



AIATSIS

AUSTRALIAN INSTITUTE OF ABORIGINAL
AND TORRES STRAIT ISLANDER STUDIES

AIATSIS Submission Wiyi Yani U Thangani (Aboriginal and Torres Strait Islander Women's Voices) Australian Human Rights Commission

Contents

AIATSIS	1
Executive Summary.....	3
Reforming native title processes	3
Indigenous women, governance and native title corporations.....	4
Addressing Trauma and Intergenerational Trauma	5
Introduction.....	6
Gender and Native Title.....	7
Mabo and Wik and their limitations	9
Aboriginal and Torres Strait Islander women, governance and native title corporations	12
Intergenerational trauma and native title legal processes	15
Returning Country, Land Justice and its interconnectedness to healing	16
Conclusion	20
Appendix A - Critical race theory and native title.....	22
Appendix B - Indigenous women and human rights litigation	27



AIATSIS

AIATSIS is one of Australia's publicly funded research agencies and has legislative responsibility, *inter alia*, to provide leadership in Aboriginal and Torres Strait Islander research and the provision of advice to government on Aboriginal and Torres Strait Islander culture and heritage and native title law.

As a national Institute, AIATSIS works at the intersection of Indigenous and non-Indigenous Knowledges, playing an important role in the mediation of those Knowledges and supporting their expression and protection via our research and collections work.¹ AIATSIS is committed to ensuring Indigenous Knowledges, culture and governance is understood, respected, valued and empowered by laws and policies that concern them. As a national Institute, AIATSIS works at the intersection of Indigenous and non-Indigenous Knowledges, playing an important role in the mediation of those Knowledges and supporting their expression and protection via our research and collections work.

Our research work involves both academic and community based investigation into, and study of, materials and sources in order to establish new evidence and reach conclusions with the aim of enabling archive access and information management, repatriation and the recording of new materials within culturally informed frameworks.

AIATSIS also has legislative responsibility to provide leadership in best practice ethical research with Indigenous peoples and to imbue collections practices that promote the informed consent of Indigenous communities and individuals.² AIATSIS has conducted many successful research and recording projects in communities.

The AIATSIS Native Title Research Unit (NTRU) was established 26 years ago, as a partnership between the Commonwealth Indigenous Affairs portfolio agency and AIATSIS, following the High Court's *Mabo*³ decision. AIATSIS supports the native title sector and conducts research and analysis of the law, policy and practice of native title.

Our research is informed by community governance and is underpinned by the principles of our Guidelines for Ethical research with Indigenous Peoples

¹ Tran, T. and Barcham, C. '(Re) defining Indigenous Intangible Cultural Heritage' AIATSIS Research Discussion Paper No. 37, AIATSIS Research Publications, Canberra 2018, p.4

² The 2012 AIATSIS Guidelines for Ethical Research with Indigenous Peoples (GERAIS) are available at: <https://aiatsis.gov.au/research/ethical-research/guidelines-ethical-research-australian-indigenous-studies>. GERAIS will be revised and renewed following consultation with major stakeholders in 2018.

³ *Mabo and ors v State of Queensland (No 2)* 175 CLR 1

(GERAIS).⁴ The new AIATSIS Indigenous Research Exchange, established in 2018, will provide additional capacity to coordinate and provide sound policy advice, ethical best practice in research methodologies and evaluation of policies in accordance with Indigenous Knowledges.

⁴ Available at: <https://aiatsis.gov.au/research/ethical-research/guidelines-ethical-research-australian-indigenous-studies>

AIATSIS Submission *Wiyi Yani U Thangani* (Aboriginal and Torres Strait Islander Women's Voices) Australian Human Rights Commission

Executive Summary

Reforming native title processes

AIATSIS submits that:

- Substantive reform of native title law is required in order to be inclusive of Aboriginal and Torres Strait Islander female experiences, issues and aspirations.⁵
- Adherence to the preamble and original intentions of the *Native Title Act 1993* (Cth), which emphasises the resolution of native title claims by negotiation and agreement rather than contested litigation, as central to the native title process is essential.
- Accepting and acknowledging Aboriginal and Torres Strait Islander women's law and the protocols that govern Aboriginal and Torres Strait Islander women's law and their worldviews must be reflected in the way that native title litigation and negotiations are managed and conducted.
- Flexibility with respect to the hearing of native title matters and where appropriate – that is, where Indigenous law so demands – assigning female Judges to the hearing of women's evidence is required.⁶

⁵ As Alison Whittaker explains: 'Aboriginal legal identity is a construction almost external to Aboriginality itself – a guise adopted to navigate institutionally-white law. Aboriginal legal identity is a grey legal subjectivity, precisely because the law attempts to define something other than Aboriginality itself, something which, through deep colonisation, might fuse itself to Aboriginality. This something is imprecisely racialised, clumsily located, innately vexed by what it is, but is not stated to be – a category by which settler colonial law seeks to reconcile its position relative to the native, and to address the entrenched deprivation it set in motion. Aboriginalities have long inhabited a position of contention with the law, even as we are crudely adopted into it. Laden with a strong sense of what they are and might be, Aboriginalities outside law might be impossibly richer ways of locating self in relation to the whole, outside of the oversight of the law, and even its institutional Aboriginal arbiters. Within the law, however, these ambiguities are overborne by legal rigidity.' Whittaker, Alison 'White Law, Blak Arbiters, Grey Legal Subjects: Deep colonisation's role and impact in defining Aboriginality at law' in (2018) Australian Indigenous Law Review 4 available at: http://www.ilc.unsw.edu.au/sites/ilc.unsw.edu.au/files/AILR_20_Whittaker.pdf p45

⁶ In *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v State of Queensland (No 2)* [2014] FCA 52 for example the women deposing their evidence were fortunate to be assigned Her Honour Justice Mortimer, however there is no indication that the Court can accommodate its listings to conform with the gender restrictions on knowledge when hearing native title matters. Likewise in *Wyman on behalf of the Bidjara People v State of Queensland (No 2)* [2013] FCA 1229, women deposing to their evidence were fortunate to be doing so before Her Honour Justice Jagot. There are only 4 female Judges in the national native title practice list in the Federal Court of Australia.

- The inequality of bargaining position of native title claimants, and trauma caused by the connection requirements with respect to the burden of proof imposed on native title claimants must be addressed.⁷
- Understanding the impact of native title legal processes upon Aboriginal and Torres Strait Islander women, their law, ontology and epistemologies requires further research and consultation with and amongst Aboriginal and Torres Strait Islander women themselves. This engagement and consultation should inform an ongoing dialogue with the Federal Court of Australia, legislators, policy makers and other stakeholders.
- The Australian Human Rights Commission *Wiyi Yani U Thangani* project is an evident step in the right direction: and a strengthened commitment should be reflected in policy to support the engagement of Aboriginal and Torres Strait Islander women and girls with the native title and land rights processes, as elaborated elsewhere in this submission.
- Dedicated resources should also be made available to Aboriginal and Torres Strait Islander women as directors in native title corporations to be provided with assistance in drafting their rules of incorporation, so as to properly reflect their ontologies and epistemologies within their instruments of governance.

Indigenous women, governance and native title corporations

AIATSIS submits that:

- Indigenous governance structures, informed by Indigenous law, epistemologies and ontologies, are part of the developing common law of native title and native title corporations' law.
- Sustainably developing the Indigenous Estate in accordance with the needs and aspirations of Aboriginal and Torres Strait Islander women and Indigenous law is required.
- If Indigenous women and their communities are to effectively manage the Indigenous Estate, they must have control over their lands and waters in accordance with the principle of Aboriginal self-determination. This form of self-determination means

⁷ Senator Patrick Dodson, *No one can ever take your land away*; key note address to the AIATSIS National Native Title Conference, 5 June 2018 available at: <https://aiatsis.gov.au/publications/presentations/no-one-can-ever-take-your-land-away>

resourcing communities efficiently to implement structures that support local level governance and self-management particularly in regional and remote communities.⁸

- The mandatory nature of incorporation means that government must properly fund native title corporations in accordance with the positive statutory obligations that these entities bear with respect to the administration of the Indigenous Estate. This requires direct funding to RNTBCs as well as additional funding for salaried positions and assistance from dedicated staff members from ORIC.⁹ Direct funding will allow RNTBCs to address cultural competency issues for staff as well as to increase their native title expertise more broadly.
- A national network for native title corporations currently being facilitated by the National Native Title Council (NNTC) also requires adequate resourcing and funding as do Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs).¹⁰

In 2019, as part of the extension of our work into the capacity and design of native title corporations in the sector¹¹ AIATSIS will, through its PBC Survey, continue its research on the role of Indigenous men and women in native title corporations including the specific governance issues that arise for Indigenous women and their lived experiences as native title corporation directors.¹²

Addressing Trauma and Intergenerational Trauma

AIATSIS submits that:

- The impact of intergenerational trauma on Aboriginal and Torres Strait Islander women and communities of native title holders has not been properly assessed and addressed as part of native title legal processes.
- Acknowledging and reforming the native title legal process which exacerbates intergenerational trauma, is necessary to support Aboriginal and Torres Strait Islander women who are leading communities that are resilient and in a process of healing.¹³

⁸ Dodson, M and Smith, D.E. *Governance for sustainable development: Strategic Issues and principles for Indigenous Australian Communities*. (CAEPR Discussion Paper No.250/2003, Canberra)p11

⁹ *Ibid.* pp47-48

¹⁰ *Realising the Promise of Native Title*: National Native Title Council Discussion Paper (2019) available at:

<http://nntc.com.au/wp-content/uploads/2019/02/Realising-the-Promise-of-Native-Title-NNTC-Discussion-Paper.pdf>

¹¹ Strelein, L, Bauman, T and Weir, J (eds) *Living with native title: the experiences of registered native title corporations* (AIATSIS Research Publications, Canberra 2006 available at:

<https://aiatsis.gov.au/sites/default/files/products/monograph/bauman-strelein-weir-living-native-title-book.pdf>

¹² AIATSIS PBC Capability Project: <https://aiatsis.gov.au/research/research-themes/native-title-and-traditional-ownership/pbc-capability-project>

¹³ Quayle C and Hassing C *Trauma Informed Practice*, presentation to the AIATSIS NTRB Native Title Legal Workshop, 22 February 2019, Sydney

AIATSIS Submission *Wiyi Yani U Thangani* (Aboriginal and Torres Strait Islander Women's Voices) Australian Human Rights Commission

Dr Lisa Strelein and Cedric Hassing

Introduction

AIATSIS has limited the scope of this submission to the *Wiyi Yani U Thangani* project to the challenges faced by Aboriginal and Torres Strait Islander women and girls in native title, including theirs and their communities' land justice aspirations. In our submission we also examine the ways in which Aboriginal and Torres Strait Islander women and girls have engaged in the native title claims process and in the post-determination phase of native title, including their strong involvement in native title corporations, also known as Prescribed Bodies Corporate (PBCs) or Registered Native Title Bodies Corporate (RNTBCs).

There is little specific information available on Aboriginal and Torres Strait women's experiences of the legal system,¹⁴ native title law and legal processes. AIATSIS submits that when reflecting on the role of Aboriginal and Torres Strait Islander women in native title law it is most important to canvas and hear the lived experiences of Aboriginal and Torres Strait Islander women as native title holders themselves. The impact of trauma and intergenerational trauma on Aboriginal and Torres Strait Islander women and communities arising out of native title legal processes and institutional arrangements, including evidentiary requirements that purport to recognise and protect but work to extinguish native title, must be properly assessed and addressed.

Within this framework, it is also important to:

- Better support mediated outcomes by a process of negotiation and agreement in good faith as noted in the preamble and mediation provisions of the NTA.¹⁵
- Reduce the time of native title applications.
- Ensure that the fiduciary obligations of government respondents are reinforced in the same way that native title holders are

Increasingly Aboriginal and Torres Strait Islander women are taking it upon themselves to ensure that Aboriginal and Torres Strait Islander women's law and culture is preserved, strengthened and appropriately passed on to the younger

¹⁴Payne, S. *Aboriginal Women and the Law*, available at:

<https://aic.gov.au/sites/default/files/publications/proceedings/downloads/16-payne.pdf>

¹⁵ See AIATSIS case note available at the Native Title Law Database (NTLD): <https://aiatsis.gov.au/western-bundjalung-people-v-attorney-general-new-south-wales-2017-fca-992>

generations. Examples include the Kapululangu Aboriginal and Torres Strait Islander women's law and culture centre which was established by the Balgo Women Elders in 1999 as part of the Kimberley Aboriginal Law and Culture Centre (KAALAC) Desert Women's Project (DWR) in 1986.¹⁶

Legislation and government policy must therefore recognise and value Indigenous women's Knowledges¹⁷ and ways of governing; free from discrimination and regulatory overburden.¹⁸ Western governance structures may not be in accordance with Indigenous law. AIATSIS recommends that specialist services and dedicated resources to assist Aboriginal and Torres Strait Islander women to reflect Indigenous laws and women's beliefs and perspectives as part of the instruments of governance for native title corporations should be provided as a matter of necessity.

AIATSIS submits that further research and consultation with and amongst Aboriginal and Torres Strait Islander women themselves is required to understanding the impact of native title legal processes upon Aboriginal and Torres Strait Islander women, their law, ontology and epistemologies. This engagement and consultation must inform an ongoing dialogue with the Court, legislators, policy makers and other stakeholders.

The essence of achieving and developing appropriate Aboriginal and Torres Strait Islander women's policy is more likely to be successful through establishing institutional structures and principles which are robust enough to encompass and engage diversity and equality before the law.¹⁹ For Aboriginal and Torres Strait Islander women and communities, land justice is part of a multi-faceted approach to ending Indigenous disadvantage. It is this holistic approach that offers the most promise for an improved future for Indigenous people.²⁰ AIATSIS strongly supports the ongoing work of the *Aboriginal and Torres Strait Islander women's Voices Wiyi Yani U Thangani* project at the Australian Human Rights Commission. Incorporating and understanding the lived experiences of Aboriginal and Torres Strait Islander women in native title law will work to redress the androcentric nature of this area of law.

Gender and Native Title

¹⁶ See: <http://www.kapululanguculturecamps.com/kapululangu>

¹⁷ Blair, N. (2015). *Privileging Australian Indigenous knowledge: Sweet potatoes, spiders, waterlilies and brick walls (United States of America: Common Ground Publishing, 2015).*

¹⁸ See Strelein, L. and Hassing C. (2017) *AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) Technical Review of the Corporations (Aboriginal and Torres Strait Islander Act) 2006:* https://aiatsis.gov.au/sites/default/files/products/submission/catsi_act_review_171031.pdf p3

¹⁹ D F Martin Rethinking the design of Indigenous organisations: the need for strategic engagement (Centre for Aboriginal Economic Policy Research, ANU, 2003 Discussion Paper 248/2003) p9

²⁰ Behrendt, L., Watson, N. *Shifting Ground: Why land rights and native title Have not delivered social justice* (2007) The Journal Of Indigenous Policy-Issue 8, 94: 102

Native title practitioners, such as Bird Rose, have long noted the history of male dominated evidence, via the written record, and practice within the native title system.²¹ Within native title research and practice, there is a gap in the literature around gender.²² While there is some literature on gender in the context of native title claims,²³ institutions²⁴ and negotiations, a significant gap remains in our understandings of the roles of men and women, and the implications of gender in the governance of native title.²⁵

There has been a view in the past that women have been excluded from native title and are often marginalised.²⁶ In contrast, a number of observers have contextualised and/or challenged the view of women as excluded from native title. O’Faircheallaigh argues that women’s apparent absence from negotiations in the native title arena does not necessarily imply their exclusion.²⁷

Ketley has argued that the different requirements of proof for native title, as opposed to those for land rights, have facilitated greater contribution and participation of Aboriginal and Torres Strait Islander women in native title proceedings, such as through a lesser reliance on patrilineal principles as proof of land ownership.²⁸

The judges of the High Court found as a consequence that in a native title proceeding it will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs.²⁹ There was limited acknowledgment and analysis of the effects of the violent and dysfunctional Dickensian society of the coloniser and English society at the time.³⁰

²¹ Bird-Rose, Deborah *Women and Land Claims Land Rights Laws Issues of Native Title Issues Paper 6*, AIATSIS Research Publications 1999 and Palmer, Kingsley *Australian Native Title Anthropology: Strategic Practice, the Law and the State* (ANU Press, Canberra 2018)

²² Ganesharajah, C and McCourt, P *Reflections on women and AIATSIS Native title Native Title Newsletter, Number 4 (2009) pp4-5*

²³ Baines, P *Seeking Justice: Traditions of social action amongst Indigenous Women in the south west of Western Australia* in P Brock (ed) *Words and Silences: Aboriginal women politics and land* (Allen and Unwin, Crows Nest, 2001) 56-91; Langton, M *Grandmothers Law, company business and succession in changing Aboriginal land tenure systems* in G Yunupingu (ed) *Our Land is Our Life-land rights, past present and future* (University of Queensland Press, St Lucia, QLD, 1997, pp84-116)

²⁴ Mc Glade, H *Aboriginal women and the Commonwealth Governments response to Mabo* in P Brock (ed) *Words and Silences: Aboriginal women politics and land* (Allen and Unwin, Crows Nest, 2001) pp139-136

²⁵ Buchanan, Geoff. *Gender and Generation in Native Title*. Land, Rights, Laws: Issues of Native Title (2015) 6(3) available at: https://aiatsis.gov.au/sites/default/files/products/issues_paper/gender_and_generation_in_native_title.pdf p1

²⁶ Ganesharajah, C and McCourt, P *Reflections on women and AIATSIS Native title Native Title Newsletter, Number 4 (2009) p4*

²⁷ O’Faircheallaigh, C O *Women’s Absence, Women’s power, Indigenous women and negotiations with mining companies in Australia and Canada (2013) Journal of Ethnic and racial Studies*, vol 36, no 11, pp1789-1807.

²⁸ Ketley, Harriet. *On their own terms: Aboriginal women’s evidence in Native Title Claims*. *Balayi: Culture, Law and Colonialism*, Vol. 1, No. 2, Jan 2000: 51-72.

²⁹ Palmer, Kingsley *Australian Native Title Anthropology: Strategic Practice, the Law and the State* (ANU Press, Canberra 2018) p31

³⁰ Reynold, Henry *Why Weren’t We Told?* (Penguins, Sydney 1999)

Yorta Yorta elder and leader Monica Morgan reflects that:

What we found during the course of our native title claim is nothing but an endorsement of the existing *status quo* enjoyed through the process of invasion and the subsequent colonisation of Yorta Yorta country. This went unabated from the early 1800s to the present day, resulting in the occupation on our traditional lands and waters by people with rights 'greater' than the Yorta Yorta's rights. The prevailing discrimination in the process of devising native title legislation, including later amendments by both Labor and Liberal governments, meant the redistribution of our lands and waters. This discrimination left Yorta Yorta people the most disadvantaged in regards to land holdings and the waters in our own country.³¹

In the High Court's decision the presentation of evidence and legal interpretation undertaken by and of white men were raised to a sublime position of authority. Thus 'reflecting the power inherent in legal discourse to corrupt meaning as well as the role of legal translation in that process ...The possessive logic of patriarchal white sovereignty was omnipresent, but invisible, unnamed and unmarked in this decision, appearing to be disinvested when protecting its sovereignty. Despite the High Court's decision, the bloodline to country of the Yorta Yorta continues to carry their sovereignty. Indigenous sovereignty invokes different sets of relations, belonging and ownership that are grounded in different epistemology from that which underpins the possessive logic of patriarchal white sovereignty and its premise that adverse possession is nine tenths of the law.'³²

The possessive logic of patriarchal white sovereignty operated discursively and ideologically in the *Yorta Yorta* decision to produce legal and political resistance to native title by creating judicial and legal impediments that were presented as though they are blind to race and gender.

Mabo and Wik³³ and their limitations

Discussion about Indigenous women needs to be placed within two overarching contexts. The first is an understanding of Aboriginal and Torres Strait islander history and culture prior to European contact. The second is an understanding of post European colonisation in Australia. These frameworks inform the way topics of

³¹ Morgan, Monica "What has native title done for me lately?" (2009) 93 Australian Law Reform Commission Reform Journal 24

³² Moreton-Robinson, Aileen 'The possessive logic of patriarchal white sovereignty: The High Court and the Yorta Yorta decision' in Rigg, D. (ed) *Taking up the challenge: Critical race and whiteness studies in a post colonising nation* (Crawford House Publishing, 2007, Belair, SA) 122-123

³³ *Wik and others v State of Queensland* (1997) 187 CLR 1

identity and the roles of Aboriginal and Torres Strait Islander women can be properly considered.³⁴

The historic *Mabo* judgment saw the High Court of Australia rule that the Meriam Islanders held native title rights over land and that the doctrine of *terra nullius* (literally 'land of no one') declaring that Australia was without prior occupants or sovereigns at the time of European arrival) was false. Yet, in *Mabo*, the rights of the coloniser, being phrased and produced in the name of the coloniser, always limited the possibility of justice. The powers of the coloniser in relation to land and sovereignty were never challenged by the settler society; the scenario as constructed was never to be challenged.³⁵

In response to *Mabo*, the rights and interests of Aboriginal and Torres Strait Islander peoples have been recognised under the *Native Title Act 1993* (Cth) rather than the common law, but the logic is the same. Some rights and interests that existed under pre-colonial laws and customs survived the Crown's assertion of sovereignty and can be enforced under the contemporary Australian legal system.³⁶ The *Wik*³⁷ decision held that native title was not necessarily extinguished by pastoral leases over land, and that both titles could in fact, co-exist.³⁸

Despite this, Indigenous dispossession has continued; facilitated by the passing of the *Native Title Amendment Act 1998* (Cth) which limited the circumstances in which native title could be claimed and resulted in the dismissal of 80 of the 115 claims then before the National Native Title Tribunal in New South Wales.³⁹

Women in evidence

In a number of cases Aboriginal and Torres Strait Islander women have been observed as playing a critical and at times dominant role in native title processes. In some instances, the significant involvement of Aboriginal and Torres Strait Islander women in native title processes has been linked to the demographic transformation of Aboriginal societies in the wake of colonisation.

³⁴ Dudgeon, Pat *Mothers of Sin: Indigenous Women's Perceptions of Their Identity and Gender* 107 *Us Women Our Ways Our World* (Magabala Books, Broome 2017) 124

³⁵ Watson, Irene 'From a Hard Place: Negotiating a Softer Terrain' in *Indigenous Australians, Social Justice and Legal Reform* (Editors Hossein, E., Worby, G., Tur, S. (Federation Press, Sydney 2016.) p120

³⁶ Duff, N. *What's needed to Prove native title: Finding flexibility within the law on connection* AIATSIS Research Discussion Paper, Number 35 (2014) 7 available at: https://aiatsis.gov.au/sites/default/files/products/discussion_paper/whats-needed-to-prove-native-title.pdf

³⁷ *Ibid.*

³⁸ Behrendt, L. *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, Sydney, 2002) p2

³⁹ *Ibid.* pp3-4

Ketley explores, in the judgment of *Ward*,⁴⁰ the challenge of restricted evidence due to women's law and ritual. In that case the Miruwung and Gajerrong women were faced with a dilemma - to effectively prove the existence of their Law they must breach it.⁴¹ In *Ward* the applicants proposed that gender restricted evidence from female witnesses should be received by a female anthropologist who would prepare a report containing a confidential section. This was not to be read by men. The respondents successfully objected and the women's evidence was heard by a male judge.⁴²

Similarly, in *Harrington-Smith on behalf of the Wongatha People Justice Lindgren* made orders for some culturally sensitive evidence to be given in gender-restricted session. In the case of 'Men's Restricted Evidence', only initiated Aboriginal men and non-Aboriginal men were permitted to be present. In contrast, in the case of 'Women's Restricted Evidence', only women and the male judge were permitted to be present.⁴³

This reveals the complex mix of cultural, historical, demographic and institutional factors that underlie men's and women's perceived or actual power and participation in the native title processes. These observations reveal a further critical factor influencing gender roles and relations in the native title arena: a factor captured by the concept of the 'intercultural'.⁴⁴ Simply assigning claims which concern restricted women's evidence is not enough.

Connolly has called for Courts to adopt a 'cross cultural interpretive ethos' and says that where evidence of concepts which are culturally different to the background of the judge, are involved a 'process of enculturation' is required in order for the judge to have the capacity and motivation to bring relevant evidence within his or her sensory range and engage in the kind of reasoning to cognitively appropriate and properly understood the concepts involved.⁴⁵

Despite Indigenous law forming the basis for the recognition of native title, these cases demonstrate that native title procedures fail to observe the gender restriction when 'secret women's' evidence was being given. A system which compels Indigenous women to disregard their own epistemologies and protocols in order to

⁴⁰ *Ben Ward & Ors v Western Australia & Ors* [1998] FCA 147

⁴¹ Ketley, Harriet. *On their own terms: Aboriginal women's evidence in Native Title Claims*. Balayi: Culture, Law and Colonialism, Vol. 1, No. 2, Jan 2000: 51-72.

⁴² Johnston, Peter *Gender restricted land claims –legal and constitutional issues 2 Mac LR 29 at 37-38* available at: <http://classic.austlii.edu.au/au/journals/MacarthurLawRw/1998/2.pdf>

⁴³ *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) [2007] FCA 31 at [375] Lindgren J

⁴⁴ Merlan, F *Caging the rainbow, places, politics and Aborigines in a north Australian town*, University of Hawaii Press, Honolulu, 1998, F Merlan *Exploration towards intercultural accounts of social cultural and reproduction and change Oceania*, vol 75, number 3, pp167-182

⁴⁵ Singleton, Scott PhD thesis *Drawing inferences in the Proof of Native Title –Historiographic and Cultural Challenges and Recommendations for Judicial Guidance* available at: https://eprints.qut.edu.au/119688/1/Scott_Singleton_Thesis.pdf 112 (references omitted).

prove their native title rights requires reform. Flexibility on evidentiary issues is not merely legally permissible; there is a duty upon government respondents and the courts to provide for this.⁴⁶

AIATSIS submits that in accordance with International Human Rights law it is imperative that Aboriginal and Torres Strait Islander women and communities are at the forefront of engagement with legislators and policy makers to address these legislative and policy inconsistencies and conflicts.⁴⁷

Aboriginal and Torres Strait Islander women, governance and native title corporations

Under the *Native Title Act* every successful claimant must establish a native title corporation (to hold land as a trustee or agent for their native title interests) following a determination of native title. These native title corporations play a fundamental role in the native title system, with numbers growing significantly over the past 20 years. Under this structure native title managers and native title corporation boards must comply with a variety of complex legislation,⁴⁸ often with limited resources and funding.⁴⁹

Native title corporations are one area that have achieved reasonable gender representation – stronger than the non-Indigenous equivalent. In 2013 ORIC declared that ‘Aboriginal and Torres Strait Islander corporations are leading the way in terms of gender equality in the boardroom.’⁵⁰ In 2015 AIATSIS reported that 41% of directors of prescribed bodies corporate (PBCs) for 2011-2012 were female and whilst men occupied more PBC board positions than women there was significant geographic variations.⁵¹ The report also examined how Aboriginal and Torres Strait Islander women may contribute to the native title process in ‘behind-the-scenes’ roles and that lower visibility in the process does not necessarily imply their exclusion.⁵²

Indigenous women as members, directors and managers of Aboriginal and Torres Strait Islander corporations bring distinctive understandings and practices regarding

⁴⁶ Ibid. p58

⁴⁷ T Tran & Stacey, C 2016 ‘Wearing two hats: The conflicting governance roles of native title corporations and community/shire councils in remote Aboriginal and Torres Strait Islander communities’, *Land, Rights, Laws: Issues of Native Title*, vol. 6, no. 4 AIATSIS Research Publications, Canberra 2016.

⁴⁸ the Native Title Act, CATSI Act and general law obligations including equity, administrative law, planning law, environmental law, resources law, land law, taxation, occupational health and safety, workplace relations etc.

⁴⁹ For example-see P Memmott and P Blackwood ‘Managing mixed indigenous land titles –Cape York case studies’ in *Living with native title: The experiences of registered native title corporations* (eds L M Strelein Jessica K Weir and T Bauman, AIATSIS Research Publications, Canberra 2013) pp217-254 ‘Native title is one of several categories of Aboriginal-owned land on Cape York, each of which is associated with a particular corporate land holding entity.’ p218

⁵⁰ ORIC *Women lead the way* in Aboriginal and Torres Strait Islander Corporations, media release ORIC, 16 September 2013

⁵¹ Buchanan, Geoff. *Gender and Generation in Native Title*. *Land, Rights, Laws: Issues of Native Title* (2015) 6(3) available at: https://aiatsis.gov.au/sites/default/files/products/issues_paper/gender_and_generation_in_native_title.pdf

⁵² Ibid. pp13-15

such matters as the undertaking of responsibilities, the exercise of authority, the conduct of disputes, and the making of decisions.

Understanding how organisational management, in a corporate form, reflects Aboriginal and Torres Strait Islander women's governance structures is critical for the success of CATSI boards and female directors and the support of general members.⁵³ In addition, understanding how some legal requirements may be incommensurable with some Aboriginal and Torres Strait Islander political and community obligations under Indigenous law to particular persons or sites is essential.⁵⁴

AIATSIS research and native title corporation case studies have identified four broad priorities for native title corporations:

1. Independence: native title corporations seek more corporate independence in the management of their native title rights and interests.
2. Respect and recognition: native title corporations seek greater levels of political recognition and respect for their traditional rights from other groups.
3. Caring for country, culture and people: native title corporations aspire to use their native title rights to improve the social and cultural wellbeing of their members as well as the broader community.
4. Community development, service provision and economic development: native title corporations want to use their native title rights to provide greater socio economic security for their communities.⁵⁵

One of Aboriginal and Torres Strait Islander women's greatest fears is that their children will lose their cultural values and beliefs and not identify strongly enough with Aboriginal society to counter other cultural influences that are constantly present.⁵⁶ Native title corporations can provide a space for the creation of new resources and meanings that may help Aboriginal groups more effectively undertake

⁵³ Jessica Weir (ed T Tran) *Native title and governance: the emerging corporate sector prescribed for native title holders* ((3)(9) *Land Rights Laws Issues of Native Title* AIATSIS Research Publications, Canberra 2007, Canberra) 8

⁵⁴ *Registrar of Aboriginal and Torres Strait Islander Corporations v Murray* [2015] FCA 346 at [3] per Gordon J. Also Op Cit. see Mantaziaris and Martinpp182-238. Also note in *Shaw Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 1397, the best interests of the corporation as a whole is determined objectively (since ASIC v Adler [2002] NSWSC 171) and according to the context of each particular factual circumstance and situation and the rules of incorporation themselves. In other words, determining what is in the best interests of a corporation is affected by the specific context of the corporation and its purpose and objects.

⁵⁵ *Ibid*, p29

⁵⁶ Daylight, Phyllis, P. and Johnstone, M. *Women's Business Report* (Department of Prime Minister and Cabinet, Australian Government Publishing Service, 1986) available at: https://wiyiyaniuthangani.humanrights.gov.au/sites/default/files/1986_AGPS_Womens_Business.pdf p27

their roles in maintaining their own laws⁵⁷ or become the vehicle to protect language and culture in Indigenous terms.

To achieve these societal goals, the groundwork for good governance requires investment. Whilst for some Aboriginal and Torres Strait Islander women there exists a high level of experience with principles of business administration and law for others, there is a persistent and significant lack of capacity in the sector due to a lack of resourcing.

Consequently, native title corporation boards can become boards of burden, doing much of the heavy lifting of the native title system for little financial reward.⁵⁸

Effective governance is appreciated by Aboriginal and Torres Strait Islander People, academics and government as one of the keys to overcoming colonial legacies of socioeconomic disadvantage and social dysfunction, and for building a sound base for local community and economic development.⁵⁹

AIATSIS submits that the mandatory nature of incorporation means that Government should ensure that native title corporations are properly funded to meet the positive statutory obligations they bear with respect to the administration of the Indigenous Estate and women's involvement in carrying out these obligations. Native title corporations require additional resources, including direct funding, to be able to carry out these obligations and continue to strive for even stronger gender equality. Building capacity and effective participation of Aboriginal and Torres Strait Islander women in governance to address the needs and aspirations of their communities will positively influence benefits for Aboriginal and Torres Strait Islander communities.⁶⁰ This means resourcing communities efficiently to implement structures that support local level governance and self-management, particularly in regional and remote communities.⁶¹

⁵⁷ Barcham, M. *Working with Indigenous and western corporate structures-the Central Arrernte case* in Strelein, L, Bauman, T and Weir, J (eds) *Living with native title: the experiences of registered native title corporations* (AIATSIS Research Publications, Canberra 2006 available at: <https://aiatsis.gov.au/sites/default/files/products/monograph/bauman-strelein-weir-living-native-title-book.pdf> p253

⁵⁸ Buchanan, Geoff. *Gender and Generation in Native Title*. Land, Rights, Laws: Issues of Native Title (2015) 6(3) available at: https://aiatsis.gov.au/sites/default/files/products/issues_paper/gender_and_generation_in_native_title.pdf p16

⁵⁹ Jessica Weir (ed T Tran) *Native title and governance: the emerging corporate sector prescribed for native title holders* ((3)(9) *Land Rights Laws Issues of Native Title* AIATSIS Research Publications, Canberra 2007, Canberra) 3

⁶⁰ Buchanan, Geoff. 'Gender and Generation in Native Title' Land, Rights, Laws: Issues of Native Title (2015) 6(3) available at: https://aiatsis.gov.au/sites/default/files/products/issues_paper/gender_and_generation_in_native_title.pdf

⁶¹ Dodson, M and Smith, D.E. *Governance for sustainable development: Strategic Issues and principles for Indigenous Australian Communities*. (CAEPR Discussion Paper No.250/2003, Canberra)p11

In 2019 AIATSIS will continue surveying native title corporations, including gender representation, as part of the extension of our work into the capacity and design of native title corporations in the sector.⁶²

Intergenerational trauma and native title legal processes

It is important to remember the physical and cultural violence following invasion occasioning pain, harm and consequentially intergenerational trauma for Aboriginal and Torres Strait Islander women and communities is continuing. 'In addition, the emerging international literature on indigenous health and wellbeing and intergenerational trauma may also yield concepts, language and other research that will aid in the task of assessing some of the deeper cumulative consequences of loss of connection to country.'⁶³

Aboriginal and Torres Strait Islander communities are undergoing a process of healing after generations of trauma occasioned by colonisation. European invasion has resulted in what is now accepted as ongoing intergenerational trauma for Aboriginal and Torres Strait Islander women and communities meaning that programs focussed on healing are a matter of priority.⁶⁴ If the cultural healing is able to occur at the community level, underpinned by the principles of self-determination and empowerment, there is a prospect of the benefits of this healing being passed on to children and young persons, through stronger, safer, more resilient communities, and families.⁶⁵

Grief and loss have unique meanings for Aboriginal and Torres Strait Islander women and communities in relation to the historical and contemporary context of

⁶² Strelein, L, Bauman, T and Weir, J (eds) *Living with native title: the experiences of registered native title corporations* (AIATSIS Research Publications, Canberra 2006 available at:

<https://aiatsis.gov.au/sites/default/files/products/monograph/bauman-strelein-weir-living-native-title-book.pdf>

⁶³ McGrath, P *Native Title Anthropology after the Timber Creek decision*, AIATSIS Research Publications, 2017, Canberra available at: <http://www.austlii.edu.au/au/journals/LRightsLaws/2017/1.pdf> p3 citing: 'For example: J Atkinson, *Trauma trails, Recreating Song Lines: The Transgenerational Effects of Trauma in Indigenous Australia*, Spinifex Press, North Melbourne, 2002; Jonathan Kingsley et al, 'Developing an Exploratory Framework Linking Australian Aboriginal Peoples' Connection to Country and Concepts of Wellbeing', *Int. J. Environ. Res. Public Health*, vol. 10, no. (2), pp. 678–98, 2013; N Argenti & K Schramm (eds), *Remembering Violence: Anthropological Perspectives on Intergenerational Transmission*, Berghahn Books, New York, 2010. See also: L Connor et al, 'Environmental Change and Human Health in Upper Hunter Communities of New South Wales, Australia', *EcoHealth*, vol. 1, su. 2, pp. 47–8, 2004, and other related publications for a useful discussion of theory and method informing an ongoing anthropological study of environmental change and human distress.'

⁶⁴ Daylight, Phyllis, P. and Johnstone, M. *Women's Business Report* (Department of Prime Minister and Cabinet, Australian Government Publishing Service, 1986) available at:

https://wiyiyaniuthangani.humanrights.gov.au/sites/default/files/1986_AGPS_Womens_Business.pdf p21

⁶⁵ Fogliani, RVC *Western Australian Coroner's Inquest into the deaths of: THIRTEEN CHILDREN AND YOUNG PERSONS IN THE KIMBERLEY REGION, WESTERN AUSTRALIA, 7 February 2019* available at:

<https://www.coronerscourt.wa.gov.au/files/inquest-2019/13-Children-and-Young-Persons-in-the-Kimberley-Region-Finding.pdf> p373

invasion, dispersal, being silenced, child removal and the overlaying of these on current experiences of grief and loss.⁶⁶

Today, Aboriginal children and young people grow up in chronic states of grief and loss. The loss of one person is an experience of grief to many people. In viable kinship systems, this loss of one person and the grief of many is mitigated largely by the kinship system alongside ceremony and knowledge-rich traditions and protocol that involve everyone in some way.⁶⁷

The continuing incarceration of Aboriginal and Torres Strait Islander women and young people and the increasing removal of Aboriginal and Torres Strait Islander women and children from their families perpetuates the impact of grief and loss on Community.⁶⁸

Ambelin Kwaymullina writes:

In the wake of colonialism, the damaged and broken connections between people and people and people and country mean that...we can struggle to see our world and ourselves clearly.⁶⁹

Appreciating and understanding the traumatising effects of legal processes and the ongoing intergenerational trauma on Aboriginal and Torres Strait Islander women and communities is urgently required. The consequence of invasion and violence, of forcible removals and an attempted cultural genocide must be addressed as a matter of both health and justice.⁷⁰

Appreciating the structures and strategies that will promote healing for Aboriginal and Torres Strait Islander women and their communities in accordance with Indigenous epistemologies and world views is urgently required. AIATSIS submits that consulting and engaging with Aboriginal and Torres Strait Islander women about the initiatives that promote healing is a matter of priority, as a part of trauma informed practice⁷¹ and a restorative justice model.

Returning Country, Land Justice and its interconnectedness to healing

⁶⁶ See the work of Dr Tracey Westerman - (1999) PhD Thesis: *Psychologically Speaking: Frameworks for Working With Aboriginal Communities* (executive summary) available at: <http://indigenouspsychservices.com.au/wp-content/uploads/2018/10/Frameworks-of-working-with-Aboriginal-people.doc-Frameworks.pdf>

⁶⁷ *Intergenerational and collective trauma within Aboriginal and Torres Strait Islander Communities*, *Blue Knot Foundation Newsletter* (2016) available at: 3

⁶⁸ Australian Institute of Health and Welfare *Aboriginal and Torres Strait Islander Stolen Generations and Descendants: Numbers demographics characteristics and deselected outcomes* (2018), report available at: <https://www.aihw.gov.au/getmedia/a6c077c3-e1af-40de-847f-e8a3e3456c44/aihw-ihw-195.pdf.aspx?inline=true>

⁶⁹ Kwaymullina, Ambelin 'The Creators of the future: Women Law and Telling Stories in Country' in *Us Women Our Ways Our World* (Magabala Books, Broome 2017) 102

⁷⁰ See Bringing them Home: Stories of the Stolen Generations, *Bringing them Home: The Stolen children report* available at: <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/bringing-them-home-stolen>

⁷¹ Atkinson, J Nelson, J Brooks, R Atkinson, C Ryan K *Working Together Addressing Individual and Community Transgenerational Trauma* (2010)

Research has shown that returning control of the Indigenous Estate to native title holders and traditional owners increases the wellbeing of those individuals and communities.⁷² The Commonwealth Government's National Strategic Framework for Aboriginal and Torres Strait Islander Peoples' Mental Health and Social and Emotional Wellbeing 2017-2023 states that:

Understanding social and emotional wellbeing and good mental health for Indigenous communities' means acknowledging the interconnectedness of body, mind and emotions, family and kin, community, culture and spirituality and ancestors⁷³

It is therefore a positive obligation of law and policy makers to implement a framework that encourages and facilitates the leadership of Aboriginal and Torres Strait Islander women in programs that protect their lands and waters in accordance with the principles of sustainable development and wellbeing.

Indigenous Peoples' laws and philosophical traditions, kinship, language and art are all connected through their relationship with lands and waters. As such, the rights of Aboriginal and Torres Strait Islander peoples are recognised under international law and reflected in Australia's obligations under the United Nations Human Rights framework, and in particular, the United Nations Declaration on the Rights of Indigenous Peoples 2007.⁷⁴

It has been extensively demonstrated that caring for Country and having control over Country improves wellbeing.⁷⁵ Retaining connection to country is critical to the identity and cultural continuity of Aboriginal and Torres Strait Islander societies and, as a consequence, the wellbeing and freedom of individual Aboriginal and Torres Strait Islander people.

⁷² Larson, S., Stoeckl, N., Jarvis, D., Addison, J., Prior, S., Esparon, M. 'Using Measures of wellbeing for impact evaluation: Proof of concept developed with an Indigenous community undertaking land management programs in northern Australia,' (2018) Royal Swedish Academy of Sciences 2018, published online: <https://doi.org/10.1007/s13280-018-1058-3> p9 32 T Alfred & J Cornassel, 2005 'Being Indigenous: Resurgences against Contemporary Colonialism' Government and Opposition Blackwell, Oxford, p. 599 cited in: Strelein, L. Tran, T., Barcham, C. 'AIATSIS Submission: Closing the Gap Refresh Public Discussion Paper (2018) p5

⁷³ The National Strategic Framework for Aboriginal and Torres Strait Islander Peoples' Mental Health and Social and Emotional Wellbeing 2017-2023 is available online: <https://pmc.gov.au/resource-centre/indigenous-affairs/national-strategic-frameworkmental-health-social-emotional-wellbeing-2017-23> p16. See also Mayi Kuwaya: the National Study of Aboriginal and Torres Strait Islander wellbeing: ANU.

⁷⁴ Strelein, L and Hassing, C AIATSIS Submission into Senate Inquiry on Faunal Extinction available at: https://aiatsis.gov.au/sites/default/files/products/policy_paper_submission/aiatsis_senate_enquiry_faunal_extinction_crisis.pdf p2

⁷⁵ The National Strategic Framework for Aboriginal and Torres Strait Islander Peoples' Mental Health and Social and Emotional Wellbeing 2017-2023 is available online: <https://pmc.gov.au/resource-centre/indigenous-affairs/national-strategic-frameworkmental-health-social-emotional-wellbeing-2017-23> The report identifies that control over country improves the physical, mental, and spiritual wellbeing of Indigenous peoples-p16. See also Larson, S., Stoeckl, N., Jarvis, D., Addison, J., Prior, S., Esparon, M. 'Using Measures of wellbeing for impact evaluation: Proof of concept developed with an Indigenous community undertaking land management programs in northern Australia,' (2018) Royal Swedish Academy of Sciences 2018, published online: <https://doi.org/10.1007/s13280-018-1058-3> pp9-10

Difficulty accessing services and funding to support their needs remains an issue for Aboriginal and Torres Strait Islander women. In 2017 the Australian National Audit Office (ANAO) Report into the *Indigenous Advancement Strategy*⁷⁶ (IAS) audited the effectiveness of the IAS:

Stakeholder feedback provided to the ANAO indicated that community involvement in the IAS was limited...When the ANAO asked applicants what changes they would like to see, the two most common responses were greater partnership and collaboration with Indigenous communities to design solutions and a bottom up approach to service delivery.⁷⁷

Professor Megan Davis reflected on the damage occasioned by the IAS:

After the destruction wrought by the Indigenous Advancement Strategy (IAS) – a federal government policy established in 2014 that has seen funding ripped out of communities, with the bulk of it shifting to non-Indigenous hands – participants in the constitutional dialogues were unequivocally attracted to a Voice.⁷⁸

In 1986 the *Women's Business Report* identified a number of issues that impaired Aboriginal and Torres Strait Islander women's realisation of equality before the law across the broad areas of housing, health, employment, education, and access to legal services. The report made a number of recommendations that remain to be implemented. Very little has improved in 33 years for Aboriginal and Torres Strait Islander women.⁷⁹

Achieving appropriate Aboriginal and Torres Strait Islander women's policy is more likely to be successful through establishing institutional structures and principles which are robust enough to encompass and engage diversity and equality before the law.⁸⁰

⁷⁶ Australian National Audit Office (ANAO) Report number 35, Indigenous Advancement Strategy Review available at: <https://www.anao.gov.au/work/performance-audit/indigenous-advancement-strategy>

⁷⁷ *Ibid.* p35

⁷⁸ Davis M, 'Voice, Treaty, Truth' The Monthly July 2018 available at: <https://www.themonthly.com.au/issue/2018/july/1530367200/megan-davis/voice-treaty-truth>

⁷⁹ 'We see disproportionately high numbers of men and women held in police cells, incarcerated in gaols, and significant numbers passing away from violence, illness or a combination of both while detained by the state this year. These increasing rates of incarceration and death, 25 years after the RCIADIC are an intolerably high price.'-Australian Human Rights Commission *Social Justice Report* (2016) p7 citing-Anna Olsen and Ray Lovett, 'Existing knowledge, practice and responses to violence against women in Australian Indigenous communities' (State of knowledge paper, issue 2, ANROWS, January 2016) p10 cited in Australian Human Rights Commission *Social Justice Report* (2016) p10. Aboriginal and Torres Strait Islander women are hospitalised for family violence related assault at a much higher rate than non-Indigenous women and are more likely to be killed as a result of violent assault. - T Cussen & W Bryant, *Indigenous and non-Indigenous homicide in Australia*, Australian Institute of Criminology (May 2015); Australian Institute of Health and Welfare, *The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples 2015* (2015) 44-45.

⁸⁰ D F Martin Rethinking the design of Indigenous organisations: the need for strategic engagement (Centre for Aboriginal Economic Policy Research, ANU, 2003 Discussion Paper 248/2003) p9

Aboriginal and Torres Strait Islander women will be able to thrive if they are not wrongfully arrested and imprisoned, if they are treated by medical personnel in hospitals, if they are educated and treated with respect. It is impossible to accept anything less.⁸¹ Aboriginal and Torres Strait Islander men must also play their part in recognising the humanity and right to a full and happy life of Aboriginal and Torres Strait Islander women.

Re-empowering Aboriginal and Torres Strait Islander women means understanding the interconnectedness of Country to Aboriginal and Torres Strait Islander communities' and their wellbeing: and wellbeing as the foundation of all social, cultural, economic, political and legal rights.

AIATSIS further submits that ensuring equality for Aboriginal and Torres Strait Islander women and communities is the urgent responsibility of all Australians. Recognising and resolving native title claims and realising Aboriginal and Torres Strait Islander women's land justice aspirations is important to achieve reconciliation and equality before the law.

So we old people are getting tired and we just want to make sure our younger generation knows the right way for country and feels strong to keep the culture and country healthy from the day it was created.⁸²

The constant diminution of Indigenous Peoples' rights makes it difficult for Aboriginal and Torres Strait Islander women to form a positive view of public policy developments in the area of native title law. A prerequisite for refreshing policy thinking requires acknowledgment of the failure of the last decade and the deepened impoverishment in remote Indigenous Australia.⁸³

A practical and empirically-informed framework is urgently needed based on negotiated principles.⁸⁴ 'The contrast between progressivist public rhetoric about empowerment and self-determination and the raw evidence of a disastrous failure in major aspects of Australian Aboriginal Affairs policy since the 1970s is inexcusable.'⁸⁵

Professor Megan Davis offers the following critique:

⁸¹ Langton, Marcia 'For Her We Must: No Excuses Time to Act' Griffith Review 60 (2018) available at: <https://griffithreview.com/articles/for-her-we-must-no-excuses-naidoc-marcia-langton/>

⁸² Janet Oobagooma in 'Dambeemangaddee Country, Culture and People: Our Country is where our ancestors come from' in Blundell, V., Doohan, K., Vachon, D., Allbrook, M., Jebb, Mary Anne and Bornman, J. *Barddabardda Wodjenangorddee: We're Telling all of you: The Creation, History and People of Dambeemangaddee Country* : compiled and written in collaboration with Dambeemangaddee People: published by Dambimangari Aboriginal Corporation, Derby, WA, (2017) 404

⁸³ Altman, Jon submission *Closing the Gap Refresh* available at: https://closingthegaprefresh.pmc.gov.au/sites/default/files/submissions/jon_altman.pdf p7

Ibid.⁸⁴

⁸⁵ Sutton, P. *The politics of suffering: Indigenous policy in Australia since the 1970s*, Anthropological Forum, Volume 11, No2, 2001, p4

Public policy no longer requires the imprimatur of the Aboriginal people; Aboriginal participation in the decisions taken about their lives is negligible. It is a distraction, an indulgence even. Desperate pleas for a renewed emphasis on Indigenous design and Indigenous participation is met with the unexamined refrain, 'We tried that and it didn't work'. A mostly uncritical mainstream media cheers from the sidelines, dutifully promoting prime ministerial remote-community fly-bys as policy and gushingly retweeting images of unnamed natives: state-funded junket as *the coming of the light*... The issue of fungibility of native title or compensation for state theft of wages while living under compulsory racial segregation laws – these things do not move a nation.⁸⁶

Listening to, understanding and appreciating the impact of the anger and frustration of Aboriginal and Torres Strait Islander women around public policy reform in Indigenous Affairs and native title law reform is part of the healing process. One of the key issues confronting native title holders is how they can convert their native title rights into a resource base for development.⁸⁷ Native title corporation administrative requirements and reporting obligations which do not match local realities can also disable the operation of these entities.⁸⁸ Native title corporations provide potential as the vehicles for administering the Indigenous Estate in accordance with the principles of Aboriginal Self-Determination, but for this to occur will require significant and ongoing investment from the Commonwealth and State and Territory Governments.

Conclusion

AIATSIS submits that recognising Aboriginal and Torres Strait Islander women's leadership as a critical part of the Aboriginal Rights Law movement is important to reconciling the traumatic impact of native title legal processes upon Aboriginal and Torres Strait Islander women's lives and upon their laws and Knowledges. Consultation with and amongst Aboriginal and Torres Strait Islander women is an important first step. This engagement and consultation should inform an ongoing dialogue with the Court, legislators; policy makers and other stakeholders in the area of native title and Indigenous Peoples and the law.

AIATSIS submits that building the capacity and effective participation of Aboriginal and Torres Strait Islander women in governance and native title corporations who

⁸⁶ Davis, Megan 'Listening but not hearing' Griffith Review Edition 51 available at: <https://griffithreview.com/articles/listening-but-not-hearing/>

⁸⁷ M Barcham 'Working with Indigenous and western corporate structures-the Central Arrernte case' in (eds L M Strelein Jessica K Weir and T Bauman, AIATSIS Research Publications, Canberra 2013) p261

⁸⁸ Jessica Weir (ed T Tran) *Native title and governance: the emerging corporate sector prescribed for native title holders* ((3)(9) Land Rights Laws Issues of Native Title AIATSIS Research Publications, Canberra 2007, Canberra) 7

have positive mandatory statutory obligations as well as the requirement to address the needs and aspirations of their communities: will positively influence benefits for Aboriginal and Torres Strait Islander communities.⁸⁹ This will also facilitate and achieve the international human right to be self-governing and self-determining and will promote strategies that bring healing to Indigenous communities.

Re-empowering Aboriginal and Torres Strait Islander women means understanding the interconnectedness of Country to Aboriginal and Torres Strait Islander women with their wellbeing: for wellbeing is the foundation of all social, cultural, economic, political and legal rights. AIATSIS further submits that ensuring equality for Aboriginal and Torres Strait Islander women and communities is the urgent responsibility of all Australians. Recognising and resolving native title claims and realising Aboriginal and Torres Strait Islander women's land justice aspirations is important to achieve reconciliation and equality before the law.

AIATSIS strongly supports the ongoing work of the *Aboriginal and Torres Strait Islander Women's Voices Wiyi Yani U Thangani* project at the Australian Human Rights Commission. For Aboriginal and Torres Strait Islander women and communities, land justice is part of a multi-faceted approach to ending Indigenous disadvantage. It needs to be a form of land justice that seeks to benefit Indigenous people rather than secure non-Indigenous interests. And it needs to be accompanied by a commitment to end the under-funding of Indigenous health, education, and housing and community infrastructure. It is this holistic approach that offers the most promise for an improved future for Aboriginal and Torres Strait Islander women and communities.⁹⁰

⁸⁹ Buchanan, Geoff. 'Gender and Generation in Native Title' Land, Rights, Laws: Issues of Native Title (2015) 6(3) available at: https://aiatsis.gov.au/sites/default/files/products/issues_paper/gender_and_generation_in_native_title.pdf

⁹⁰ Behrendt, L., Watson, N. *Shifting Ground: Why land rights and native title Have not delivered social justice* (2007) The Journal Of Indigenous Policy-Issue 8, 94: 102

Appendix A - Critical race theory and native title

Critical Race Theory (CRT) scholarship is concerned with exploring the constructed nature of racial privilege.⁹¹ In Australia there has also been a development of CRT with a specific focus on the context of colonialism. This scholarship is a form of Indigenous Critical Race Theory⁹² and is pioneered in the writing of scholars such as Professor Irene Watson and distinguished Professor Aileen Moreton-Robinson.⁹³ Critical Whiteness Studies is a current theoretical movement concerned with critiquing white privilege.

Dudgeon observes that Aboriginal and Torres Strait Islander women face the twin obstacles of both racism and sexism.⁹⁴ AIATSIS submits that it is most important to contextualise this submission on Aboriginal and Torres Strait Islander women in native title with the ongoing impact of institutionalised racism. The increasing impact of critical race theory in both jurisprudential and broader terms is also of direct relevance to the lived experiences of Aboriginal and Torres Strait Islander women in both a historical and contemporary setting.

Professor Aileen Moreton-Robinson writes that:

Indigenous women's ways of knowing are informed by shared knowledge and experiences, some of which we are conscious while others remain unconscious. Our way of knowing is thus also informed by our social positioning. All Indigenous women share the common experience of living in a society that deprecates us. We share the experience of having different cultural knowledges. We share in the experience of the continual denial of our sovereignties. We share experiences of the politics of dispossession. We share our respective countries' histories of colonisation. We share the experience of multiple oppressions. We share in the experiences of living in a hegemonic white patriarchal society...⁹⁵

⁹¹ Delgado, R. and Stefancic, J. *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?* in Delgado and Stefancic (eds), *Critical Race Theory –The Cutting Edge* (2nd ed, 2000) 232

⁹² Bielefeld, S. *The dehumanising violence of racism the role of law* (D Phil thesis, Southern Cross University, 2010) available at: <https://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1174&context=theses> 44

⁹³ See for example: Watson, I. *Settled and Unsettled Spaces: Are We free to Roam* (2005) 1(1) *Australian Critical Race and Whiteness Studies Association Journal* 40; Watson, I. *De-Colonisation and Aboriginal Peoples: Past and Future Strategies* (2007) 26 *The Australian Feminist Law Journal* 111; Moreton-Robinson, A. *The House that Jack Built: Britishness and White Possession* (2005) 1 *Australian Critical Race and Whiteness Studies Association Journal* 21, 21–22

⁹⁴ Thomas, Carol and Selfe, Joanne *Aboriginal Women and the Law in Aboriginal Justice Issues* (Australian Institute of Criminology, Canberra, 1993) p168, available at: <https://aic.gov.au/publications/proceedings/21>

⁹⁵ Moreton-Robinson, Aileen M. *Towards an Indigenous Women's Standpoint*. *Australian feminist studies*, (2013) 28(78) pp 342.

Professor Robinson has also described native title as ‘nothing more than a bundle of rights to hunt, gather and negotiate as determined by Australian law.’⁹⁶ Likewise Bielefeld has written that native title law reinforces legal positivism and formalist methodology that ensures that white privilege continues to be maintained at the expense of Indigenous Australians.⁹⁷

Dudgeon writes that: ‘to understand the stories of our foremothers (and our own stories), we need to understand not only the sexual commodification of Aboriginal and Torres Strait Islander women, but also the dual influences of racist and sexist ideologies on how they were perceived. The poignant probability is that the internalisation of such brutal perceptions resulted in the silencing of Aboriginal and Torres Strait Islander women’s views of themselves and their worlds’.⁹⁸ This no doubt has had an impact on both the participation of women and their involvement in land rights and native title claims however very little research has been conducted on the lived experiences of women in terms of the land rights and native title litigated processes.⁹⁹

A cursory examination of Indigenous and non-Indigenous Australian reflections and criticisms of juridical and political developments since significant constitutional events in Australia (such as the 1967 Referendum or even Mabo(2)) illustrates the incapacity of Australian public institutions to adequately respond to Indigenous culture, and thus Aboriginal and Torres Strait Islander notions of religion and spirituality. Aboriginal customary law, land rights, native title, intellectual property and heritage protection, Indigenous peoples have been disappointed with the paucity of recognition and legal protection given to tangible and intangible aspects of Indigenous culture and religion. Moreover, any legislative protection or common law interpretation has frequently diminished or inadequately accommodated these aspects. ¹⁰⁰

The reality for Indigenous Australians is that in many cases because of the chasm between the common law and native title rights, the latter, when recognised, will amount to little more than symbols. ¹⁰¹ AIATSIS submits that it is important to remember the racialised context of native title law and the direct impact of

⁹⁶ Moreton Robinson, A. (ed) *Sovereign Subjects Indigenous Sovereignty Matters* (Allen and Unwin, Sydney, 2007) 401. See also Wilkie, M. and Gregory, M. *Aboriginal Law in Australian Courts – Black History on White Paper* (1996) 21(1) *Alternative Law Journal* 1

⁹⁷ Bielefeld, S. *The dehumanising violence of racism the role of law* (D Phil thesis, Southern Cross University, 2010) available at: <https://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1174&context=theses>

⁹⁸ *Ibid.*

⁹⁹ Ketley, Harriet. *On their own terms: Aboriginal women’s evidence in Native Title Claims. Balayi: Culture, Law and Colonialism*, Vol. 1, No. 2, Jan 2000: 51-72.

¹⁰⁰ David Mercer, “Citizen Minus’?: Indigenous Australians and the Citizenship Question” (2003) 7(4; *Citizenship Studies* 421-45.

¹⁰¹ See, e.g., Larissa Behrendt, *Achieving Social Justice* (2003); Megan Davis, “Chained to the Past: The Terra Nullius of Australian Public Institutions” in T Campbell, J Goldsworthy, A Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006); Mick Dodson and Lisa Strelein, “Australia’s Nation-Building: Renegotiating the Relationship between Indigenous Peoples and the State” (2001) 68 *University of New South Wales Law Journal*.

institutionalised racism on the context of Aboriginal and Torres Strait Islander women's rights before the law and in terms of their experiences with the legal system.¹⁰²

'It might have been better to redress the wrongs of dispossession by a true and unqualified settlement of lands or money than by an ultimately, futile or unsatisfactory, in my respectful opinion, attempt to fold native title rights into the common law. Australia's public institutions have failed to accommodate difference and in some cases, as seen in native title law, have distorted and limited the practice of Indigenous culture and religion. This has been referred to in some literature as the psychological terra nullius or the racism of Australia's public institutions.'¹⁰³

Racism is not a mistake, not a matter of episodic, irrational behaviour carried out by vicious-willed individuals, not a throwback to a long-gone era. It is a ritual assertion of supremacy... It is performed largely unconsciously... Racism seems right, customary, and inoffensive to those engaged in it, while bringing psychic and pecuniary advantages.¹⁰⁴

Examining the lived experiences of Aboriginal and Torres Strait Islander women and native title law and the broader institutional settings and structures in Australia that promulgate institutionalised racism¹⁰⁵ also highlights the trauma of legal processes in Aboriginal and Torres Strait Islander women's lives; and the impact of intergenerational trauma on Aboriginal and Torres Strait Islander women and Aboriginal and Torres Strait Islander communities.

The increasing influence of black women's voices and scholarship in the area of CRT and Critical Whiteness Studies highlights the impact of institutionalised sexism and gender inequality that continues to persist alongside institutionalised racism for Aboriginal and Torres Strait Islander women. This form of racism is accompanied by white privilege.¹⁰⁶

It is crucial to examine the place of law in the construction of race in the native title context because law has been the channel through which racist policies have been legitimised and enforced in each of the regimes under study.

Race policies and philosophies mean little unless acted upon. The avenue to practice has been through law. Law becomes the vehicle by which the policy

¹⁰² Moreton-Robinson, A. *Witnessing the Workings of White Possession in the Workplace: Leesa's Testimony* (2007) 26 Australian Feminist Law Journal 81, 82

¹⁰³ Davis, M. "Reviewing Racism: HREOC and the Racial Discrimination Act 1975 (Cth)" (1997) Indigenous Law Bulletin 29

¹⁰⁴ Delgado, R. and Stefancic, J. *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?* in Delgado and Stefancic (eds), *Critical Race Theory – The Cutting Edge* (2nd ed, 2000) 232

¹⁰⁵ Watson, I. *Buried Alive* (2002) 13 *Law and Critique* 253; Watson, I. *From a Hard Place: Negotiating Softer Terrain* (2004) (7)(2) *Flinders Journal of Law Reform* 205

¹⁰⁶ Moreton-Robinson, A. *Witnessing the Workings of White Possession in the Workplace: Leesa's Testimony* (2007) 26 Australian Feminist Law Journal 81, 82.

achieves procedural validity and political-social legitimacy. Policy becomes enshrined, achieving a kind of holy-writness, one suggesting that the law has magical qualities beyond those of the men who enacted it.¹⁰⁷

Professor Watson has also argued that the entire system of native title is fundamentally inadequate because it refuses to address the issue of Indigenous rights to land and the issue of sovereignty.¹⁰⁸

Invasion was accompanied by an entrenched belief at the time that non-white people were inferior to white a person,¹⁰⁹ which underpins the false and pernicious erroneous premise of the doctrine of white supremacy. As such, the first major legislative acts were focused on implementing the White Australia Policy.¹¹⁰ The impact of invasion and race theory is exacerbated in the evidentiary requirements for Aboriginal and Torres Strait Islander traditional owners seeking land justice for past wrongs.¹¹¹

In Australia this dominant colonial ideology continues to normalise the oppression of Indigenous peoples.¹¹² In the context of native title it was these racial fears that were inflated to undermine the land justice aspirations of Indigenous Peoples.¹¹³

The legacy of this false and erroneous doctrine of white supremacy persists in Australia and is the native title legal process. It seems that once racist policy attains the privileged status of law it is extremely difficult to mount a successful challenge to such law. The repeal of racist laws enacted by parliament is a lengthy and difficult process, requiring many years of lobbying, and goodwill on the part of parliamentarians to change oppressive laws.¹¹⁴ Repeal is less likely to occur in a colonial legal system such as Australia where 'there is significant reluctance to disturb the colonial inheritance of 200 years of denial of the rights of Indigenous peoples'.¹¹⁵

¹⁰⁷ Colin Tatz, 'Racism, Responsibility and Reparation: South Africa, Germany and Australia' (1985) 31(1) Australian Journal of Politics and History 162, 165 cited in Bielefeld, S. *The dehumanising violence of racism the role of law* (D Phil thesis, Southern Cross University, 2010) available at: <https://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1174&context=theses> 12

¹⁰⁸ Watson, I. *Buried Alive* (2002) 13 *Law and Critique* 253, 257.

¹⁰⁹ Bielefeld, S. *The dehumanising violence of racism the role of law* (D Phil thesis, Southern Cross University, 2010) available at: <https://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1174&context=theses>

¹¹⁰ Ibid. 46- as cited in Bielefeld, S. *The dehumanising violence of racism the role of law* (D Phil thesis, Southern Cross University, 2010) available at: <https://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1174&context=theses> 287

¹¹¹ Bird, G. *The Process of Law in Australia – Intercultural Perspectives* (Butterworths, Sydney 1993) 128.

¹¹² Bielefeld, S. *The dehumanising violence of racism the role of law* (D Phil thesis, Southern Cross University, 2010) available at: <https://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1174&context=theses> 9

¹¹³ Watson, I. *Law and Indigenous Peoples: the impact of colonialism on Indigenous cultures* (1996) 14(1) *Law in Context* 107, 108.

¹¹⁴ Bielefeld, S. *The dehumanising violence of racism the role of law* (D Phil thesis, Southern Cross University, 2010) available at: <https://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1174&context=theses> 12

¹¹⁵ Strelein, L. *Compromised Jurisprudence – Native Title cases since Mabo* (AIATSIS Research Publications, Canberra, 2006)

Dudgeon writes that as an Aboriginal woman one of the most damaging aspects of settler narratives was that they had her believing that she should be grateful that she lived in a Western world rather than in a traditional Aboriginal context:

It is of concern how these distorted depictions influence our thinking. Indigenous Peoples must decolonise our minds and rebuild our contemporary cultures in strong powerful ways. From an Indigenous viewpoint, history and received knowledge are contested areas for both are products of the colonising projects of the West.¹¹⁶

Aboriginal and Torres Strait Islander women possess a unique, yet chronically undervalued and marginalised voice. Living in a white hegemonic nation is the reality for Aboriginal people in Australia¹¹⁷ who continue to have their voices ignored or silenced.¹¹⁸ This struggle is even more profound for Aboriginal and Torres Strait Islander women, who endure the ‘dual oppression’ of the colonising and patriarchal practices embedded in Australian society and governance.¹¹⁹ This is compounded by a narrative of Aboriginal culture which is largely male-constructed and focused. There are necessarily differences between the aspirations and goals of Indigenous men and women, yet the mechanism of Aboriginal rights and self-determination as it has been conceived and developed in Australia, is based on a male-orientated understanding of what it means to be Aboriginal; ‘the male prisoner, the male spiritual custodian of culture, the male victim of colonisation...’¹²⁰

Acknowledgment of this unique position occupied by Aboriginal and Torres Strait Islander women in Australian society needs to be translated into recognition of, and engagement with, these women. The current conceptualisation of Aboriginality must be reconstructed, inclusive of female experiences, issues and aspirations. The *Wiyi Yani U Thangani* project is an evident step in the right direction, and AIATSIS submits that strengthened commitment should be reflected in policy and greater consideration of Aboriginal and Torres Strait Islander women’s ability to engage with the native title and land rights processes, as elaborated elsewhere in this submission.

¹¹⁶ Ibid

¹¹⁷ Moreton-Robinson, Aileen M. Whiteness matters: implications of talking up to the white woman. *Australian Feminist Studies*, (2006) 21(50), pp. 245-256.

¹¹⁸ Wright, Alexis *What happens when you tell somebody else’s story?* (2016) *Meanjin Quarterly* available at: <https://meanjin.com.au/essays/what-happens-when-you-tell-somebody-elses-story/>

¹¹⁹ Moreton-Robinson, Aileen M. ‘Towards an Indigenous Women’s Standpoint’ (n 178)

¹²⁰ Davis, Megan. ‘Aboriginal Women: the right to self-determination’ (2012) 16(1) *Australian Indigenous Law Review* pp. 82

Appendix B - Indigenous women and human rights litigation

For Aboriginal and Torres Strait Islander women there are many cases that emphasise the relationship between law, history and violence.¹²¹

In *Kruger v the Commonwealth*¹²² the judges spoke of legislation being enacted for the benefit of Indigenous People¹²³ regardless of evidence to the contrary.¹²⁴ *Kruger* was the first case to be heard in the High Court of Australia that considered the legality of the formal government assimilation based policy of removing Indigenous children from their families. In *Kruger* the plaintiffs had brought their case on the grounds of the violation of various rights by the effects of the Northern Territory ordinance that allowed for the removal of Indigenous children from their families. The plaintiffs had claimed violations of the implied rights to due process before the law, equality before the law, freedom of movement and the express right to freedom of religion contained in s 116 of the Australian Constitution. They were unsuccessful on each count, a result that highlighted the general lack of rights protection in our system of governance, in which, through policies like child removal, there was a disproportionately high impact on Indigenous people as a result of those silences.¹²⁵

What we can see in the *Kruger* case is the way that the issue of removal – seen as a particularly Indigenous experience and particularly Indigenous legal issue – can be expressed in language that explains what those harms are in terms of rights held by all other Australians. *Kruger* also highlights how few of our rights which we assume as given are actually protected by our legal system and the case has been used to illustrate the need to change this failure through legal, particularly constitutional reform.¹²⁶

In *Nulyarimma v Thompson*¹²⁷ the history which seeks to deny the crime of Genocide Indigenous peoples was privileged.¹²⁸ In *Nulyarimma* it was alleged in the Federal Court of Australia that certain politicians, together with the Commonwealth Government, had committed acts of genocide under the 1948 convention on the

¹²¹ For an extensive analysis of these cases see Ann Curthoys, Ann Genovese and Alexander Reilly *Rights and Redemption- History Law and Indigenous People* (ANU Press, Canberra (2008)

¹²² (1997) 190 CLR 1.

¹²³ Chris Cunneen and Julia Grix, The Limitations of Litigation in Stolen Generations Cases, Australian Institute of Aboriginal and Torres Strait Islander Studies Research Discussion Paper No 15 (2004), 26

¹²⁴ Bielefeld, S. *The dehumanising violence of racism the role of law* (D Phil thesis, Southern Cross University, 2010) available at: <https://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1174&context=theses> 38

¹²⁵ Behrendt, L. 'Power from the People: A Community based approach to Indigenous Self-determination' in *Indigenous Australians and Social Justice and Legal Reform*. (eds Hossein Esmaili, Gus Worby and Simone Tur (Federation Press, Sydney 2016) 87 at 94

¹²⁶ Behrendt, L. 'Power from the People: A Community based approach to Indigenous Self-determination' in *Indigenous Australians and Social Justice and Legal Reform*. (eds Hossein Esmaili, Gus Worby and Simone Tur (Federation Press, Sydney 2016) 87 at 94-95

¹²⁷ (1999) 165 ALR 621

¹²⁸ Irene Watson, 'Buried Alive', above n 2, 264.

Convention on the Prevention of the Crime of Genocide. The case was actually two sets of proceedings¹²⁹ and they were heard together as *Nulyarimma* because of their commonality. The cases were dismissed unanimously by the Court on the basis that genocide was not a crime under Australian law (Wilcox and Whitlam JJ) whereas the third Judge (Merkel J) dissented and held that genocide as an international crime was part of the common law of Australia, however he agreed with the majority that the claims were not sustainable.¹³⁰

As Professor Tatz has reflected:

Australians understand only the stereotypical or traditional scenes of historical or present-day slaughter. For them, genocide connotes either the bulldozed corpses at Belsen or the serried rows of Cambodian skulls, the panga-wielding Hutu in pursuit of Tutsi victims or the ethnic cleansing in the former Yugoslavia. As Australians see it, patently we cannot be connected to, or with, the stereotypes of Swastika-wearing SS psychopaths, or crazed black tribal Africans. Apart from Australia's physical killing era, there are doubtless differences between what these perpetrators did and what we did in assimilating people and removing their children. But, as we will see, we are connected – by virtue of what Raimond Gaita calls "the inexpugnable moral dimension" inherent in genocide, whatever its forms or actions.¹³¹

In *Kartinyeri v The Commonwealth*¹³² the history of the coloniser was again privileged over that of Aboriginal and Torres Strait Islander women seeking to protect sacred sites.¹³³ In 1997, the Commonwealth parliament passed the *Hindmarsh Island Bridge Act 1997* (Cth) ('the Bridge Act'), exempting a tourism development project from the usual ministerial approval processes. The Act removed the disputed construction site from the probable protection of the *Heritage Protection Act*, meaning that the construction could take place despite any consequent harm to Indigenous cultural heritage within the area. The plaintiffs were members of the Ngarrindjeri people, they

¹²⁹ *Re Thompson* [1999] FCA 1192, 1 September 1999 and *Buzzacott v Hill* [Proceedings A5 of 1999].

¹³⁰ Peters, Sean *the Genocide Case, Nulyarimma v Thompson* (1999) *Australian International Law Journal* 15 at 15, available at: <http://classic.austlii.edu.au/au/journals/AUIntLawJI/1999/15.pdf>

¹³¹ Tatz, Colin *Genocide in Australia*: AIATSIS Research Discussion Paper 8, 1999: 2-Tatz cites Raimond Gaita's three essays on the subject of Holocaust, genocide and the removal of Aboriginal children in Quadrant: "Genocide and Pedantry", July-August 1997, pp. 41-5; "Genocide: The Holocaust and the Aborigines", November 1997, pp. 17-22; and "Reply to Kenneth Minogue", November 1998, pp. 39-43.

¹³² ((1998) 195 CLR 337. 'The Hindmarsh Island Bridge Act 1997 (Cth) specifically provided that the protective provisions of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) would not apply with regard to the construction (or associated activities) of a bridge in the 'Hindmarsh Island bridge area' (as defined). The applicants, who had previously sought protection for the area under the 1984 Act, sought a declaration that the 1997 Act was invalid. On 1 April 1998 the full High Court delivered its answer. Section s 51(xxvi) of the Commonwealth Constitution authorises Parliament to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'. In 1967, following a referendum under s128 of the Constitution, the words 'other than the aboriginal race in any state' had been removed from s51 (xxvi). Applicants argued that s51(xxvi) was confined so as to authorise only laws for the *benefit* of 'the people of any race' generally, or, particularly, for members of 'the aboriginal race'-See Nettheim, Garth *The Hindmarsh Bridge Act Case: Kartinyeri v Commonwealth* [1998] IndigLawB 48; (1998) 4(12) *Indigenous Law Bulletin* 1

¹³³ Watson, Irene "Settled and unsettled Spaces: are we free to roam?" *Australian Critical Race and Whiteness Studies Journal*, vol. 1, pp40-52.

claimed that their cultural heritage was threatened by the construction of the bridge.¹³⁴

As Professor Irene Watson writes:

Here the argument over the construction of a bridge from mainland Goolwa to Hindmarsh Island was brought to a crisis when an Aboriginal man told a journalist that the position held by local Nunga women that their secret sacred business would be damaged by the bridge would be fabricated. Within a fortnight this story was to create such a critical uproar that the State called for a Royal Commission of Inquiry.¹³⁵ On 7 July 2010, in a ceremony at the foot of the bridge, the SA Australian Government endorsed the Federal Court's findings that the 'secret women's business' was genuine. This then saw Ngarrindjeri elders lead a symbolic walk across the bridge.¹³⁶

'Historical narratives are very relevant to all of these cases....History has become a matter which can have current legal ramifications about who can claim protection from the law and who cannot, whose dignity will be respected and whose denied.'¹³⁷

The trauma and impact on the elderly women concerned from the Ngarrindjeri nation was never properly addressed or properly compensated. Appreciating the systemic

¹³⁴ The question before the High Court was whether the Bridge Act was validly enacted pursuant to s 51(xxvi) of the Constitution. It was submitted by the plaintiffs that any law enacted under s 51(xxvi) had to be for the benefit or advancement of people of any race, and not to their detriment. The Bridge Act was 'detrimental' because it removed rights the plaintiffs would usually enjoy under the (clearly beneficial) Heritage Protection Act. Alternatively, it was also argued that s51(xxvi) could not authorise laws that were disadvantageous to Indigenous Australians, in view of the benevolence associated with the 1967 constitutional alteration (i.e. the revised drafters' intentions). However in *Kartinyeri* no majority emerged on that crucial beneficial/detrimental law issue. Three Justices (Brennan CJ and McHugh J, with Gaudron J agreeing on this point) found the Bridge Act was a partial repeal of the Heritage Protection Act, as its effect was to in part reduce its scope. As the *Heritage Protection Act* was indisputably a law validly enacted under s 51(xxvi), the same head of power could support its whole or partial repeal (thus illustrating the principle that what Parliament can enact, it can repeal, in whole or in part). On this point, Brennan CJ and McHugh J stated (at 356): Once the true scope of the legislative powers conferred by s 51 are perceived, it is clear that the power which supports a valid Act supports an Act repealing it. This decision meant that these three Justices did not need to consider the scope of s 51(xxvi); Gaudron J still did deliver some obiter views on that issue.¹³⁴ Gummow and Hayne JJ, also in the majority, did not accept the 'repeal' argument, but did find the law validly enacted under s 51(xxvi). Kirby J did not agree that the Bridge Act was a simple repeal of the Heritage Protection Act, and found it invalid. Thus, Gaudron, Gummow, Kirby, and Hayne JJ all considered the scope of s 51(xxvi), dividing on whether s 51(xxvi) only authorises laws for the benefit of the people of a race or, in the alternative, for the benefit of the people of the Aboriginal race. Gummow and Hayne JJ suggested that the power could be used to impose a disadvantage on Aboriginal people, while Gaudron and Kirby JJ disagreed with them. It is worth delving into some of the detail of their reasoning, in order to illustrate the different approaches to constitutional interpretation.¹³⁴ The case illustrates the tendency of the High Court to adopt quite divergent interpretive approaches to constitutional issues, and how that judicial interpretation can lead to a diminution of Indigenous rights. Notably Kirby J in dissent found the law to be beyond the scope of the race power because it was detrimental to Indigenous people by reference to their race. He said (at 417): The purpose of the race power in the Australian Constitution, as I read it, is therefore quite different from that urged for the Commonwealth. It permits special laws for people on the grounds of their race. But not so as adversely and detrimentally to discriminate against such people on that ground. Kirby J also referred to the proper place of human rights standards drawn from comparative or international law in assisting the resolution of constitutional ambiguities. Castan, Melissa *Constitutional deficiencies in the protection of Indigenous rights: reforming the races power*: available at <https://apo.org.au/sites/default/files/resource-files/2011/10/apo-nid26680-1089906.pdf>

¹³⁶ Nason, David (7 July 2010). "[Pain eases with apology over Ngarrindjeri secret women's business](#)". *The Australian*.

¹³⁷ Bielefeld, S. *The dehumanising violence of racism the role of law* (D Phil thesis, Southern Cross University, 2010) available at: <https://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1174&context=theses> 50. See also Singleton, Scott PhD thesis *Drawing inferences in the Proof of Native Title –Historiographic and Cultural Challenges and Recommendations for Judicial Guidance* available at: https://eprints.qut.edu.au/119688/1/Scott_Singleton_Thesis.pdf 77 Chapter 3-The Judicial Historical Endeavour. See also McGrath, A and Jebb, MA *Long History Deep Time: Deepening histories of place* (ANU Press, 2015)

and institutionalised racism that facilitated the disparagement of these Elders as part of the native title process requires meaningful acknowledgment and reparations for past wrongs to facilitate healing.

From the earliest days of colonisation Indigenous women and their communities have experienced massacres, theft of land, theft of their children, enslavement, assaults and imprisonment.¹³⁸ The effects of violence and invasion and the devastation of forcible removal of children and dislocation from Country for Aboriginal and Torres Strait Islander women continue to be unresolved.

The two centuries that followed the arrival of the British were times of devastation for the women of country, of death and disease, of slavery and stolen children, and damage to the connections between people and people and people and country from which women drew their sustenance, their safety and their strength. The shattering experience of colonialism in turn shattered Indigenous female identity, fragmenting the holistic way of being that had sustained Indigenous women in country for so many thousands of years.¹³⁹

Indigenous women today are the inheritors of the multigenerational trauma of dispossession. But we are also the inheritors of a much older and more enduring legacy. We are born of the red desert sand, the shining blue sea and the ancient spirit of this country. And although we have suffered terrible damage as a people and a culture, the essence of our holistic identity remains embedded in this living land. The reflection of our whole selves is all around us, if we can only learn how to perceive and value it. And in so doing we can help to create a future where life within ourselves and all around us is nurtured and made whole.¹⁴⁰

Professor Behrendt argues that there is no universal experience of female oppression, and barely a commonality between the experiences of non-Aboriginal and Torres Strait Islander women and Aboriginal and Torres Strait Islander women in Australia.¹⁴¹ How we think about social relations and whose perspectives form the background for social stories reveal deployments of power that are obscured as a result.¹⁴²

In accordance with what Professor Larissa Behrendt has written, a better approach to the protection of Aboriginal and Torres Strait Islander women's rights is a multi-faceted process that must incorporate the following:

¹³⁸ Reynolds, H. *Dispossession – Black Australians and White Invaders* (Penguin Books, Sydney 1989) 1

¹³⁹ Kwaymullina, Ambelin 'The Creators of the future: Women Law and Telling Stories in Country' in *Us Women Our Ways Our World* (Magabala Books, Broome 2017) 102

¹⁴⁰ *Ibid.* pp 103-104

¹⁴¹ Behrendt, Larissa, 'Aboriginal women and the white lies of the feminist movement: implications for Aboriginal women in rights discourse' (1993) *Australian Feminist Law Journal* 27-44.

¹⁴² Ball, Timmah 'Still talkin' up to the white woman: Encounters with corporate feminism' Griffith Review Edition 56: Millennials strike back available at: <https://griffithreview.com/articles/still-talkin-up-to-the-white-woman-corporate-feminism/>

- A better understanding of how inequalities have become institutionalised, allowing ‘formal equality’ to become a tool that maintains an unequal *status quo* and perpetuates injustice. How for example can seemingly neutral laws operate to produce inequality? How does property law, seemingly neutral, perpetuate a disadvantage that leaves Indigenous people continually dispossessed?
- A thorough understanding of what Indigenous women’s political aspirations are and how these can be accommodated within Australia’s institutions including aspirations for framework agreements or treaties on behalf of Aboriginal and Torres Strait Islander communities and nations;
- A coupling of legal victories to change public (mis)perceptions about Indigenous women. This will require institutional reform and imagining how we perceive Aboriginal and Torres Strait Islander women.
- An exploration of the ideals of identity and equality alongside Indigenous legal and political aspirations through a change to Australia’s institutions which much become more effective at achieving gender equality and fairness as a foundation¹⁴³

Acknowledgment of the unique position occupied by Aboriginal and Torres Strait Islander women in Australian society needs to be translated into recognition of, and engagement with, these women. The current conceptualisation of Aboriginality must be reconstructed, inclusive of female experiences, issues and aspirations. The *Wiyi Yani U Thangani* project is an evident step in the right direction, and AIATSIS submits that strengthened commitment should be reflected in policy and greater consideration of Aboriginal and Torres Strait Islander women’s ability to engage with the native title and land rights processes, as elaborated elsewhere in this submission.

¹⁴³ Behrendt, L. *Achieving Social Justice: Indigenous Rights and Australia’s Future* (Federation Press, Sydney, 2002) pp14-15