itself, which the Victorian Government committed itself to negotiate through the implementation of the *Aboriginal Victorians Act 2018* (Vic)(Treaty Act).

The Treaty Act sets out what the Assembly is tasked with negotiating, being:

1. An interim dispute resolution process.
2. A treaty negotiation framework, based on a broad set of principles to facilitate flexible negotiation.
3. An independent treaty authority to oversee and facilitate negotiations.
4. A self-determination fund to ensure Aboriginal Victorians are adequately resourced to negotiate.

Under what will be a state-wide treaty, Members (of the Assembly) have called for some specific reforms under the treaty, which give shape to institutional oversight for First Nations over government, which include

1. Black Parliament – a representative body where First Peoples are making decisions and laws on matters impacting on Aboriginal communities.
2. Reserved seats to Parliament ensuring Aboriginal representation in Parliament.
3. A Voice to Parliament at the State level.

Further information about the role of the Assembly and the Treaty Act can be accessed here: https://www.firstpeoplesvic.org/

Presentation: Treaty and the implications for native title in Victoria

First Nations Legal & Research Services (FNLRS) presented on treaty implications for native title in Victoria, noting that the Treaty Act makes explicit that nothing in the Act is intended to affect native title rights and interests otherwise than in accordance with the *Native Title ACT 1993* (Cth)(NTA), and likewise with the State cultural heritage legislation. FNLRS considered how this may play out in practice.

Panel Discussion: Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs and Anor v Montgomery (S192/2021) (*Montgomery*).

Clinton Benjamin facilitated a discussion among panellists in relation to the Montgomery and other recent cases where questions of Aboriginal identity were at the fore. Joining the panel were:

- Dr Eddie Cubillo, Larrakia/ Wadjigan and Central Arrente man and Director Indigenous Law and Justice Hub, University of Melbourne.
- Karina Hawley, Gamilaroi woman and solicitor with the National Justice Project. Karina was the instructing solicitor for the NNTC as an intervenor in the Montgomery matter before the High Court.
- Professor Kirsty Gover, Melbourne University Law School.

With the change in government, the new Attorney-General withdrew the Commonwealth's application in Montgomery, seeking to overturn the High Court decision in *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3 (*Love & Thoms*), which determined that an Aboriginal person could not be an 'alien' under the Constitution and therefore was not vulnerable to deportation under the *Migration Act 1958* (Cth). Despite this, questions remain in relation to the appropriateness of the test for determining Aboriginality, including whether the tripartite test in Mabo is an appropriate test to be applied to determine who is an Aboriginal and/or a Torres Strait Islander? The appropriateness of a test at all was also discussed, when it comes to external definitions of Aboriginality. As the panel discussed, which body of law — traditional law and custom or settler law — and with reference to the *Montgomery* matter in particular, gets to determine the meaning of cultural adoption and its interaction with the concept of *biological descent* and race?

Below are links to a number of relevant AIATSIS case notes on:

Love v Commonwealth of Australia; Thoms v Commonwealth of Australia [2020] HCA 3 https://aiatsis.gov.au/ntpd-resource/1958

Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) [2021] FCA 647 https://aiatsis.gov.au/ntpd-resource/2124

Conducting native title meetings

Representatives from Queensland South Native Title Services (QSNTS), Kimberley Land Council (KLC) and North Queensland Land Council (NQLC) each presented on some practical considerations for running native title meetings efficiently and effectively.

QSNTS's session spoke to the conduct of authorisation meetings including notice requirements, and also of conducting a largely online meeting during COVID-19 where travel restrictions were in place in Queensland. KLC also spoke to meeting notification requirements, and the need to ensure that all people who are entitled to attend meetings and participate in decision-making have the requisite information to do, or not to do, both. NQLC gave some practical tips on the conduct of meetings and getting business done via technology.

Case Updates

Barrister, Tina Jowett provided case updates on a number of matters on Day One and Two. Summaries of the two case updates can be found on pages 26-30.

Day One ended with a presentation from Kimberley Land Council (KLC) on the circumstances surrounding the appointment of the Indigenous Land and Sea Council (ILSC) as a default Prescribed Body Corporate (PBC) where a native title holding group fail to nominate a PBC.

See AIATIS's case note on *Sturt on behalf of the Jaru People v State of Western Australia* [2021] FCA 219. https://aiatsis.gov.au/ntpd-resource/2115

Day Two Highlights

The first half of the day focussed on the interaction of native title and renewable energy, and included a presentation by Gamilaroi man Ganur Maynard, Associate to the Hon Justice Mortimer of the Federal Court. Ganur presented on free, prior and informed consent in negotiating renewable energy projects on land subject to native title claims and determinations.

Ganur's CAEPR Working Paper on the topic can be accessed here:

https://caepr.cass.anu.edu.au/research/publications/renewable-energy-development-and-native-title-act-1993-cwlth-fairness

Further presentations on Day Two included a consideration of good faith negotiations in future act matters before the National Native Title Tribunal and the alternative settlement regime in Victoria, under the *Traditional Owner Settlement Act 2010* (Vic).

The day closed with a presentation on the draft *Returning Native Materials: Best Practice Guide* which was developed by AIATSIS in partnership with Yamatji Marlpa Aboriginal Corporation (YMAC).

Further information about AIATSIS's Returning Native Title Materials project can be accessed here https://aiatsis.gov.au/research/current-projects/returning-native-title-materials

Day Three

The final day of the workshop was a dedicated four-hour advocacy training session facilitated by barristers Robert Blowes SC and Susan Phillips.

This session took a more practical look at questions of practice and procedure when appearing in the Federal Court. The training sessions was highly interactive and during which some of the more junior lawyers engaged in role play, appearing before "justices" Blowes and Phillips to practice their advocacy and court etiquette skills.

AIATSIS and the NNTC are extremely grateful for the attendance and participation at the workshop by native title organisations and for the contributions made by the presenters.

Save the date

AIATSIS is pleased to advise that the 2023 NTRB Legal Workshop will be held in Adelaide from 29 August to 31 August 2023.
For details and to register visit
https://aiatsis.gov.au/whats-new/events/2023-ntrb-legal-workshop

Corellas on the banks of the Macintyre River Gamilaroi country

Case notes

Rainbow on behalf of the Kurtjar People v State of Queensland (No 2) [2021] FCA 1251

The right to take and use resources 'for any purpose'

By Tina Jowett, Barrister

1. *Rainbow on behalf of the Kurtjar People v State of Queensland (No 2)* [2021] FCA 1251 ('**Rainbow**') concerned the Kurtjar people's rights and interests to take, use share or exchange resources for any purpose in a native title determination area.
2. On 26 July 2022, *Rainbow* was determined and recognised the Kurtjar people's native title rights and interests.[1] Rares J's decision was significant as the first successfully determined fully contested native title determination on the east coast of mainland Australia.
3. The Kurtjar people's claim to native title rights and interests extended over land and waters in south-west Cape York, including two large pastoral lease holdings, Miranda and Delta Downs.
4. *Rainbow* concerned two central issues:
    i. whether the Kurtjar people have always been the traditional owners or have they succeeded and by what process, to the land and waters (the **succession issue**);[2]
    ii. what is the correct description to articulate the non-exclusive right and interest to access natural resources and to take, use, share and exchange those resources for any purpose (the **right to take resources issue**).[3]
5. The Kurtjar people argued that their non-exclusive native title rights and interests in the claim area include 'the right to access natural resources in those areas and to take, use, share and exchange those natural resources for any purpose.'[4]
6. Section 211(1) of *Native Title Act 1993* (Cth) (**NTA**) acknowledges that an existing native title right may be affected by legislative prohibitions or restrictions on the carrying out of the activity.[5] More broadly, this aligns with the recognition in ss 223 and 225 of the *NTA* that the existence or possession of a right or interest can be distinct from its exercise or enjoyment, as held by Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta*.[6]
7. In *Rainbow*, Rares J recognised that the 'regulation of [the native title right or interest's] exercise and enjoyment does not affect the nature or existence of the right itself'.

Kurtjar Lay evidence

8. Rares J outlined several examples provided in the evidence by the Kurtjar witnesses as to their right to take resources, hunt and fish on Kurtjar country.[7] This right extended, contemporaneously, to the use of land for the commercial benefit of the Kurtjar people. For example, Fred Pascoe explained that Kurtjar law permitted the taking of sandalwood from Kurtjar country by a Kurtjar person because a royalty was being paid by that person to the Kurtjar community.[8] Likewise, the grazing of cattle by the Kurtjar who owned Morr Morr Pastoral Company Pty Ltd within Kurtjar country on Delta Downs was in accordance with Kurtjar law because Kurtjar people manage and run their pastoral company 'in a way that it doesn't harm our country.'[9]
9. Historically, Fred Pascoe and Joey Rainbow gave evidence about the Kurtjar trading resources with other groups in the past, citing local trading routes with the Tagalaka, the Ewanian, Gkuthaarn and Kukatj, groups from Cape York, and west to the Northern Territory.[10]

Kurtjar Anthropological evidence

10. The anthropological evidence supported the conclusions that in hunter-gatherer societies trade had an important social role, and that the Kurtjar's traditional laws and customs would constrain the way in which they could access resources.[11]

11. The anthropological experts agreed in their concurrent evidence that Kurtjar people had the right to take resources from their country but that their traditional laws and customs regulated the exercise of that right so that they must use it as individuals or a group in a way that is sustainable and not 'greedy'. Where the use extends beyond the needs of the individual and his or her family, it is for the benefit of the Kurtjar people as a community.[12]

12. They also agreed that the conduct of the commercial enterprises on Delta Downs and the Kurtjar person who harvests sandalwood under conditions that benefit the Kurtjar community are in accordance with the traditional normative laws and customs of the Kurtjar people.[13]

The State's submissions

13. The State's anthropologist, Dr Palmer, characterised the historical 'trades' between hunter-gatherer societies as 'exchange transactions' intended to maintain good relations between neighbouring groups, rather than generating economic benefits for the Kurtjar people.[14]

14. Dr Palmer stated that 'according to anthropological understandings the right and its exercise are not differentiable.'[15]

15. By contrast, the State argued that a native title right is distinguishable from its exercise. It submitted that in determining how to express a right in common law terms in a determination under s 225 of the *NTA*, it is necessary to have regard to evidence as to customary restraints on the exercise of the right.

16. The State's position was that traditional Kurtjar laws and customs allowed for the exploitation of resources for the benefit of the community, but not for personal financial gain,[17] the accumulation of capital[18], or generating an independent surplus or capital.[19]

Consideration of Akiba

17. The focal point of analysing the Kurtjar people's right to take and use resources concerned an analysis of the meaning of s 225 *NTA*, particularly in determining the correct formulation of non-exclusive native title rights and interests within the meaning of this provision. In doing so his Honour considered the findings relating to the right to take fish and other resources in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* (2013) HCA 33 (**Akiba**).

18. Their Honours in *Akiba* determined that rights as broad as the right 'to take for any purpose'[20] may be exercised for commercial or non-commercial purposes. Referring to [21] of *Akiba*, Rares J emphasises that this broadly defined native title right ought not to be sectioned into lesser rights or 'incidents' defined by the various purposes for which they might be exercised.

19. In *Rainbow*, Rares J emphasised the distinction made in Akiba between a native title right and an activity attesting to the existence of this right.[21] Rares J notably observes that 'at its heart, the right that the society had was that it or its members could take the resources of the claim area for any purpose, but the traditional laws and customs might regulate the exercise and enjoyment of that right at particular times or locales or in particular respects.'[22]

Application of legal principles

20. In response to the State's submissions, Rares J accepted that before sovereignty, no one in the Kurtjar society (as it existed then) would have understood or considered in economic terms concepts of commercial purposes, or the accumulation of capital.[23]

21. His Honour described the core of the right that the Kurtjar society possessed: 'that it or its members could take the resources of the claim area for any purpose, but the traditional laws and customs might regulate the exercise and enjoyment of that right at particular times or locales or in particular respects.'[24] However, His Honour stated that 'the regulation of its exercise and enjoyment does not affect the nature or existence of the right itself.'[25]

Blue Bush Sandalwood.

22. Rares J rejected the State's argument that the determination under s 225 should express the right to take resources with a limitation 'for domestic or communal purposes,' because it was directed at the exercise, not existence of the right to take resources, whereas the statutory questions are directed to possession of the rights or interests, not their exercise.

23. His Honour expressed the opinion that 'traditional laws and customs that regulate the right are distinct from the right itself,' which was supported by reference to statutory construction of the NTA, in particular s 223(1)(a) which defines native title rights and interests as being the rights and interests 'possessed under the traditional laws... and... customs' of the native title holders, as well as ss 94A and 225(b) which require that an order making a determination of native title determine 'the nature and extent of the native title rights and interests in relation to the determination area' as opposed to setting out the whole of the traditional laws and customs that regulate the exercise and enjoyment of those rights and interests.[29]

24. Justice Rares rejected the proposition that under s 225(b), the role of the Court was to set out 'the whole of the constraints or limitations on the circumstances governing the exercise or enjoyment of a native title right or interest, recognised by the common law, that may be placed on it by traditional laws and customs.'[30] Rather, that level of regulation of the exercise or enjoyment of the right ought be left to the operation of the traditional laws and customs which the native title holders continue to acknowledge and observe.

25. Addressing the specific examples of the operations of Morr Morr Pastoral Company Pty Ltd and the permission for a Kurtjar individual to take sandalwood, Rares J held that these 'represent changes to, or adaptations of, their traditional laws and customs that remain rooted in the pre-sovereignty system but accommodate the fact that the Kurtjar people are living in the twenty-first century and can exploit the resources of their country under those laws and customs for the communal benefit, including by providing them with employment through such commercial activities.'[31]

26. Justice Rares concluded that the description of the right to take resources should employ the same terminology as in *Akiba*, namely 'the right to access and to take for any purpose resources in the [determination area].'[32]

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1 *Rainbow on behalf of the Kurtjar People v State of Queensland (No 3)* [2022] FCA 824.

2 *Rainbow on behalf of the Kurtjar People v State of Queensland (No 2)* [2021] FCA 1251 (**Rainbow**) at [4].

3 *Rainbow* at [4]

4 *Rainbow* at [280].

5 *Rainbow* at [311].

6 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (**Yorta Yorta**) at 455 [84]; *Rainbow* at [283].

7 *Rainbow* at [285]–[289].

8 *Rainbow* at [286].

9 *Rainbow* at [287].

10 *Rainbow* at [288]–[289].

11 *Rainbow* at [290], [293], [296].

12 *Rainbow* at [296].

13 *Rainbow* at [298].

14 *Rainbow* at [293]–[295].

15 *Rainbow* at [294].

16 *Rainbow*

17 *Rainbow* at [302]–[303].

18 *Rainbow* at [304].

19 *Rainbow*

20 *Rainbow* citing *Akiba* at 224–225 [21].

21 *Rainbow* at [309] citing Akiba at 241–242 [66]–[67].

22 *Rainbow* at [313].

23 *Rainbow* at [311].

24 *Rainbow* at [313].

25 *Rainbow* at [312], citing *Western Australia v Willis* (2015) 239 FCR 175 at 187–188 [36]–[37], 190 [44] and 215-216 [99]–[100] (per Dowsett and Jagot JJ).

26 *Rainbow* at [317].

27 *Rainbow* at [324]-[325].

28 *Rainbow* at [317].

29 *Rainbow* at [317], [320].

30 *Rainbow* at [321].

31 *Rainbow* at [323].

32 *Rainbow* at [327].

Harkin obh of the Nanatadjarra People v State of Western Australia (No 2) [2021] FCA 3

By Tina Jowett, Barrister

1. *Harkin obh of the Nanatadjarra People v State of Western Australia (No 2)* [2021] FCA 3 (***Harkin***) involved two interlocutory applications for the summary dismissal or strike out of a native title determination application.[1]
2. The first application was filed by the Nangaanya-ku applicant to strike out the overlapping Nanatadjarra claim under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**) or, alternatively, under s 84C(1) of the *Native Title Act 1993* (Cth) (**NTA**), on the basis that the application had never been properly authorised.[2]
3. In response, the Nanatadjarra applicant unsuccessfully brought its own interlocutory application seeking leave under s 66B of the NTA to replace the persons who constituted the applicant.[3]
4. Section 31A(2) of the FCAA provides for summary judgment for one party against another in relation to the whole or part of any proceeding if:
    i. the first party is defending the proceeding or that part of the proceeding; and
    ii. the court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.
5. The Nanatadjarra applicant's claim was summarily dismissed for the following two reasons:
    i. the applicant had not discharged its evidentiary onus that, on the balance of probabilities, there was a traditional decision-making process or that the claim was authorised by the whole 'native title claim group'; and
    ii. on the basis of the available evidence, the Nangaanya-ku applicant had established that there were no reasonable prospects of establishing that the Nanatadjarra held native title rights and interests in the application area beyond those persons who were included in the claim group description of the Nanatadjarra claim.[4]

Decision-making process

6. The authorisation process that the Nanatadjarra applicant relied upon was described inconsistently in the evidence.
7. On the one hand, the original Form 1 application and supporting s 62 affidavits suggested the agreed and adopted decision-making process under s 251B(b) of the NTA involved consultation amongst members of the claim group, with decisions made either by consensus or by a majority.[5]
8. On the other hand, Ms Harkin's affidavits suggested that there was a traditional decision-making process, as described in s 251B(a), where Nanatadjarra elders made decisions following consultation with their families,[6] other evidence implied that Ms Harkin considered herself as being able to make decisions on behalf of the Nanatadjarra claim group without any necessary consultation with other Nanatadjarra elders.[7]
9. Due to numerous inconsistencies in the evidence and other evidentiary difficulties, Griffiths J concluded that the Nanatadjarra applicant could not satisfy, on the balance of probabilities, that there was a traditional decision-making process that was followed when authorising the Nanatadjarra claim.[8]

Who were the Nanatadjarra authorising claim group?

10. Furthermore, Griffiths J found considerable uncertainty in determining who constituted the Nanatadjarra authorising group. This initially comprised the Nanatadjarra claim group who met on 13 February 2016 and 21 May 2016 but later changed to reflect Ms Harkin's description of an authorising group of 12 elders, who had met on 7 January 2014.[9]
11. His Honour considered this change as a way for the Nanatadjarra applicant to avoid determining whether the 13 February 2016 and 21 May 2016 meetings validly authorised the Nanatadjarra native title determination application.[10]

12. However, such inconsistencies demonstrated 'a significant degree of artificiality', with the applicant lacking the evidence to support the factual assertion that the Elders who attended the meetings 'were representative of **all** of the persons who comprised the native title holding group'. Moreover, there was no evidence to suggest that the Nanatadjarra Elders had engaged in consultation with their respective families at either meeting.[11]

Subgroup problem

13. An additional problem with the Nanatadjarra claim, which was "sufficient of itself to have the application summarily dismissed", was that there were persons with native title rights and interests (**NTRI**) in the Nanatadjarra application area who were not included in the Nanatadjarra claim group description.[12]

14. The Nanatadjarra claim group description depicted NTRI as being derived through '[descent] from a parent, grandparent or great-grandparent born on country'. Four witnesses gave evidence that their parent or grandparent was born in the claim area, and were not described as members of the Nanatadjarra claim group.[13] Additionally, two apical ancestors, who satisfied this description, were removed from the Nanatadjarra claim group despite their descendants having 'ritual status' and able to 'speak for country'.[14]

15. To resolve this difficulty, the Nanatadjarra applicant proposed to amend the claim under s 66B of the NTA by omitting a particular geographical area associated with other apical ancestors. However, Griffiths J held an invalid application cannot have its invalidity removed if it 'stems from a central deficiency with the initial authorisation', such as if the evidence indicates that the application was not properly authorised in the first place.[15]

16. His Honour noted that s 66B of the NTA only applies where the current applicant is 'no longer authorised' or 'has exceeded the authority given to him or her by the claim group'. Where a native title application has never been properly authorised, it is appropriate to 'seek to have the claim struck out under s 84C [of the NTA, … or s 31A(2) of the [FCAA]'.[16]

17. While courts retain a discretion under s 84D(4) not to strike out or summarily dismiss an application that initially was not properly authorised, Griffiths J was not persuaded that this discretion should be exercised in the circumstances.[17]

18. Griffiths J also held that the Nanatadjarra claim was not properly authorised by meetings held on 13 February 2016 and 21 May 2016. In particular, he noted that the February 2016 meeting minutes did not record any formal resolution being passed by the persons present who authorised the making of the claim.[18]

19. Furthermore, the resolution passed at the meeting on 21 May 2016, which authorised the lodgement of the claim, did not meet the relevant legal requirements. The notice given at the meeting did not give all members of the claim group a reasonable opportunity to participate in the decision-making process. The public notice of the meeting 'invited only the descendants of the apical ancestors identified in the claim group description and did not invite other persons to make contact' who may hold NTRI. His Honour agreed with the Registrar's decision that this was an important consideration in determining that the Nanatadjarra application for registration was not authorised by all the persons in the claim group as required for registration under s 190C(4)(b) of the NTA.[19]

Conclusion

20. Accordingly, Griffiths J summarily dismissed the s 66B Nanatadjarra interlocutory application as it failed to demonstrate the claim was properly authorised.[20]

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1 *Harkin obh of the Nanatadjarra People v State of Western Australia (No 2)* [2021] FCA 3; BC202100113 (***Harkin***).
2 *Harkin* at [1].
3 *Harkin* at [4].
4 *Harkin* at [25].
5 *Harkin* at [26].
6 *Harkin* at [29].
7 *Harkin* at [30].
8 *Harkin* at [32].
9 *Harkin* at [33].
10 *Harkin* at [34].
11 *Harkin* at [33]–[36].
12 *Harkin* at [38].
13 *Harkin* at [39].
14 *Harkin* at [40].
15 *Harkin* at [41].
16 *Ibid.*
17 *Harkin* at [42].
18 *Harkin* at [43].
19 *Harkin* at [44].
20 *Harkin* at [45]–[46].

Native title in review

By Felicity Thiessen

Introduction

2 June 2022 marked the 30th anniversary of the decision in *Mabo v Queensland (No 2)* (*'Mabo'*)[1] in which the High Court, inter alia, *rejected the doctrine that Australia was terra nullius (land belonging to no-one) at the time of European settlement and held that the common law of Australia recognises a form of native title that reflects the entitlement of Indigenous people* to their traditional lands in accordance with their laws and customs.[2]

Below is a brief consideration of some significant 'events' before *Mabo*, in relation to the recognition of Indigenous peoples' rights followed by a non-exhaustive overview of key developments in native title jurisprudence following the *Mabo* decision and the enactment of the *Native Title Act 1993* (Cth) ('NTA').

Before Mabo

Cooper v Stuart[3]

In 1889 the Privy Council, hearing an appeal in relation to a land dispute in New South Wales, considered the extent to which English law was introduced into the Colony. The Council noted that *[t]here is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law,* ***and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions.***[4] The Council held that New South Wales could inevitably be characterised as the latter, and therefore was governed by British law.[5] While *Cooper v Stuart* did not involve a consideration of Indigenous rights, the decision impeded recognition of native title until the High Court decision in *Mabo*.

Commonwealth Electoral Act 1962 (Cth)

Denial of the presence of complex social and legal Indigenous cultures throughout Australia inevitably led to the exclusion of Indigenous peoples from colonial structures and processes, including participation in electoral processes.

It wasn't until **1962** that Commonwealth legislation allowed Aboriginal and Torres Strait Islander people to enrol and vote in federal elections via an amendment to the Commonwealth Electoral Act.[6] However, unlike for other Australians, enrolment was not compulsory and full voting rights at the federal level were not enacted until **1984**, when Indigenous peoples were required to register on the electoral roll,[7] a significant lapse in time post the 1967 referendum referred to below.

Constitutional 'recognition'

When the *Australian Constitution*[8] came into being in 1901 there were only two references to Aboriginal people:

Section 51 (xxvi) gave the Commonwealth power to make laws with respect to 'people of any race, **other than the Aboriginal race in any state**, for whom it was deemed necessary to make special laws'.[9] This meant that the states were free to legislate oppressive regimes which regulated every aspect of Indigenous peoples lives, including the 'protection' acts.

Section 127 provided that 'in reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, **aboriginal natives shall not be counted**'.[10]

On 27 May 1967, 90.77 per cent of Australian citizens voted 'Yes' to amending the Constitution so that Indigenous people would be counted as part of the population and so that the Commonwealth would be able to make laws for Indigenous people (concurrently with States).[11]

Milirrpum v Nabalco Pty Ltd[12] (*'The Gove Land Rights Case'*)

In 1963, without consulting the Yolgnu people of Gove Peninsula in Arnhem Land, the Federal Government announced its intention to grant land to Nabalco Pty Ltd to mine bauxite in the area. The initial response of the Yolgnu people was the presentation of the Yirrkala Bark Petitions (one in Yolngu Matha, one in English) explaining to the Government that, among other things:

- the land in question has been hunting and food gathering land for the Yirrkala tribes from time immemorial;
- that places sacred to the Yirrkala people, as well as vital to their livelihood are in the area of the bauxite mine area; and
- that the Yolngu feared that their needs and interests would be completely ignored as they had been ignored in the past.[13]

As a result of the petition the Select Committee on Grievances of Yirrkala Aborigines, Arnhem Land Reserve, was established. Appearing before the Committee, Yolngu man Milirrpum gave the following testimony: *We want to hold this country. We do not want to lose this country. That is how the people are worrying about this country. We want to get more room for our hunting and our fishing, because later on we got more people. Our children are to come. All my children at school in this country. They want to hold this country.*[14]

The Committee acknowledged the rights set out in the petition and recommended compensation for loss of livelihood be paid, that sacred sites be protected, and that an ongoing parliamentary committee continue to monitor the mining projects. [15] However the operation of the Nabalco bauxite mine proceeded unhindered.

In response a group of Yolngu people brought an action in the Northern Territory seeking the invalidation of the grant of mining rights on their traditional lands because the grant failed to account for the Yolgnu holding ongoing, communal title to the lands subject of the grant.[16]

The action was unsuccessful. Justice Blackburn held that *no doctrine of communal title has ever existed in the common law* and that the land in question formed part of the settled colony subject to the English law, considering himself bound by the Privy Council decision in *Cooper v Stuart*.[17] However, Justice Blackburn did find that a subtle and elaborate system of laws and customs continued to exist which left open the possibility of recognition in the future.[18]

In Brief

Examples of Indigenous peoples fighting for recognition of their rights to equality, self determination and land rights are too many to acknowledge in this overview, noting briefly the following actions.

1949 – The Pilbara Strike

In 1946 Aboriginal workers left pastoral stations throughout the Pilbara in protest against rampant inequality in their working and living conditions and is the longest strike in Australian history lasting until 1949.[19]

1966 – The Wave Hill 'walk-off'

In August 1966, Gurindj workers walked off Wave Hill station, as a protest against working conditions, including wages. The strike was led by Vincent Lingiari, and garnered wide support from unionists.[20] Ultimately, a portion of lands were returned to the Gurindji people by the Whitlam government in 1975, with a native title determination over Wave Hill handed down by the Federal Court in 2020.[21]

1972 – Aboriginal Tent Embassy

The Aboriginal Tent Embassy was set up on 26 January 1972

in protest against the denial of Indigenous land rights, and which issued a list of demands to relating to the recognition of land rights, protection of sights and compensation for loss of land.[22] The Embassy became a permanent establishment in 1992 despite best, and violent attempts, to 'remove' it, and remains a centre for activism against continuing injustices and inequality experienced by Indigenous peoples.[23]

1988 – The Barunga Statement

The Barunga Statement is a painted document presented to the Australian Government calling on it and the Australian people to recognise the rights of Indigenous peoples and to negotiate a Treaty recognising those rights including original ownership of the lands.[24]

Racial Discrimination Act 1975 (Cth)[25]

Coming into effect on 31 October 1975, the *Racial Discrimination* Act 1975 (Cth) ('RDA') is a federal anti-discrimination statute making discrimination on the basis of race, colour, descent or national or ethnic origin unlawful and is designed to protect the rights of all Australians.[26] As a result, since the introduction of the RDA, it is unlawful to enact legislation to extinguish native title as it would detrimentally affect the property rights of one group of Australians, distinguished by race.[27] As such, native title holders are entitled to compensation for activities which diminish or damage their native title rights and interests[28] but only for acts after the RDA came into effect.

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) ('ALRA')[29]

In 1973, Prime Minister Gough Whitlam appointed Justice Edward Woodward (who had appeared as Senior Counsel in the Goves Land Rights Case) to conduct a Royal Commission into Aboriginal land rights in the Northern Territory.[30] Justice Woodward, who had appeared as Senior Counsel in the Gove land rights case, delivered two reports, the first recommending the establishment of Aboriginal Land Councils to provide a united Aboriginal voice for advice and advocacy in the Northern Territory.[31] A final report paved the way for the enactment of the ALRA which, in the words of Justice Woodward, was the doing of simple justice to a people who have been deprived of their land without their consent and without compensation.[32]

Recognition of native title in common law

Mabo v Queensland (No 2) (1992) 175 CLR 1 ('Mabo')

In 1992, a majority of the High Court upheld a claim by the Meriam people to rights of possession, occupation, use and enjoyment of the Murray Islands under a communal native title sourced in their pre-sovereignty laws and customs.[33]

The majority found that:

- There was a concept of native title at common law;[34]
- The source of native title was the traditional connection to, or occupation of, the land;[35]
- The content of native title was determined by the character of the connection or occupation under traditional laws and customs;[36] and
- Native title could be extinguished by the valid exercise of governmental powers providing a *clear and plain intention* to do so was manifest.[37]
- sovereignty was acquired over Australia by settlement and therefore that the common law became the law of the land, binding all occupants.[38]

Recognition of native title in statute

Native Title Act 1993 (Cth) ('NTA')

What followed from the *Mabo* decision was a period of intense criticism of the High Court for judicial activism – from a conservative lens the job of the Court is to apply law, not to make it.[39] A scaremongering campaign followed, suggesting that 'backyards' were under threat from native title; and immense amounts of energy and money was invested into considerations of how to diminish the effects of the *Mabo* decision (imagined or otherwise). In the words of the Robert Tickner, Minister for Aboriginal and Torres Strait Islanders, at the time the judgment was handed down, 'There is no real appreciation of the vitriol, intolerance and scaremongering that went on in the debate on Mabo'.[40]

After a lengthy passage through parliament, the *Native Title Act*

Upper Noosa River in Kabi Kabi country.

1993 (Cth) (NTA) came into effect on 1 January 1994, its 'main objects' being:

- Providing for the recognition and protection of native title;
- Establishing ways and standards for future dealings affecting native title may proceed;
- Establishing a mechanism for determining claims to native title; and
- Providing for the validation of past acts and intermediation period acts invalidated because of the existence native title.[41]

The Preamble

Importantly, the 'moral foundation'[42] of the NTA is captured in its Preamble, which acknowledges that Aboriginal and Torres Strait Islander peoples have been progressively dispossessed of their lands, largely without compensation and that there has been a failure by successive governments to reach lasting and equitable agreement about the use of their lands, acknowledging also the resulting and continuing comprehensive disadvantage that rests on that dispossession.[43]

The Preamble observes that the NTA contains **special measures** to rectify the consequences of past injustices and emphasises conciliation in the just and proper ascertainment of native title rights and interest.[44]

However, the Preamble also notes that the need for certainty for the broader Australian community, and for the enforceability of acts potentially made invalid because of the existence of native title.[45] It is clear from a consideration of the case law below, and the legislative responses to it, that the need for certainty for industry has remained a primary concern in the resolution of native title applications, and frequent disregard for the unique character of native title rights and interests.

Native title rights and interests

Section 223(1) of the NTA defines native title or native title rights and interests as the communal, group or individual rights and interests of Indigenous peoples in relation to land or waters, where:

1. the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
2. the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
3. the rights and interests are recognised by the common law of Australia.[46]

The nature and content of native title rights and interests has been

considered and 'clarified' through an evolving body of case law, in some circumstances favourable to native title claimants but most frequently raising the benchmark for satisfying section 223.

The evidential onus, borne by native title claimants, for satisfying the requirements of section 223, particularly given the impacts of colonisation as well as the significant period of time between assertions of sovereignty and the enactment of the NTA, demonstrate a clear disjunct with the beneficial measures detailed in the Preamble. Proposals to reverse the onus borne by the native title applicant or, as proposed by former Chief Justice French, the introduction of a presumption of continuity (of the existence of native title rights and interests) have not made headway.[47]

An opportunity for co-existence of rights and interests

Wik Peoples v Queensland (1996) 187 CLR 1

An early, impactful consideration of the application of the NTA by the High Court occurred in *Wik Peoples v Queensland (Wik)*.[48] The applicants asserted that their native title had not been extinguished by the granting of pastoral leases under Queensland legislation.[49] At first instance in the Federal Court, Justice Drummond found that there was binding authority supporting a conclusion that a pastoral lease granted exclusive possession which extinguished native title, as argued by the respondents.[50] An appeal by the applicant was referred directly to the High Court due to the importance of the issues to be determined.[51]

The High Court's consideration of whether the pastoral lease granted exclusive possession and extinguished native title commenced with an inquiry into the relevant legislation and whether there was an *intention 'manifested clearly and plainly'* for the legislation to do so.[52]

The majority held that the grant ***did not*** confer a right of exclusive possession and did not necessarily extinguish all native title rights and interests which might exist in relation to that land.[53] Rather, native title rights were extinguished by, or would yield to, the rights conferred by the grant of the pastoral lease only to the extent that the two sets of rights and interests were inconsistent.[54] To the extent that they were not inconsistent, the two interests would, therefore co-exist.[55]

Opportunity lost: The ten point plan and 'bucket loads of extinguishment'

Prior to the *Wik* decision, the Liberal-National Coalition Government had already signalled its intention to amend the NTA, to the benefit of industry, including by raising the bar for the registration test, narrowing the right to negotiate and validating certain pre-1994 acts.[56] In response to the *Wik* decision, and promising 'bucket loads of extinguishment', the government released its Ten Point Plan, most of which was given effect in the *Native Title Amendment Act 1998* (Cth), and which represented a reduction in the protection afforded by the common law, the RDA and the original 1993 NTA.[57]

A heavy burden – Yorta Yorta

The majority finding in *Mabo 2*, that the **source** of native title was the traditional connection to, or occupation of, the land and that the **content** of native title was determined by the character of the connection or occupation under traditional laws and custom was given form in section 223 of the NTA.[58] How section 223 is to be satisfied was laid down in the High Court decision in *Yorta Yorta Aboriginal Community v Victoria ('Yorta Yorta')*.[59]

In *Yorta Yorta* the High Court upheld the first instance decision of Justice Olney who found that *the tide of history has indeed washed away any real acknowledgement of their traditional laws and real observance of their traditional customs* holding that the Yorta Yorta people no longer held native title rights and interests.[60]

The key findings in *Yorta Yorta* were that:

- native title rights and interests are rights and interests that find their origin in pre-sovereignty law and custom, they are not created by statute;[61]
- a 'traditional' law or custom is one which has been passed from generation to generation of a **society** (being a body of persons united in and by its acknowledgment and observance of a body of law and customs);[62]

- the origins of the content of the law or custom concerned are to be found in the normative rules of the societies that existed before the assertion of British sovereignty;[63]
- the **'normative system'**—that is, the traditional laws and customs—under which rights and interests are possessed must have had a continuous existence and vitality since sovereignty;[64]
- the acknowledgment and observance of the traditional laws and customs must have continued 'substantially uninterrupted' since sovereignty.[65]

The 'Yorta Yorta test' raised widespread concern for the seemingly insurmountable hurdle the test created for achieving recognition of native title in areas where colonisation and continuing restrictive and oppressive state policy impacted on the exercise of native title rights and interests.[66]

Considerations by the courts when applying the Yorta Yorta test have focussed largely on the extent to which laws and customs can change over time and still be considered traditional (**permissible adaptation**);[67] and the extent of continuity of acknowledgement and observance of laws and customs over time that is required (**continuity of 'connection'**)[68].

Some of the key findings in relation to both principles include:

- the absence of continuous physical connection to an area subject to a claim would not necessarily be a bar to proving connection where evidence of a spiritual connection has been maintained: *Western Australia v Ward*.[69]
- the question of whether laws and customs have continued substantially uninterrupted is to 'be answered by ascertaining whether, for each of the relevant society since sovereignty, those laws and customs constituted a normative system giving rise to rights and interests in land', and whether the normative system has been observed through the generations: *Bodney v Bennell*.[70]
- a shift from patrilineal to cognitive descent was a permissible adaptation, not giving rise to a new normative system, but rather representing a *change of emphasis* in the laws and customs relating to group membership: *Griffiths v Northern Territory of Australia*.[71]

The nature and extent of native title rights and interests

Nature of native title rights and interests

Section 225(b) of the NTA requires a determination of native title to include a determination of the nature and extent of the native title rights and interests recognised.[72] To satisfy this requirement requires the identification of "how rights and interests possessed under traditional law and custom can properly find expression in common law"[73] however there is a clear tension in this task when acknowledging the *sui generis* or unique nature of native title. In any case property law concepts such as 'bundle of rights' and 'exclusive possession' have been widely adopted in that task.

Bundle of rights

For example, the High Court in *Ward* explained the utility in adopting 'bundle of rights' to describe the nature of native title rights because it 'draws attention first to the fact that there may be more than one right or interest and secondly to the fact that there may be several kinds of rights and interests in relation to land that exist under traditional law and custom.[74]

Exclusive possession

In *Mabo* the High Court declared that the content of native title of the Meriam People amounted to an entitlement *'as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands'* thus recognising that native title could amount to exclusive use and enjoyment.[75]

Section 225(e) of the NTA expressly requires the determination of areas of exclusive possession, and, in the absence of extinguishing acts, native title will generally be an exclusive possession title.[76]

Successful claims to exclusive possession have largely been ground in demonstrating the existence of a right to control access, under traditional law and customs. In *Griffiths v Northern Territory* the Full Court described individuals controlling access to country as gatekeepers, a responsibility based in law and custom[77], and in *Ward* the High Court described it as a right to be asked permissions, to 'speak for country' and protect it from harm.[78] *Griffiths also* confirmed

that claimants were not required to bring evidence of actually excluding others to have a right of exclusive possession recognised.[79]

The following factors can also be extracted from judicial considerations of whether there is a right of exclusive possession:

- it is not necessary to have regard to whether non-Indigenous people observe or respect a right to control access;[80]
- however attempts to control access of non-Aboriginal people is consistent with a right of exclusive possession;[81]
- difficulty in enforcing a native title right is not grounds for denying its existence.[82]

The right to take resources

The right to take resources has been the subject of much judicial consideration and until the High Court decision in *Akiba v Commonwealth of Australia ('Akiba')*[83] it was widely considered that native title rights were limited by purpose, exercised for personal and domestic use only.[84]

In the earlier decision of *Commonwealth v Yarmirr*, while finding that native title existed in relation to the sea and seabed of the claim area, the Court also found that such rights were non-commercial.[85] According to the Court, there was no right to trade in the resources of the area as a right to trade in goods did not meet the definition of native title because it was not a right in relation to land or waters.[86]

However, in Akiba, the High Court found a native title right to access resources and to take for any purpose resources in the native title area including the right to take marine resources for trading or commercial purposes.[87] Importantly, the Court noted that '[t]he purpose which the holder of that right may have had for exercising the right on a particular occasion of was not an incident of the right; it was simply a circumstance attending its exercise.'[88] The proper focus is on the right, not how it is exercised.[89]

Even where commercial rights are recognised under native title law, Akiba confirmed that their exercise will still be subject to state regulation including, for example, the need to obtain fishing licenses.[90]

Extinguishment

Whether native title rights and interests have been extinguished by government actions has been the subject of extensive consideration by the courts.

Pastoral Leases

As discussed above, the 1996 High Court decision in *Wik* held that the granting of certain pastoral leases in Queensland did not extinguish native title, with the interests co-existing to the extent there was no conflict between the rights, and in the event of a conflict the rights of the pastoralist prevailed.[91]

State Permits

In *Yanner v Eaton*, the High Court held that the exercise of the native title right to hunt was a matter within the control of the claimant community and the existence of State regulations requiring a permit for hunting activities did not extinguish the right.[92]

Effect of the grant of freehold

In *Fejo v Northern Territory* the High Court considered whether a grant of freehold completely extinguished native title and whether that extinguishment was permanent or could be revived.[93] The majority held that a freehold grant was inconsistent with the continued existence of native title rights and interests, and that the effect was permanent.[94]

In 2002 greater 'guidance' on extinguishment was given by the High Court in *Ward*, providing that extinguishment may be caused by:

- laws or acts that indicate **a clear and plain intention** to extinguish native title, and
- laws or acts which create rights in third parties in respect of a parcel of land which are **inconsistent** with the continued right to enjoy native title.[95]

The Court found that the inquiry into the question of extinguishment commences with the identification of the rights and interests said to be impacted.[96] Conceptualising native title as a bundle of rights, the Court further found that where the creation of rights in third parties is inconsistent with the exercise of only some native title rights then only those native title rights will be extinguished permanently.[97]

Contrary to Ward, in 2014 the High Court found in *Western Australia v Brown ('Brown')* that mineral leases do not confer exclusive possession rights on the lessee and therefore native title could co-exist with mineral leases.[98] The Court also held that any extinguishing effect occurred at the time of the grant of the title and not at the time the act occurred.[99] This finding amounted to a rejection of previous findings in *De Rose v South Australia* on that particular

issue.[100] *Brown* also confirmed that "inconsistency is that state of affairs where 'the existence of one right necessarily implies the non-existence of the other'".[101]

Compensation

Possibly the most significant decision since Mabo is the High Court decision in *Northern Territory of Australia v Griffiths ('Timber Creek')*.[102]

Section 51 of the NTA provides that there is an entitlement to compensation, on just terms, to compensate native title holders for any loss, diminution, impairment or other effect an the act on native title rights and interests.[103]

Compensable acts include the following:

- the validation of acts done since the *Racial Discrimination Act 1975* (Cth) commenced, which would otherwise have been invalid because of the existence of native title;
- acts done on or after 1 January 1994; and
- the validation of some acts done between 1 January 1994 and 23 December 1996 which were invalid under the original NTA.[104]

The court awarded compensation for economic loss (calculated by reference to the freehold value of the land) and cultural loss (spiritual or religious hurt caused by the acts) and awarded interest on the economic loss.

Key findings by the High Court included:

- The NTA limits the amount of compensation for extinguishment of exclusive possession native title to the value payable for the compulsory acquisition of a freehold estate in the land;
- Non-exclusive possession of native title, lacking the power to exclude others or control the behaviour of others on the land, is a lesser right to land and the Court applied a 50 per cent discount from the freehold value of the land;
- Compensation must be assessed on a case by case basis, including, but not limited to, an assessment of the nature and timing of the extinguishing act, and the particular and overall impacts of the extinguishing acts on the native title rights and interests.

With many native title determination applications finalised, there was much anticipation of an influx of compensation applications post the *Timber Creek* judgment. However, to date *Timber Creek* remains the only High Court authority for the assessment of compensation for the extinguishment of native title rights and interests under the NTA.

Watch this space

In *Galarrwuy Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth & Ors (Gove Compensation Claim)*, an application has been made to the Federal Court arguing that under the Constitution an acquisition of land must be on just terms, and therefore compensation is payable for extinguishing acts that occurred **prior** to the enactment of the *Racial Discrimination Act 1975* (Cth) The matter was part heard before the Full Court of the Federal Court in October 2022, with judgment yet to be handed down.

Determinations in Cape York and the Torres Strait

The year of the 30th anniversary of *Mabo* ended on a very high note when Justice Mortimer made orders on 30 November 2022 recognising the native title rights over the land and sea of the country of the Kemer Kemer Meriam, Kulkalgal, Ankamuthi, Gudang Yadhaykenu and Kaurareg Peoples in the undetermined portion of the Torres Strait and Northern Cape York.[105]

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2 Native Title Act 1993 (Cth) Preamble ('NTA').

3 Cooper v Stuart [1889] UKPC 1 (03 April 1889) ('Cooper v Stuart').

4 Cooper v Stuart [11].

5 Ibid.

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8 Australian Constitution.

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[35] Ibid.

[36] Ibid.

[37] Ibid [75]-[76].

[38] Mabo [83].

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[42] Sampi v Western Australia [2005] FCA 777 [942].

[43] NTA, Preamble.

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[70] *Bodney v Bennell* (2008) 167 FCR 84.

[71] *Griffiths v Northern Territory* [2007] FCAFC 178 [145].

[72] NTA s 225.

[73] *Ward* [89]

[74] Ibid at [36]

[75] Mabo [217].

[76] NTA s 225(e).

[77] *Griffiths* [145].

[78] *Ward* [88].

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[81] *Gumana v Northern Territory of Australia* [2005] FCA 50 [208].

[82] *Rubibi Community v Western Australia* (No 6)[2006] FCA 82.

[83] *Akiba v Commonwealth of Australia* (2013) 250 CLR 209 ('Akiba') .

[84] See. *Yanner v Eaton* [1999] HCA 53.

[85] *Commonwealth v Yarmirr* (2001) 208 CLR 1 ('Yarmirr')

[86] *Yarmirr* [120].

[87] *Akiba* [66].

[88] *Akiba* [66].

[89] See *Willis on behalf of the Pilki People v State of Western Australia* [2015] FCAFC 186.

[90] AIATSIS, 'Commercial rights' (Web Page, 22 December 2022) https://nativetitle.org.au/learn/native-title-and-pbcs/commercial-rights

[91] Wik

[92] *Yanner v Eaton* (1999) 201 CLR 351 ('Yanner').

[93] *Fejo v Northern Territory* [1998] HCA 58.

[94] ibid

[95] *Ward* [94]-[95].

[96] *Ibid.*

[97] Ibid.

[98] *Western Australia v Brown* (2014) 253 CLR 507 *('Brown').*

[99] ibid

[100] See *De Rose v South Australia (No 2)* (2005) FCFCA 137.

[101] *Brown* [38].

[102] *Northern Territory of Australia v Griffiths* ('*Timber Creek*').

[103] NTA s 51

[104] National Native Title Tribunal, *Native Title Compensation* (Factsheet, 2021) http://www.nntt.gov.au/Information%20Publications/Native%20Title%20Compensation%20Factsheet.pdf.

[105] National Indigenous Times, Historic native title decision celebrated in Cape York and Torres Strait, (Web Page, 2 December 2022) https://nit.com.au/02-12-2022/4424/historic-native-title-decision-celebrated-in-cape-york-and-torres-strait

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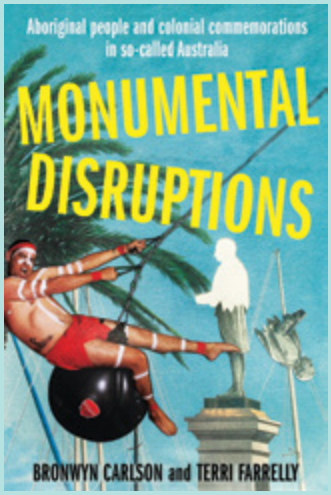

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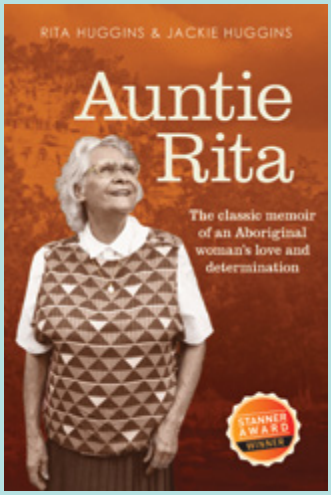

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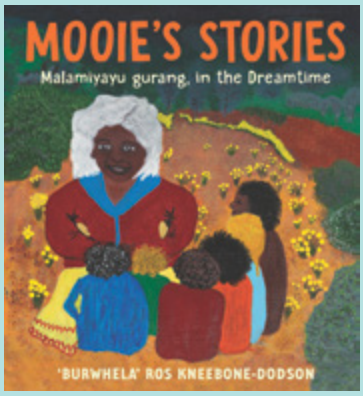

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Native Title Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

GPO Box 553 CANBERRA ACT 2601
P 02 6261 4223
F 02 6249 7714
E nativetitleresearchunit@aiatsis.gov.au

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