

# INDIGENOUS LAND RIGHTS: AUSTRALIA'S RESPONSE FOLLOWING *MABO* — THE PRESENT AND THE FUTURE\*

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## INTRODUCTION

It is both helpful and necessary to set the scene for the discussion of both the present and the future so that there is an understanding of where Australia has come from since 1770, when Captain Cook first planted the British flag on Australian soil. As history has shown, it is a pretty low base. It is a story now well known to many, but certainly not to all, Australians. But, before that, it is necessary to identify what is encompassed within the expression 'Indigenous Land Rights'. It is not a concept which simply represents what the law of Australia would call 'freehold', the fullest description of the bundle of rights which attaches to the rights which attach to personal ownership of land. It is far more than that. It is a concept which relates back to the earliest occupiers of Australia, which recent evidence puts back to up to 65 000 years.

It is difficult to give adequate words to describe the concept. Many have tried. I include two quotes:

[Land is] hearth, home, the source and locus of life, and everlastingness of spirit.<sup>1</sup>

The Dreaming taught why the world must be maintained; the land taught how [the world must be maintained]. Songlines distributed land spiritually; 'country distributed it geographically.'<sup>2</sup>

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<sup>1</sup> This account was first published by the Australian anthropologist, W E H Stanner in *After the Dreaming: The Boyer Lectures 1968* (1968, Australian Broadcasting Commission) and reproduced in the book of his essays, *White Man Got No Dreaming* (1979, Australian National University Press), 230.

<sup>2</sup> Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia*, (2011, Allen & Unwin) 139. Incidentally, Gammage and more recently some others have cogently presented the thesis that the Indigenous Australians were a much more sophisticated community or communities than mere hunter gatherers — see for example, Paul Irish, *Hidden in Plain View: The Aboriginal People of Coastal Sydney*, (2017, New South Publishing); and Bruce Pascoe, *Dark Emu, Black Seeds: Agriculture or Accident*, (2017, Magabala Books). Gammage, in his Introduction says at 2: 'The Law — an ecological philosophy enforced by religious sanction — compelled people to care for their count.' That is a quite different and persuasive thesis than that of Jared Diamond in his monumental book *Guns, Germs and Steel: The Fates of Human Societies*, (1997, W W Norton).

There is no dispute about the strength and depth of the relationship of Indigenous Australians with their country; a visceral interdependent relationship born of long knowledge and understanding and the corresponding responsibility of care and accountability to the country. It is amply recognised in the High Court in the seminal decision of *Mabo v Queensland (No 2)* ('*Mabo*')<sup>3</sup> given on 3 June 1992.

## I SOME BRIEF HISTORY

The Admiralty Instructions to Captain James Cook on his voyage on the Endeavour in 1768–1770 included a direction to sail to Tahiti to observe the transit of Venus, and then to sail south in search of the 'Great Southern' continent. The 'Secret Instructions' (held in the National Library of Australia) included the following:

You are also WITH THE CONSENT OF THE NATIVES to take possession of convenient situations in the country in the name of the King of Great Britain, or if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.<sup>4</sup>

As we know, Cook, after seeing New Zealand, travelled up the eastern coast of Australia, stopping in Botany Bay in late April 1770, and then continuing north mapping the coastline. He ultimately, on 22 August 1770, on Possession Island on the northern tip of Queensland took possession of the eastern coast of Australia. He had noted signs of habitation as he sailed up the coast, including fires, but, I infer, did not consider the habitation was in any sense ordered or structured. He noted in his diary that the Aborigines 'lived mainly on shellfish and did not cultivate the land or erect permanent habitations on it' and that the land was 'in a pure state of nature.' Hence, the description TERRA NULLIUS. History has shown that he was wrong. (It is interesting to speculate what might have happened if Cook had been more informed). I am not aware of any study of the alternatives.

The Treaty of Waitangi, which governs the relationship between European settlers and the Maoris in New Zealand, was made some 70 years later in 1840. The European

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<sup>3</sup> (1992) 172 CLR 1.

<sup>4</sup> A transcript of the *Secret Instructions for Lieutenant James Cook Appointed to Command His Majesty's Bark the Endeavour* (30 July 1768) is available at: <[https://www.foundingdocs.gov.au/resources/transcripts/nsw1\\_doc\\_1768.pdf](https://www.foundingdocs.gov.au/resources/transcripts/nsw1_doc_1768.pdf)> (emphasis added). A photograph of the original can be found at <<https://www.foundingdocs.gov.au/item-did-34.html>>.

settlement of what became Canada commenced much earlier, and is marked by territorial battles between the French and the British, and later with the settlers in what became the United States. In those wars, the Indigenous Canadians often played a significant and strategic part. At the conclusion of the Seven Years' War between the British and the French, in 1760, the British entered the Treaty of Oswegatchie with seven Indigenous Tribes centred around the St Lawrence Valley. The Royal Proclamation of 1763 purported to establish the borders of the British Province of Quebec and to reserve the territory to the west of the Appalachian Mountains for Indigenous Peoples. Its significance seems to have been ignored in the Treaty of Paris 1783, negotiated without participation of Indigenous Peoples. Thereafter, over the following decades, the British entered into treaties with the Indigenous Canadians on many occasions, save for the far western province of British Columbia. So, at least it can be seen that the notion of Treaties with Indigenous People was in currency by the time of Cook's voyage.<sup>5</sup>

It took a long time for that wrong view to be corrected. It is not necessary to trace in any detail the relationship between the Indigenous Australians and those who settled from other places. It is not a history of which most Australians are proud. It is a history, amongst other things, of colonial settlement over Indigenous land with the consequent dispossession of the Aboriginal Australians, and without recognition of the nature of the Indigenous Peoples' relationship with their country or the effects of such displacement upon them. It is a history reflected in the famous speech by Prime Minister Paul Keating at Redfern in December 1992 and by Prime Minister Kevin Rudd in his Apology to Australia's Indigenous Peoples in February 2008.

I move to the 1960s decade. It is in that decade, in 1967, that a Constitutional Referendum, supported by more than 90% of Australians, voted for constitutional recognition of the First Australians, to enable the Commonwealth to specifically legislate for the betterment of Indigenous Australians, and for them to be counted in the census of the Australian population. Even to say that today is embarrassing — to think that for 180 years after the First Fleet sailed into Botany Bay, the Aboriginal Australians were not even counted in the census. But not all were, by then, sympathetic to their land interests. The notion of terra nullius persisted.

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<sup>5</sup> See generally: <[www.thecanadianencyclopedia.ca/en/article/aboriginal-treaties](http://www.thecanadianencyclopedia.ca/en/article/aboriginal-treaties)>

In the early 1960s, the grant of certain mining leases to Nabalco was proposed on the Gove Peninsula, where the Yonglu/Yirrkala People lived on the Arnhem Land Reserve. Those people resisted that proposal, and asserted their traditional interests in that land. That was expressed in the Yirrkala Bark Petitions presented to the parliament of Australia (and tabled in the House of Representatives on 14 and 28 August 1993). The Bark Petitions asserted the traditional interests of the Yirrkala People in that land from ‘time immemorial’ and referred to ‘places sacred’ to them. As they were received and tabled in the Parliament, they represent the first recognition of Indigenous Land claims in Australian legal structures.<sup>6</sup> Despite the Bark Petitions, the mining leases were granted under the *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT).

The next major event signalling the Indigenous assertion of land rights took place in 1966. In August of that year, the Gurindji Aboriginals working as stockmen on Wave Hill Station, owned by the Vestey interests, walked off the station. Under the leadership of Vincent Lingiari, they protested against the unequal treatment compared to white stockmen. Their concerns evolved into the strong claim that the station itself was on their Gurindji land. The stand-off lasted several years, and was broken only when the Whitlam Government was elected in late 1972. As is now well known, a substantial portion of Wave Hill Station was acquired by the Government and then granted to the Gurindji People. There is an iconic photograph of Prime Minister Whitlam, just after handing over the deeds to the station, pouring dirt from his hand to that of Vincent Lingiari.<sup>7</sup> As an aside, I note that in 1967, Ted Egan, a well-known and much respected Northern Territorian, wrote the song ‘Gurindji Blues.’ It was recorded in 1971, sung by a young Yolngu man, now internationally famous as a singer songwriter, the recently deceased Dr G Yunupingu. It may well be his first recording. I should note that the grant to the Gurindji People was a ‘conventional’ land grant, but made in recognition of their traditional communal interests in land.

The Yirrkala People of the Gove Peninsula did not stop with their Petitions. They promptly brought proceedings in the Supreme Court of the Northern Territory in

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<sup>6</sup> House of Representatives Select Committee, Parliament of Australia, *Report on the Grievances of the Yirrkala Aborigines, Arnhem Land Reserve* (1963) Parliamentary Papers 1962–63, No 311: <[http://indigenoustrights.net.au/resources/documents/report\\_on\\_grievances\\_of\\_yirrkala\\_aborigines](http://indigenoustrights.net.au/resources/documents/report_on_grievances_of_yirrkala_aborigines)>.

<sup>7</sup> The Gurindji story, including the period after the land grant, is well told in Charlie Ward, *A Handful of Sand: The Gurindji Struggle, after the Walk-off*, (2011, Monash University Publishing).

*Milurpump v Nabalco Pty Ltd and The Commonwealth* (the ‘Gove Land Rights Case’)<sup>8</sup> to challenge the validity of the Ordinance and of the mining leases. Judgment was given in 1971. The claim was dismissed because, although the judge, Justice Blackburn, had made findings of fact sympathetic to the Yonngu People about their traditional interests in the land, the doctrine of communal native title did not form, and never has formed, part of the law of any part of Australia. There was no appeal from that judgment.

Soon after, the Aboriginal Embassy was set up on the lawns outside the then Parliament House, asserting Indigenous land rights in Australia. In response to what is commonly called the *Gove Land Rights Case* decision, upon the Labor Government coming into power, the Prime Minister Gough Whitlam established the Aboriginal Land Rights Commission, headed by Sir Edward Woodward (who appeared as senior counsel for the Yonngu People in that case), as a Royal Commission. It made a number of recommendations in favour of recognising Aboriginal Land Rights.

That, in turn, led to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). It provided for circumstances in which the traditional Aboriginal owners of land in the Northern Territory, which was unalienated Crown land, could be granted that land in perpetuity. That Act was instigated by the Whitlam Government, but was passed only after the Fraser Government was appointed. The Liberal Attorney-General responsible for the passage of that Act through Parliament was Bob Ellicott AO QC, who, as Solicitor-General of the Commonwealth, had appeared for the Commonwealth in the *Gove Land Rights Case*.

The shared approach in principle of the two main political parties was not one which persisted for long. It was reflected in South Australia, where the Labor Premier Don Dunstan had instigated the passage of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), but its passage was effected by the Liberal Premier David Tonkin, granting to those People an area roughly described as the north-western quarter of South Australia. No other state or territory followed that model. The *Land Rights Act* has proved to be largely effective. Over time, about 50% of the land area of the Northern Territory has been transferred to the Aboriginal communities who have been found to have been and to be the traditional owners as defined in that Act.

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<sup>8</sup> (1971) 17 FLR 141.

Another very significant enactment passed by the Fraser Government, after its instigation by the Whitlam Government, was the *Racial Discrimination Act 1975* (Cth). Its significance will be explained shortly.

## II EDDIE MABO

What a difference a man can make!

Eddie Mabo was a Meriam Islander, part of the Murray Islands in the Torres Strait. Those islands were never occupied by European settlers in the same way as the Australian mainland, so it was thought his circumstances might provide a better vehicle to assert and have native title recognised. As it happened, that difference was not significant.<sup>9</sup> His claim was made in 1982. The mood, at least in Queensland, was one of strong opposition.

About the same time as his claim was made, the High Court of Australia delivered judgment in *Koowarta v Bjelke Peterson; Queensland v Commonwealth*.<sup>10</sup> That case arose from the proposed acquisition of Archer River cattle station by John Koowarta from the pastoral lease holder. Koowarta was an Aboriginal man, acting on behalf of the Wik People of the far northern part of the York Peninsula. Bjelke Peterson, the then Premier of Queensland, blocked the acquisition as he did not consider it appropriate for Aboriginal People to become station operators. Koowarta successfully challenged that decision as discriminatory, and Queensland's separate action to have the *Racial Discrimination Act* declared invalid as beyond the power of the Commonwealth was unsuccessful.

Bjelke Peterson attempted a more direct road block to the claim. Queensland enacted the *Coastal Islander Declaration Act 1985* (Qld) which purported to wipe out any property rights of the Torres Strait Islanders as at 1879, without any form of compensation. That enactment, if valid, would have eliminated any native title rights held in the Murray Islands. It was unsuccessful.<sup>11</sup> That obstacle cleared, Mabo's claim could proceed. The claim was heard, the findings made, and the judgment given in the

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<sup>9</sup> The story of the claim and its outcome, and the subsequent path to the *Native Title Act 1993* (Cth) is well told by Frank Brennan in *One Land, One Nation – Mabo: Towards 2001*, (1995, University of Queensland Press).

<sup>10</sup> (1982) 153 CLR 168.

<sup>11</sup> *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

Queensland Supreme Court. The claim was not successful. On appeal, as is well known in *Mabo No 2*, on 3 June 1992 the High Court in very forceful judgments decided that the assumption of terra nullius was wrong. It concluded as follows:

The Court must proceed from the Crown's acquisition of sovereignty, initially in 1770;

The Crown therefore had radical title to all of Australia;

Native title nevertheless survived, subject to the Crown's subsequent acts; and

The Crown's subsequent acts could extinguish, in whole or in part, the native title rights.

It also concluded that native title rights, to be recognised, must have existed at the time of settlement and that the practice of those rights according to the traditional laws and customs of the particular Aboriginal community had continued to the time of recognition, by those who were the holders of native title at settlement. The 10 years had been worth the wait!

The Mabo decision immediately aroused strong community reactions — including the *Herald Sun* heading: 'Mabo Madness ... the fear of losing the Hills Hoist from the backyard'<sup>12</sup>— and, on the other hand, those who felt it was not just time, but well over time, to recognise the native title of the First Australians.

There followed an intense period of negotiation and lobbying, involving the states and territories, pastoralists and mining interests, other commercial and community interests and, of course, the Indigenous Australians themselves. It was fraught and complex, as described vividly by Brennan.<sup>13</sup> The Parliamentary process itself was complex and prolonged. Ultimately, the legislation was passed. It is noteworthy that the Indigenous Australians were able to present a coherent and consistent position, including for the purposes of compromise, to reach a result. Lois O'Donoghue spoke of the new generation of Indigenous leaders, including Noel Pearson, then the Director of the Cape York Land Council, and Pat Dodson (now a Senator), Chair of the Council for Aboriginal Reconciliation, and Marcia Langton, also a member of the Cape York Land

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<sup>12</sup> Editorial, 'Time to Stop the Mabo Madness' *The Sunday Herald-Sun* (Melbourne), 6 June 1993, 30. A copy of the original news clipping can be found at <http://australianpolitics.com/2012/05/29/mabo-madness-from-1993.html#more-6438>.

<sup>13</sup> Brennan, above n 9, Chapter 2.

Council. The Indigenous negotiating team included the Directors of the Kimberley Land Council, Northern Land Council and Central Land Council.

### III THE *NATIVE TITLE ACT 1993* (CTH)

The Act expressed its purpose as providing for the recognition and protection of native title, and precluded its extinguishment except as provided under the Act. It adopted the *Mabo Case* definition of native title: the threefold elements of a community at settlement operating under its traditional laws and customs, the continuity of the society under those laws and customs, and a current society that can be traced back to the society at settlement. The Act was amended from time to time, most notably in 1998 and 2009. It is not necessary to describe those amendments in any detail.<sup>14</sup>

There was one direct challenge to the validity of the Act, emanating from Western Australia. Its challenge, ultimately based largely on what were said to be distinguishing features of Western Australian constitutional history, failed.<sup>15</sup> There followed a series of High Court decisions on the meaning and operation of the Act. Progress was slow. Some of the delay is explained by the need for the High Court to provide its guidance. Some was due to the novelty of the type of decision required. And some was due to the need for the states and territories, in the public interest, requiring clear proof of the elements of native title for its recognition and of them and other interests to know clearly whether their Crown-granted rights had or had not been extinguished. The concerns, or caution, is, at least in the early stages, understandable.

The nature of ‘connection’ and the quality of evidence relevant to its proof emerged from the High Court decisions in *Western Australia v Ward*<sup>16</sup> and *Members of the Yorta Yorta Aboriginal Community v State of Victoria*.<sup>17</sup> In *Commonwealth of Australia v Yarmirr*<sup>18</sup> it was held that native title rights, if proven, could be recognised over areas

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<sup>14</sup> The 1998 amendments were in part in response to a decision of the High Court in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, precluding the National Native Title Tribunal from its role as principal decision maker under the Act, as well as changing the provisions about how to address future acts, and refining the provisions relating to extinguishment. The 2009 amendments were largely aimed at facilitating the making and enforcement of agreements about the recognition of native title in an effort to speed up that process).

<sup>15</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373 (‘*Native Title Act Case*’).

<sup>16</sup> (2002) 76 ALJR 1099.

<sup>17</sup> (2002) 76 ALJR 1306.

<sup>18</sup> (1999) 201 CLR 351.



of the sea and the sea bed, including below the low water mark, but below the low water mark, they could not be an exclusive right. In *Akiba v Commonwealth*<sup>19</sup> the native title rights of a broader community in the area of land and waters of 13 Indigenous communities in the Torres Strait were recognised, including the right to fish and take other resources for commercial purposes. That right has also been found to exist in relation to mainland Aboriginal communities where the evidence justifies it.<sup>20</sup>

The fear of freehold grants of land being affected by native title was dispelled in *Fejo v Northern Territory*.<sup>21</sup> On the other hand, the fact that the grant by the Crown of pastoral leases did not fully extinguish native title was determined in *Wik Peoples v Queensland*.<sup>22</sup> A pastoral lease necessarily extinguished any native title right to exclusive possession of the land, but in significant respects native title rights were found to be capable of continuing to exist over pastoral leases. Although initially of concern to some pastoralists, it is proper to note that it is commonplace now for pastoralists to welcome such a determination and to celebrate with the relevant Aboriginal community the recognition of their native title. More recently, in *State of Western Australia v Brown*,<sup>23</sup> a similar conclusion was reached in relation to mineral exploration and mining leases. The grant of such interests by the Crown did not itself extinguish native title rights over the whole of the leased area, but such a grant was necessarily inconsistent with any native title right to exclusive possession of the leased area, and in the exercise of rights under such a grant the native title rights which existed were subordinate to the miner's activities.

It is necessary to say something more about extinguishment of native title rights and interests. Not surprisingly, this was a controversial topic during the negotiations leading up to the Act itself. As noted, the *Mabo Case* recognised that, in accordance with its radical title, the Crown originally through the colonies and then through the Commonwealth and the States and Territories could validly make grants of interests in land. It has been accepted that all such grants of interests in land up to 1975 have the

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<sup>19</sup> (2013) HCA 39; (2013) 250 CLR 209.

<sup>20</sup> *Rumburriya Borroloola Claim Group v Northern Territory* ([2016] FCA 776). There was no appeal from that decision.

<sup>21</sup> (1998) 195 CLR 96.

<sup>22</sup> (1996) 186 CLR 1.

<sup>23</sup> (2014) HCA 8.

relevant extinguishing effect upon native title interests. The traditional owners of that land have lost their native title rights to the extent of inconsistency, and there is no basis prescribed for them to be compensated for that loss.

After 1975, the position is different. By a complex set of provisions, grants of interests in land made after that date and up to 1992, in the face of existing (but not yet recognised) native title rights are unlawful because they involved the taking away of native title rights without compensation. Such grants are validated, by the Act and by complementary state and territory legislation also passed about the time of the Act, but the holders of such native title rights and interests are entitled to compensation for having their rights and interests unlawfully taken away. There is more to say about compensation shortly. From 1993, after the Act commenced, it specifically provided that native title rights and interests cannot be taken away except in accordance with the provisions of the Act itself. There is a legislatively prescribed process by which that might occur: such acts are called 'future acts'. The process is also referred to below.

#### IV THE PRESENT

It is now 25 years since the commencement of the Act. Much has been achieved. There have been 395 determinations about recognising the existence of native title, with much more momentum since the 2009 amendments to the Act. That no doubt also reflects the changed community attitudes to the recognition of native title, as well as the experience progressively gained by those responsible for maintaining and responding to claims. A substantial part of the Australian continent has been the subject of claims, and many have been resolved. In South Australia, all claims from the far west and above Port Augusta and on a line from there east to the border have, in essence, been determined. There are 259 claimant applications still to be resolved (including seven compensation applications). That number includes a significant proportion in the Northern Territory where the practice, by agreement between the Indigenous claimants and the pastoralists, is to split claims into smaller areas to match the areas of pastoral leases.

At present, and for some years, the Federal Court has been able to make consent determinations at the rate of about 50 per year. In addition, the attitude of Governments has become more responsive; the resolution of claims may also increase. The Western Australian Government has recently agreed to the resolution of all claims from Perth

southwards over the south-western section of the State by agreement – the Noongyar resolution of a significant number of claims.

A further means for the less formal resolution of claims without a court determination, or the resolution of issues within claims, is available by the Indigenous Land Use Agreement ('ILUA') registered by the Native Title Registrar of the National Native Title Tribunal under the Act. That alternative has, to date, resulted in 1186 registered ILUAs.

A map depicting the present extent of recognition of Indigenous rights over country is at the end of this presentation.<sup>24</sup> The map should be read, noting that some 50% of the area of the Northern Territory has also been the subject of land grants under the *Aboriginal Land Rights (Northern Territory) Act 1976*, and that the north-eastern section of South Australia has also been the subject of specific legislative grant, and that the south-eastern corner of Western Australia is now the subject of the Noongyar settlement with the Western Australian Government.

It is noteworthy that, as the ATSIC Social Justice Commissioner, Tom Calma, said in 2011, that the early doomsday prophets have been shown to be wrong. The fears of immense social and commercial disruption by the recognition of Indigenous land rights under the Act have not come to pass. He concluded a speech with the following:

None of [the feared consequences] eventuated. Native title has disproven many of the doubts and fears it raised 15 years ago. Rather, there are any number of stories of farmers, mining companies and governments using the system to formalise positive relationships with local indigenous communities.<sup>25</sup>

The acceptance and support of the Australian community to the recognition of Indigenous rights to country, under the Act, particularly of those most in direct contact with Indigenous communities is one of the most significant outcomes of the Act itself, and of those charged with its implementation.

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<sup>24</sup> Map reproduced with the kind permission of the National Native Title Tribunal. I am indebted to the National Native Title Tribunal for the map, and for the statistics cited; they are available publicly on its website: <<http://www.nntt.gov.au/assistance/Geospatial/Pages/Maps.aspx>> The statistics are as at 30 June 2017.

<sup>25</sup> Tom Calma 'Act closed wounds but not the gap' Sydney Morning Herald, 7 January 2009, Wednesday Opinion pg 11.

## V THE FUTURE CHALLENGES

### A *Existing Claims for Recognition of Native Title*

Although the progress of recognition of Indigenous land rights under the Act is proceeding now, with an end in sight, it continues to present challenges. Proof of the elements of native title under the Act is not becoming easier. The dissipation of knowledge, partly through government policies in the middle decades of the 20<sup>th</sup> Century which discouraged the continuance of culture and language, and partly through the passing on of the elders of the Aboriginal communities without having given their knowledge of the laws and customs fully to younger generations, is a significant problem. Many of the elders living in 1992 are no longer with us.

I recall my first hearing of traditional evidence — it was graphic, sophisticated and unimpeachably impressive.<sup>26</sup> The quality of that evidence has become less apparent in many instances because of the factors mentioned, particularly in less remote areas. In some instances, the current claimants are more than one generation removed from that level of knowledge. That is not to suggest that the claimants are less genuine, or intense in their relationship with their country. In the absence of properly preserved evidence, the significance of anthropological evidence may become greater, and the understanding of the judge about what to make of the available Indigenous evidence may become more important. It is in that light that a former Justice of the Federal Court (later Chief Justice of the High Court of Australia), the Hon Robert French AC, speaking extra-curially, suggested applying a reverse onus of proof to the state or territory in whose area the claim was being made.

The same problems of a lack of resources, both anthropological and legal, and the difficulty and expense of assembling the claim group to authorise the claim and then its agreed settlement, are said to continue to exist. The passage of time also seems to have given rise to more intra-indigenous disputation about the entitlement to country, and about who is entitled to be part of a claim group. I will say more about the latter aspect in the next two subsections of this paper.

Intra-indigenous disputation about who is entitled to particular country is not surprising. It is a dictate of s 68 of the Act that there should be only one determination

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<sup>26</sup> *Alyawarr, Kaytetye, Waramungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539.

recognising native title over particular country. That requires drawing specific lines on maps, not a process inherent in traditional laws and customs. But some disputes go further than that. *The Lake Torrens Overlap Proceeding (No 3)*<sup>27</sup> provides an example. Lake Torrens, west of the Flinders Ranges, is bounded by three recognised native title claim groups: to the east, the Adnyamathanha People; to the west the Kokatha People; and to the south the Barngarla People. Each group brought separate claims to have Lake Torrens itself recognised as their traditional country. The richness of the competing evidence of dreaming stories and significant sites, which was held to be genuine, but inconsistent each with the other, highlights the difficulty of the elapse of time, and the potential for reconstruction of perceived traditional laws and customs. I heard that case, and in the result I was not satisfied that any one of the three claims groups had proved the claim at the expense of the others. That judgment is on appeal, so it is not appropriate to comment further.

### B *Compensation Claims*

The second topic in the focus on the future, is the topic of compensation claims. Division 5 of Part 2 of the Act provides for such claims. Section 51A provides that the outer limit of compensation is the amount payable if the compensation were assessed as on compulsory acquisition of freehold land, save for the need for the compensation to be on ‘just terms’ as required under s 53. There has been only one claim to date in which the quantification of the compensation has been assessed in an exposed way.<sup>28</sup> The claim concerned the land in the Township of Timber Creek, in the north-western part of the Northern Territory, where Timber Creek itself runs into the upper reaches of the Victoria River which runs north into the Joseph Bonaparte Gulf of the Timor Sea.

The Federal Court had previously determined that the claimant group were the holders of native title in the Township of Timber Creek and adjoining areas, subject to areas where the native title rights had been extinguished, either partially or totally.<sup>29</sup> The declaration of the Township prior to the commencement of the *Racial Discrimination Act 1975* had already extinguished the right of exclusive control of access to their country, but there were extensive residual non-exclusive native title rights. The

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<sup>27</sup> [2016] FCA 899.

<sup>28</sup> An earlier consent determination was made awarding agreed compensation, but the amount of the compensation paid was confidential: *De Rose v South Australia* [2013] FCA 988.

<sup>29</sup> *Griffiths v Northern Territory* (2006) 165 FCR 300 and on appeal (2007) 165 FCR 391.

compensation claim concerned the compensation for the loss of the residual non-exclusive native title rights, where the extinguishing acts had taken place after the commencement of the *Racial Discrimination Act 1975*, and no compensation had been paid at the time.

The case concerned how that compensation was to be assessed. To explain the principal issue and how it was resolved, ultimately on appeal to the Full Court (it is expected that leave to appeal to the High Court will be sought), the facts can be very simplified. The unlawful acts can be said to have taken place in about 1985. There were about 25 of them, concerning areas of between 1 hectare and about 20 hectares. In one instance, the unlawful act was on the direct route of an important dreaming story, and so blocked the dreaming line. The several unlawful acts interfered with the enjoyment of other adjacent areas, for example, because ceremonies could not be conducted where there were proximate privately owned areas.

There were four substantive issues of principle in the case:

- first, whether the wrongfully acquired property, which extinguished the residual native title, should be valued at the date of the unlawful act (1985, on the simplified facts) or at the date of the validation of that unlawful act;
- second, the value of the non-exclusive rights which were then extinguished by the unlawful but validated acts after 1975 as a proportion of the freehold value of the acquired land;
- third, what allowance for interest should be made for the lost value of those rights up to the time of the judgment; and
- fourth, and most significantly, what compensation should be allowed for the loss attributable to the special relationship of the Indigenous People for having been deprived of their land when their residual native title rights were extinguished.

The first three issues were resolved as follows. The value of the acquired rights was to be made at the date of the unlawful act. The value of the acquired non-exclusive native title rights was 65% of the freehold value of the land. The interest on the resulting compensation was to be assessed as simple interest from the unlawful acts to the date of judgment (a period of some 30 years), so the claim for compound interest was rejected. It would obviously have produced a much greater sum. The decision on the method of assessing pre-judgment interest did not exclude a different method of

assessing interest depending on the evidence in any particular compensation case. It is not necessary to comment on those aspects of the judgment.

The non-economic loss for the loss of the cultural and spiritual relationship with their land is of the major interest. I have discussed above the special nature of the Indigenous Australians' cultural and spiritual relationship with country. In the case, there was specific evidence from the claimants, supported by anthropological evidence, of such loss. The evidence showed that certain senior members of the claim group had a persisting and strong sense of guilt for having 'allowed' the acquisitions when they were, and remain, responsible for the land, as well as a strong sense of loss. That loss was to be assessed only for the loss flowing from the unlawful, but subsequently validated, acquisitions, that is those which occurred after 1975. The earlier history, and dealings in or with the land were not capable of compensation.

Rhetorically, with that loss now for over three decades and over about 25 allotments, with the consequences referred to, including the significant disturbance of the Dreaming track, and a loss which will continue into the indeterminate future, how would each of you have assessed that compensation? The primary judge assessed that element of the compensation at A\$1.3 million. The Court of Appeal did not disturb that assessment.

For the future, the number of compensation claims will undoubtedly be significant. The flow of them may await any High Court judgment in that case. The main challenges for the future will lie in assessing the non-economic loss element of compensation. First, each case will be different. Country which is remote, and where the claimants have maintained a close connection with their land, provides a very solid evidentiary base for the judgment to be made. Other cases may involve less forceful evidence, but perhaps balanced by the degree of sorrow or resentment for the loss of country. It is unlikely that a 'tariff' or standard approach will be readily utilised, at least for a time. Second, that will present a challenge to those who are responsible for attempting to negotiate such claims. And, third and in turn, that may present a challenge to the disposition of many of those claims in as timely a manner as desirable.

A separate issue is the degree of accountability the wider Australian community may be entitled to expect for the compensation awarded. The considerations relevant to this aspect may be different from the level of accountability, if any, which the wider

Australian community may be entitled to expect from the income received by an Indigenous community in the exercise of their recognised native title rights. That is addressed in the next subsection.

### *C Management and Accountability of Funds*

The topic of internal management of funds received by a particular Aboriginal community is becoming a little more vexed, especially with the process of evolution of decision-making away from traditional cultural practices. Any claim on behalf of an Aboriginal community under the Act must be authorised by the claim group, either according to its traditional laws and customs or by an agreed separate process: s 251B. Similarly, until very recently, s 251A required an Indigenous Land Use Agreement ('ILUA') to be agreed to by all the persons in the claim group. Section 203BE of the Act requires the certification of the relevant representative body that all the persons in the group have authorised the making of the ILUA.<sup>30</sup>

The Noongyar ILUA over the area of south-western Western Australia was not able to be registered because not all the members of the wide community affected agreed to it. There were a few dissidents.<sup>31</sup> The very significant potential outcome was thus to be frustrated by the precise terms of the Act. That led to rapid legislative amendment through the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth). It amended s 251A to enable the relevant claim group to decide how their will was to be expressed, that is to avoid the need for unanimity. It also retrospectively validated the Noongyar ILUA and all other registered ILUAs where there may have been similar concerns about their validity.

The point is that there is a legislative acceptance of a form of democratic or majority authorisation. That is significant in the context of the increasing numbers of Indigenous Australians living in the larger cities and who wish to maintain a connection with their country. There are very many well educated and well informed. They are young and old. How should they be able to participate in any decision to make a recognition or compensation application, or to agree to an ILUA, affecting their country? Equally, how should they be able to participate in decisions about the allocation or expenditure

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<sup>30</sup> In the case of a claimant application to the Court, there is a similar expression, but s 251B provides the means of authorisation and a claim may be made without the representative body providing its certification.

<sup>31</sup> *McGlade v Native Title Registrar* [2017] FCAFC 10.



of the income or capital received from such recognition or agreement? Should such decisions be left to a few? Is that process preferable to the more autocratic traditional customary law? Should the latter be preferred in all circumstances, or to those specific to matters of significant traditional usage of country. That is an increasingly important question where the available funds are significant. The still unresolved dispute between the three groups who benefit from the royalties received from the ongoing mining activities on the Gove Peninsula<sup>32</sup> is an illustration.

A separate question has not infrequently arisen about whether a particular person or family is a member of the claim group. That too is important for those involved. It is often a consequence of the breaking up or movement of families in the early and middle decades of the previous century. It is a requirement of judicial decision making which is a necessary but sad one. That too is an area of potentially more dispute, either in the context of entitlement to participate in decision making or in the distribution of funds. In the evidence in the dispute about Lake Torrens, there was some evidence that a particular claim group by its (then) principal elder had excluded one family some decades ago in a somewhat erratic way, and the excluded family then joined one of the other competing claim groups. I do not think that is typical, but there are genuine disputes about membership of particular claim groups.

Next, in this context, I remark on what is apparently occurring, at least in South Australia, where membership of more than one Aboriginal community or group is becoming commonly asserted. That is a matter of personal observation, rather than of any anthropological study of which I am aware. I am not an anthropologist, so the following is anecdotal and very general. Traditional laws and customs directed the belonging, and the passage of rights and responsibilities, through the mother's side or the father's side, often under complex and sophisticated rules, to a particular community. Sometimes an individual was able to choose which 'side' to follow. Over time, there may have been some adaptation of those rules to accommodate circumstances. However, it is only quite recently that there has been asserted membership of two or more Aboriginal communities, entitling that person to participate in the decision making of those several societies. It may not be said to be traditional. It is, at least on its face, inconsistent with the clear asserted lines put forward in the

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<sup>32</sup> See the Full Court judgment of a preliminary issue in *Rirratjingu Aboriginal Corporation v Northern Land Council* [2017] FCAFC 48 describing the dispute.

evidence in the Lake Torrens case. I suspect that is also a matter which may, in the proximate future, be the subject of anthropological study, both for its validity under traditional laws and customs and for its significance.

It should also be remarked that the criteria for recognition as an Aboriginal person is by no means finally settled. The common consensus is that there are three elements: an Aboriginal descent line (some say that is satisfied if there is a 1/16 descent line), self-identification as an Aboriginal, and acceptance by the Aboriginal community to which the person claims to belong.<sup>33</sup> Where there is no definitive prescription, there is scope for dispute. Again, it is debatable whether — with the dispersal of members of Indigenous communities now through exposure to opportunities for personal advancement, family circumstances and the like — the criterion of acceptance should routinely be accepted as a necessary criterion for accepted aboriginality.

I have not sought to address the particular legislative provisions under which monies received by an Aboriginal community are required to be managed. That would require detailed analysis and comment. It is not an area where specific criticism has been attracted at present, except in cases of apparently extravagant personal expenditure. That sort of behaviour is not confined to any particular group in our society. I have sought to point out the factual areas where there is scope for disputation in the future at a more general level.

Subject to those comments, I do not propose to comment on the entitlement of Indigenous communities to manage and account for their management of funds available to them from the use of their native title rights and interests. The topic was the subject of a Report to the Council of Australian Governments ‘Investigation into Indigenous Land Administration and Use,’ of a Senior Officers Working Group, December 2015. It was directed to supporting economic development of Indigenous land ‘for the benefit of all parties.’

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<sup>33</sup> See *Gibbs v Capewell* (1995) 54 FCR 503 and the discussion by Merkel J in *Shaw v Wolf* (1998) 83 FCR 113, each referring to the remarks of Brennan J in *Mabo* (1992) 172 CLR 1, 70. There is a comprehensive discussion of the topic by Dr John Gardiner-Garden in ‘Defining Aboriginality in Australia’ *Current Issues Brief* No 10 2002-03, Australian Parliamentary Library.

Professor Marcia Langton, Foundation Chair of Australian Indigenous Studies, University of Melbourne has been reported as saying in June 2017 in the Australian Mining Industry Annual Lecture of external anti-mining interest groups that,

[t]hey deliberately thwart the aspirations and native title achievements of the majority of Indigenous People by deception, by persuading the media and the public that a small handful of indigenous campaigners who oppose the legitimate interests of the majority of their own people are the truth-tellers and heroes.<sup>34</sup>

The focus on the majority viewpoint is, I think, consistent with my theme in the above comments.

In the management of funds available from compensation claims, the same or similar considerations apply. In addition, I think there is a question of further accountability of the communities who receive the compensation. Such funds are specifically granted as recompense for the loss of land. They are in part valued by reference to the spiritual and cultural losses discussed above. They are not, therefore, one generational in character. They are not the loss of any one person or generation of persons. The cultural and spiritual losses will span indefinite time. Should they be subject to some restriction upon their usage? It is hard to suggest any specific restriction. It may be impracticable or inefficient to impose restrictions upon their usage. I have no answer.

## CONCLUSION

We are all familiar, at least in a general way, with the recent National Indigenous Constitutional Convention in Mutitjulu. The recognition of Indigenous rights in land was not the primary focus of the Convention, but the right of the Indigenous community more generally to be heard. A proposed parliamentary voice for Indigenous People, as championed by Noel Pearson, a constitutional body to give Aboriginal and Torres Strait Islanders a voice in their affairs, was its outcome. It is significant that the referendum Council Report did not specify precisely how that voice was to be constituted, its functions, its structures and its procedures. That, in a sense, is also the challenge which I foresee for the future of native title claims under the Act, especially prompted by the

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<sup>34</sup> A full transcript of the speech is available from the Australian Mining Industry website: [http://www.minerals.org.au/news/annual\\_australian\\_mining\\_industry\\_lecture](http://www.minerals.org.au/news/annual_australian_mining_industry_lecture).

significant financial benefits which have followed or will follow from recognition of entitlement to country or from compensation awarded for loss of country.

It gives me some comfort that Noel Pearson, Warren Mundine, Senator Pat Dodson and Mick Dodson and, of course, Marcia Langton, are in the vanguard of the process. They each played a very significant role in the negotiations leading up to the passing of the Act.<sup>35</sup> The final sentence of Brennan's book in 1995 reads as follows:

The High Court decision and the [Native Title] Act are the reconciling pillars for the bridge that will provide recognition and justice for those on both sides of the river [Aboriginal Australians and settler Australians]. If we were to complete the bridge by 2001, all Australia could be confident that, whatever the differences, both sides of the river are part of one land, one nation.<sup>36</sup>

Well, we are not there yet, some 15 years on. But we are much closer and we are not too far away from the dream of One Land, One Nation. It is significant that, at her funeral on 11 August 2017, Justine Damond, the young woman killed by a police gunshot in Minneapolis, had her Australianness represented by the playing of two didgeridoos!

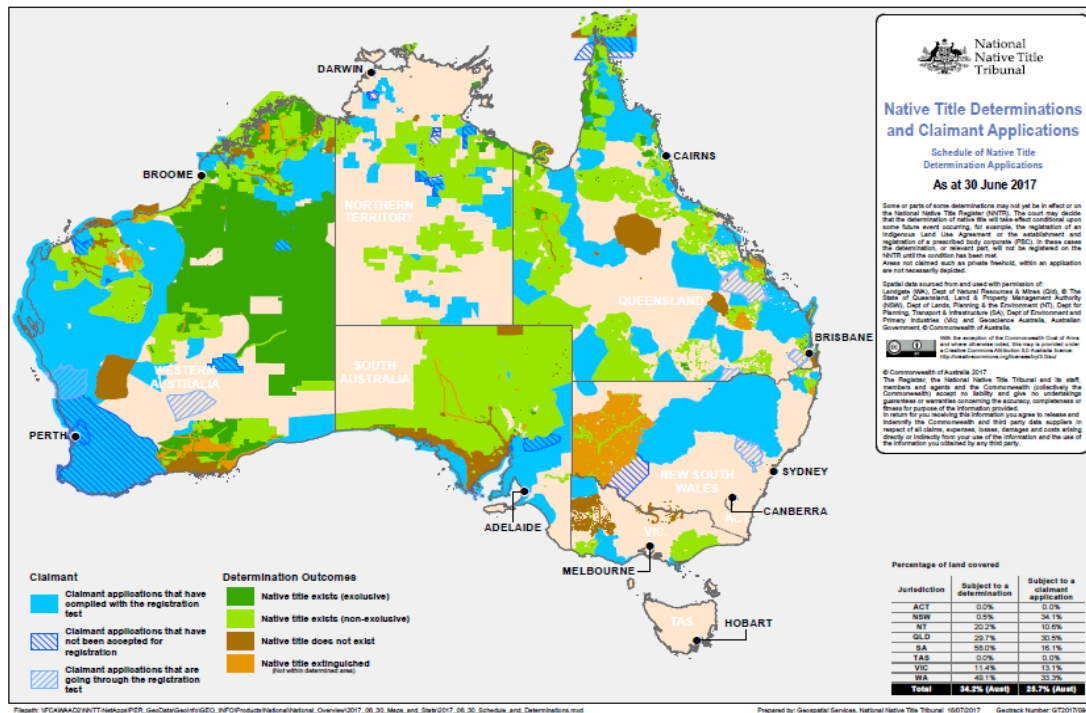
Thank you.

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<sup>35</sup> See Brennan, above n 9, especially Chapters 2 and 7.

<sup>36</sup> Brennan, above n 9, 223.

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