

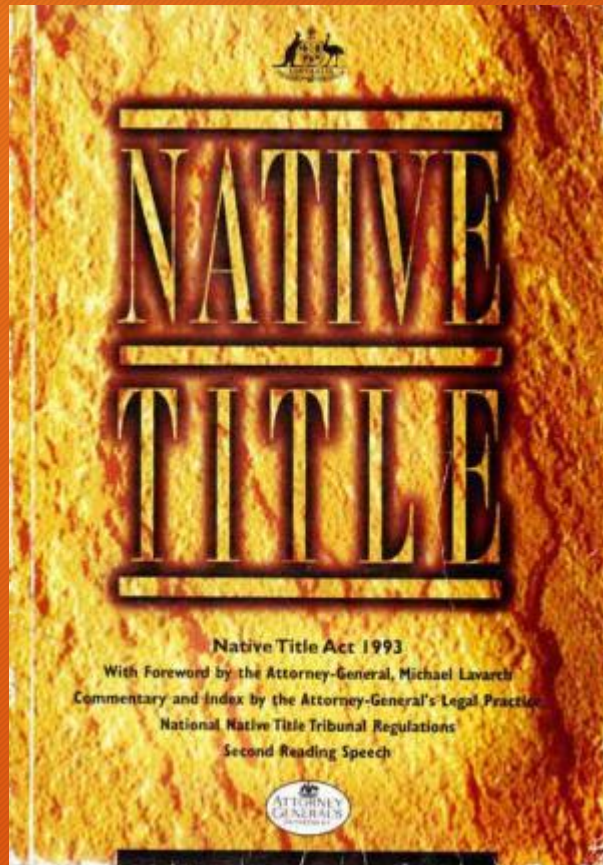
Native Title A 25-year snapshot

Translating 60,000 years of culture into Common Law rights

Greg McIntyre SC



Native Title Act 1993



- NNTT Determination of native title
 - *Waanyi Peoples (No 2)* 14 Feb 1995 - PL
 - *Ngaluma/Injibarndi* Dec 1995 -res in PL
- *Brandy v HREOC* 23 Feb 1995
- *North Ganalanja AC v Qld (Waanyi)* (1996) 185 CLR 595

Native Title Act case [1995] HCA



- Constitutional validity of NTA
- *Biljabu v WA*: Invalidity of Traditional Usages Act (WA) - inconsistent with RDA

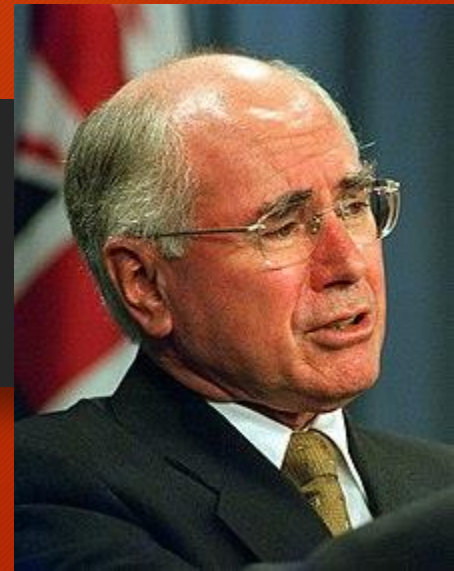
Wik Peoples v Queensland [1993]-[1996]



Gladys Tybingoompa dancing outside the High Court

- Claim lodged 30 June 1993
- Drummond J 29 January 1996
- High Court 23 Dec 1996
- Pastoral lease
 - no exclusive possession
 - rights prevail over native title to the extent of any inconsistency.
 - does not extinguish any remaining native title rights.
- Howard: “pushed the pendulum back too far in the Aboriginal direction”

Howard government's 10 Point Plan 1998



- The ten points were as follows:
- The National Native Title Tribunal holds absolute authority over claims for Native Title
- State governments are empowered to extinguish Native Title over crown lands for matters of "national interest"
- Lands providing public amenities are exempt from Native Title claims
- Mining and pastoral leases are allowed to co-exist with Native Title
- The National Native Title Tribunal can create access to traditional lands rather than granting full Native Title
- A registration test is imposed on all claimants
- The right to claim Native Title in or around urban areas is removed
- Government is permitted to manage land, water, and air issues in any site
- Very strict time limits will be placed on all claims
- Indigenous Land Use Agreements will be created to promote co-existence
- National Native Title Tribunal powers to the Federal Court
- Registration test (including authorization)
- primary production activities , access rights, compulsory acquisitions,
- 34 procedural rights right to negotiate;
- ILUAs
- Validation "intermediate period acts" and "previous exclusive possession acts"
- Howard: "the Wik decision pushed the pendulum too far in the Aboriginal direction. The 10 point plan will return the pendulum to the centre".
- 'Bucket-loads of extinguishment'



Fejo v NT [1998] HCA 58

- Larrakia People
- Darwin land once granted in fee simple had reverted to vacant Crown land - extinguishment - no revival



Yanner v Eaton [1999] HCA 53



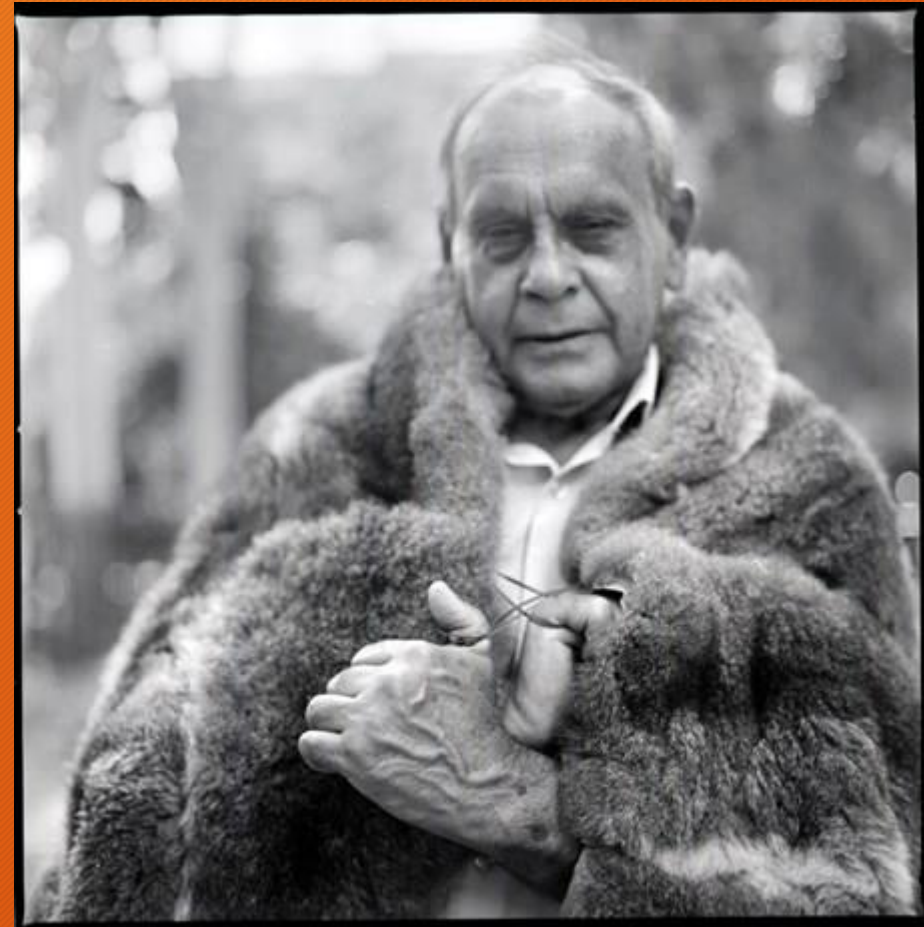
- Right to hunt crocodile not extinguished by *Fauna Conservation Act*
 - Fauna vested in Crown: not beneficial ownership
 - No statutory exemption of traditional use
 - Traditional harpoon - motorized dinghy
- ‘*property*’ does not refer to a thing: it is a description of a legal relationship with a thing.

Cw v Yarmirr [2001] HCA



- Common law Native title exists in the sea beyond the low water mark
- No exclusive native title to the sea because of the public right to fish and navigate and international right of free passage

Yorta Yorta People v Victoria [2002] 214 CLR 422



- **Society:**
- a body of persons united in and by its acknowledgment and observance of a body of laws and customs
- In relation to land
- Connection in accordance with laws and customs
- Normative system
- No new rights -
- No parallel law making
- rules of transmission
- significant adaptations

Western Australia v Ward [2002] HCA 28

- NTA v Common Law
- RDA s 10 protects nt as property
- NTA: partial extinguishment - bundle of rights - inconsistency of incidents - comparison of rights
- Contra *Delgamuukw v BC*
- No protection of cultural knowledge or spiritual connection
- French, Justice Robert --- "Western Australia v Ward: devils and angels in the detail" (FCA) [2002] FedJSchol 14
- Mining lease
- Occupation permit
- Reserve v Vested
- Project area v Actual grants
- Public fishing

Akiba v Commonwealth [2013] HCA 33

- Single Society
- Right to take - use unconstrained - includes rights use for trade
- Purpose for exercising right not an incident of right
- Non-exclusiveness of sea rights irrelevant
- Assertion of right must be corroborated, e.g., by evidence of exercise, expert evidence
- Preservation restraints, approvals or cultural restrictions does not mean non-commercial



Extinguishment

Queensland v Congoo [2015] HCA 17



- Bar-Barrum People
- WWII Artillery Range - National Security Act - possession - intent to affect existing rights as little as possible - sunset clause
- Extinguishment - ‘inconsistency of rights’?
 - FCFCA - 3 x No; 2 x Yes - duration
 - HCA -
 - 3 x No - no exclusive possession - purpose;
 - 3 x Yes - intention & adverse dominion irrelevant - rights

WA v Brown [2014] HCA 8 - Iron Ore (Mt Goldsworthy) Agreement Act - leases

Bennett J - ‘operational inconsistency’ - rejected: FC
HCA - ML - rights not exercise



No Native Title Determination - proving native title

Connection Issues:

- a. Whether Badimia country at sovereignty
 - b. Whether apical ancestors Badimia people.
 - c. whether the native title rights and interests possessed under traditional laws and customs
 - d. Whether present connection with the claim area by traditional laws and customs.
- *CG (Deceased) on behalf of the Badimia People v State of Western Australia* [2015] FCA 204 and (No 2) [2015] FCA 507
 - No body of Badimia knowledge about boundaries.
 - 4 of 18 apical ancestors Badimia
 - Contemporary laws and customs not traditional.
 - Ancestral and historical Badimia people
 - No normative system.
- Appeal: *CG (Decd) (Badimia) v WA* [2016] FCAFC 67
- Power: s 225 & s 61(1) : *Wyman (Bidjara People v Qld* [2015] FCAFC 108 confirmed
 - Natural justice
 - Discretion: proof no person /society holding native title



Noongar South West Native Title Settlement

McGlade v WA

Bennell v WA [2006] FCA 1243

6 ILUAs

30k people, 200,000 sq km

Noongar (Koorak, Nitja, Boordawan) (Past, Present, Future) Recognition Act 2016

Noongar Boodja Trust - \$50m pa for 12 years

Central Services Corp + 6 Regional Corps \$10/12yrs

Noongar Land Estate - 320,000 ha held by NBT

National Parks - Co-operative & Joint Management

Land Access Crown lands for customary activities

Noongar Standard Heritage Agreement

Noongar Heritage Partnership Agreement

Noongar Housing prog - 121 properties to NBT

Noongar business development -Govt services

Noongar Cultural Centre and offices

Noongar Land Fund \$46,850,000 over 10 years



Constitutional recognition

Acknowledgement of First Australians

Constitution - preamble/head of power

Statutory declaration

Section 51 (xxvi) - Race power - ATSI power & acknowledgment

Racial discrimination prohibition

ATSI Consultation body

Repeal section 25: If State law disqualifies persons of any race from voting then not counted as State residents



- Expert Panel, 2011
- Parliamentary Joint Select Committee, 2015
- Referendum Council, 7 Dec 2015 - 12 Regional Dialogues
- National Indigenous Constitutional Convention, Uluru, April 2017

National Indigenous position

First Nations voice

- Makarrata Commission
- - treaty
- - truth

ULURU STATEMENT FROM THE HEART



Constitutional Voice Amendment

- Section 60A(1) There shall be an Aboriginal and Torres Strait Islander body which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander people
- (2) The Parliament shall have power to make laws with respect to that body.
- Section 101 Inter-State Commission re trade & commerce - *NSW v Cth (1915)*: not Ct - defunct - I-SC Act 1975 - repealed 1989

Political representation

- National Aboriginal Consultative Council 1972-77
- National Aboriginal Conference 1977-85
- Aboriginal and Torres Strait Islander Commission 1990 - 2005
- Aboriginal and Torres Strait Islander Social Justice Commissioner 1992 AHRC Act & NTA
- Council for Aboriginal Reconciliation Act 1991 - 2001 - Reconciliation Australia
- National Congress of Australia's First Peoples 2008
- PM's Indigenous Advisory Council 2013
- Referendum Council 2015- 2017

Towards Treaties

TREATY COMMITTEE: Nugget Coombs, Judith Wright, Garth Nettheim 1979-1983

MAKARRATA (Yolngu: “spear penetrating”) - coming together after a struggle - NAC
April 1979

VICTORIA: Advancing the Treaty Process with Aboriginal Victorians Act 2018 - Body of 30 - 6
voting areas

SOUTH AUSTRALIA:

Treaty Commissioner 2016

Aboriginal Treaty Advisory Committee - expressions of interest in negotiating


Buthara Agreement - Narrunga Nation - 3 yr negotiation - Feb 2018

Adnymahtanha Nation

Ngarrindjerri Nation

TREATY
let's get it right

Fiduciary Duty: Honour of the Crown



Honour of the Crown

- Unwritten constitutional principle that the crown must act honourably vis a vis aboriginal peoples
- What does this require?
 - the duty to **consult** aboriginal peoples when contemplating decisions or conduct that may adversely affect their rights,
 - the duty to **fulfill the purpose of treaties** and be diligent in fulfilling constitutional obligations owed applicable Aboriginal peoples – including treaties
 - to act honourably in defining the rights it guarantees and in reconciling them with other rights and interests.

4

- *Cherokee Nation v Georgia* 1831 US SC
- *US v Mitchell* 1983 US SC
- *Guerin v Queen* 1984 SC Canada
- *R v Sparrow* 1990 SC Canada
- *Delgamuukw v BC* 1997 SC Canada
- *Te Runanga o Wharekauri v AG* 1993 NZ CA Cooke P
- *Mabo (No 2)* Toohey J