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TREATIES AND LAND GOVERNANCE – WHOSE LAND IS IT ANYWAY?

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Abstract

Widespread conflict over access to land followed the failure to recognize the existence of Indigenous land owners when Australia was first settled. The fiction of "terra nullius" and the legal assumption that the "waste lands" of the Australian colonies were exclusively possessed by the Crown was not set aside until 1992 by the High Court.

The statutory scheme established in 1994 to recognize and protect native title encourages flexible agreement making about the use of land but the deeply ingrained view of some non-Indigenous Australians that Indigenous land rights are less meaningful than other forms of land tenure leads to poor land governance and is an underlying cause of conflict.

Australian First Nations are now calling for meaningful recognition through a "Makarrata" or treaty like process. This will allow land governance processes to be established which reconcile all land interests and reduce the potential for conflict.

Key Words:
Land governance, Conflict, Treaty, Empower

Disclaimer and acknowledgments

Except where directly expressed in the context of this work, the views and opinions provided in this paper are those of the author and not those of the National Native Title Tribunal.

AUSTRALIA'S FIRST NATIONS AND THEIR LANDS

Australia's First Nations are Aboriginal and Torres Strait Islander peoples, descended from groups that existed in Australia and its surrounding islands prior to assertion of British sovereignty. They are separate peoples with their own distinct identity, history and cultural traditions.

Aboriginal peoples of Australia

For at least 65,000 years, Aboriginal peoples have lived on the continent now known as Australia. It is an ancient history, predating human settlement of Europe and the Americas. At the time of British settlement in 1788, it is estimated that there were approximately 750,000 Aboriginal people living across the entire continent, with possibly 500 Aboriginal nations within which there were numerous tribes or clans.

The picture painted by Captain Cook when he visited the continent in 1770 was of an immense tract of land, sparsely populated. The indigenous people were not only few in number, but they were primitive, unclothed, with only rudimentary shelter; they knew nothing of cultivation, they were not farmers, they were hunter-gatherers who wandered about "in small parties from place to place in search of Food". (Beaglehole, pp. 213, 393, 396) This portrayal was part of the argument used by white settlers to claim that Australia was terra nullius and to justify dispossession of the original occupants from their land. It contained a number of fallacies.

The idea that, before the arrival of Europeans, Aboriginal groups in Australia were nomadic, wandering "from place to place in search of Food", is a misconception still common today. Aboriginal groups were well adapted to the environment in which they lived. Marked changes in ecological and climatic conditions across the continent, from wet temperate and tropical rainforests to extremely arid deserts, led to a diversity of land use patterns; it affected food resources and land "boundaries". While groups moved between adjoining ecological systems to exploit seasonal foods and resources, their travel patterns were also subject to various territorial rules, as well as the need to meet obligations and responsibilities at sacred sites in their land or sea territory. According to the season, small local groups or bands were spread throughout their respective countries engaging in hunting, gathering and fishing, as well as social and ritual activities. People were conscious of their place within their own local territory, intimate with its geography, and spiritually attached to its sacred sites and sacred histories. (Memmott, Birdsall-Jones & Greenop, 2011, pp. 9-10) In arid parts of the continent, which could sustain fewer people, the movements of Aboriginal people were wide-ranging, travelling large distances from waterhole to waterhole in small family groups. However, in coastal and riverine areas where the largest populations of Aboriginal people lived, movements were limited, based entirely on an understanding of the seasons and the environment.

Nor were Aboriginal people primitive and uncivilized. Outstanding features of traditional Aboriginal society are highly sophisticated religion, art, social organization, an egalitarian system of justice and decision-making, complex, far-reaching trade networks, and the demonstrated ability to adapt to, and survive in, some of the world's harshest environments. (Flood, 1983, p. 16) Renowned anthropologist Claude Levi-Strauss considered that few civilizations seemed to equal the Australian tribes "in their taste for erudition and speculation and what sometimes seems like intellectual dandyism". (Levi-Strauss, 1966, p. 89) They were the "intellectual aristocrats" among early peoples. However, in the minds of the British colonists, the absence of agricultural practices was evidence of a primitive society.

The perception of traditional Aboriginal groups as hunters and gatherers who did not employ agricultural methods or build permanent dwellings has been recently challenged. (Pascoe, 2014; Gammage, 2014) Based on historical records, stories and new research Pascoe (2014) argues that the developed cultures and advanced knowledge of the Aboriginal people living on the Australian continent led them to develop sustainable and highly successful land management techniques.

Pascoe (2014) documents the evidence of these traditional Aboriginal practices from journals and diaries of explorers and colonialists. Although lifestyles varied in the coastal and riverine areas, many people lived in small towns with permanent dwellings constructed of locally sourced materials and designed to suit local conditions. Land management techniques were also refined to suit local conditions and community needs. These techniques included building dams and wells, planting, irrigating, harvesting seed, preserving and storing surplus food. Aquaculture was carried out in lakes, rivers and bays. (Pascoe, 2014, pp. 53-71)

An example is the Budj Bim eel trap system on Gunditjmara country in Victoria. Dated back 6,600 years, this system is evidence of a complex system of channels and weirs constructed from the local volcanic rock to manage water flows from nearby Lake Condah to exploit eels as a food source. This system of channels was recorded in 1841 by the Chief Protector of Aborigines, George Augustus Robinson, but his findings were not what the early settlers wanted to hear, given that the basis for settlement and dispossession was the presence of nomadic savages, not irrigators and tillers of the land. (McNiven, 2017) As long as the colonists maintained the narrative that the land did not have any signs of settlement, they could morally, and according to British law, legally continue to seize land and resources for their own use.

From 1788 onwards, British settlers brought with them the animals, crops and agricultural methods that had been used for thousands of years in Britain, ignoring the unique plants, animals, soils and weather patterns of a continent far removed from their experience. They also ignored the knowledge and techniques the local Aboriginal occupants had developed over tens of thousands of years of careful observation, which allowed Aboriginal communities to live across the entire continent.

For Aboriginal people in Australia, everything begins with the land. Prior to British settlement, Aboriginal people had a rich system of kinship and well developed governance systems, with complex interlocking rights, responsibilities, privileges and entitlements to land. The Aboriginal governance systems relating to land were based on communal principles far different from European land governance systems which linked productive use of land with individual ownership. Underpinning Aboriginal culture is the inextricable connection of people to land and the natural world, providing a link between Aboriginal people and the spiritual ancestors who created and shaped the landscape and all the things in it, both living and non-living. Land was, and remains, fundamental to Aboriginal people, both individually and collectively.

As a result, concepts of Aboriginal land ownership were, and are, different from European legal systems. Under the laws and customs of the relevant locality, particular groups were, either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names. Boundaries were defined and validated by creation stories of the spiritual ancestors. The special relationship between an Aboriginal group and its land was recognized by other groups in the relevant locality. The relationship between an individual and the land was mediated through group membership, that is, each individual belonged to certain territories within the family group and had spiritual connections and obligations to particular country of the tribe. (*Mabo v Queensland No 2* (1992) 175 CLR 1 (*Mabo*), pp. 99-100) Hence land was not "owned" in the European sense, but it was the source of identity and livelihood for those inextricably linked with it.

Aboriginal groups often had contact with outsiders before the British arrived. In the Northern Territory and parts of northern Queensland, Macassan trepang gatherers had been interacting with Aboriginal people since at least 1700. (RCIADIC, 1991, Chapter 10) Macassan interaction with Aboriginal groups extended to the coast of northern Western Australia. (Russell, 2004, p. 6) There is some suggestion of interactions before the eighteenth century. At the very least, there is agreement that there was a thriving Macassan fishery in northern Australia in the eighteenth and nineteenth centuries, until prohibited in 1906 by the Australian government. (Russell, 2004, pp. 7-8)

There is some evidence to suggest that Macassans negotiated with local Aboriginal groups for the right to fish in the waters, with an exchange arrangement of goods and sometimes money for taking trepang, and the employment of local Aboriginal people. (Russell, 2004, pp. 8-9) Whether these pre-colonial arrangements could be considered "treaties" has been the topic of some debate. (McIntosh, 2006, p. 154) McIntosh (2006) presents the results of collaborative research on "treaties" from 1986 to 1993 with a prominent Aboriginal elder (now deceased) of north-east Arnhem Land, who spoke "movingly of sacred

alliances that were the feature of a 'golden age': of partnership at the 'beginning of time' with the very earliest of the Indonesian visitors". (McIntosh, 2006, p. 155).

Macassan interactions had some influence on the cultures of Aboriginal groups in northern Australia. Items such as glass filtered into Aboriginal tool-making and Macassan words have been incorporated into some Aboriginal languages. (RCIADIC, 1991, para. 10.2.5) Other influences involved ceremonies, customs artistic works, myths and song cycles. (McIntosh 2006, p. 10) It is unlikely this influence was only one way, given the intermixing of the cultures. But as McIntosh (2006, p. 12) opines, the diversity and depth of Macassan influence on Aboriginal culture shows quite a high degree of accommodation and acceptance of the Macassan fishermen and their activities that would be unlikely if there were not mutual respect for people and property.

Torres Strait Islanders

The other Indigenous peoples in Australia are the traditional people of the Torres Strait Islands region. The Torres Strait Islands are a group of about 274 small islands in the Torres Strait, which lies between Cape York on mainland Australia and Papua New Guinea. Seventeen of the islands of the Torres Strait are inhabited.

Torres Strait Islanders are not mainland Aboriginal people who inhabit the islands of the Torres Strait. They are a separate people in origin, history and culture. Traditional peoples of the Torres Strait are likely to be of Melanesian origin, (Barham, 2000) with recent research showing that people were living in the Torres Strait around 7000 years ago. (Wright & Jacobsen, 2013) They were, and remain, maritime people. (*Akiba v Queensland* (2010) 204 FCR 1 (*Akiba*), para. [24])

The attachment of Torres Strait Island communities to their lands and surrounding seas is deep:

> Ownership and control of the reef and deeper water resources are as fundamental to culture and identity as ownership and control of dry land, and certainly more important to the future development prospects of people in the Strait. As a senior man of the Peidu clan declared 'Our feet are on the land, but our hands are in the sea'. (Scott & Mulrennan, 1999)

Subsistence patterns in the Torres Strait were diverse with the position, size and availability of natural resources on the islands reflected in the patterns of community organization and socioeconomic structures. Generally perceived, the western islands combined exploitation of bush plants with hunting and fishing while horticulture was practised in the eastern islands, exploiting the rich soil of the fertile high islands. In the northern low islands, groups combined horticulture and wild food gathering while the sandy cays and

islands of the central islands utilized large double-outrigger canoes to maintain semi-permanent inhabitation. (Lawrence & Reeves Lawrence, 2004, pp. 20-21)

From the time Luis Baez de Torres sailed through the Strait (which now bears his name) in 1606, Islander contact with Europeans was the subject of recorded account and observation. (*Akiba,* para. [7]; Lawrence & Reeves Lawrence, 2004, p. 22) From the eighteenth century, the strategically important shipping channel of the Torres Strait was frequently visited by European vessels, with whalers and sandalwood cutters among the first crews. In 1770, Lieutenant James Cook landed at Bedanug in the Torres Strait (which he renamed Possession Island) and claimed the east coast of Australia in the name of King George III of England. After the colonial settlement at Port Jackson in New South Wales was established in 1788, traders made increasing use of the shipping route through the Great Barrier Reef and Torres Strait. In 1792 the British Navy captain, William Bligh, mapped the main reefs and channels of the Torres Strait. Violent exchanges between Island warriors in canoes and British naval ships were recorded during this time, with deaths on both sides. (ADCQ, 2017, p. 6)

During the 1860s, the Torres Strait became the centre of commercial pearling and beche-de- mer (trepang) fisheries, increasing the contact between Torres Strait Islanders and Europeans, Pacific Islanders, Japanese, Malays, and Filipinos working in the thriving industries. (Lawrence & Reeves Lawrence, 2004, p. 23)

Queensland became a separate colony from New South Wales in 1859. By 1864 a settlement had been established by the Queensland Government at Somerset at the tip of Cape York, as a "base for controlling the lawless activities of the Islanders and the white adventurers living beyond government control". (Lawrence & Reeves Lawrence, 2004, p. 23) The islands up to sixty miles from the coast of Cape York were annexed to Queensland in 1872. In this annexation, the northern islands including Boigu, Dauan, Saibai, and the eastern island of Mer, were left outside the boundary, and came under the nominal control of the Governor of Fiji and the British Western Pacific High Commission. In 1879, the Queensland Government passed the *Queensland Coast Islands Act*, which extended the colony's boundary to include the remaining islands in the north and east. This annexation effectively meant that the Torres Strait area came within the Australian and Queensland borders, giving the Australian and Queensland Governments control over marine and other industries, as well as the movement of people between Papua New Guinea, the Torres Strait, and mainland Australia.

DISPOSSESSION, PROTECTION AND ASSIMILATION

Dispossession

Before departing England, Captain Arthur Phillip's instructions of 25 April 1787 included the following:

> You are to endeavour by every possible means to open intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their occupation, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence. (Historical Records of New South Wales, Sydney 1889)

These instructions were not followed. From 1788, for more than a century, British-Aboriginal relations has been characterised as a period of dispossession, physical ill-treatment, social disruption, population decline, economic exploitation, codified discrimination and cultural devastation. (Gardiner-Garden, 1999) Despite the obvious presence of Aboriginal people with developed land management techniques, they were falsely portrayed as primitive, uncivilised savages with no observable relationship with the land. Their land was taken over by the British on the premise that the land was wasteland, unoccupied and belonging to no-one; the notion of "terra nullius" was created.

European settlement moved from Botany Bay outwards, as settlers claimed land for economic purposes. The expanding pastoral industry escalated dispossession. In some parts of the country, the objective was to clear lands of Aboriginal people to enable development of land. (Dudgeon, Wright, Paradies, Garvey & Walker, 2010, p. 29) There was immediate resistance from Aboriginal people in many parts of the country, often referred to as the frontier wars, but the war for land was won by the colonists. Aboriginal resources and skills for fighting and warfare were small, in comparison with the Europeans who had the superior advantage of guns, horses and organized military force.

As their lands were increasingly occupied, and access to traditional food supplies disrupted, Aboriginal people moved towards European settlements. With violent conflicts and massacres, and increased exposure to disease, there were extremely high death rates. By the turn of the 20th century the Aboriginal population had been decimated, with an estimated population of 75,000 remaining.

In the early years there were some attempts to negotiate compromises when Aboriginal resistance impeded colonial enterprises. Although Governors Phillip and later Macquarie attracted large meetings of Aboriginal people who were willing to talk, satisfactory resolutions were not reached. Primarily the British were trying to impress Aboriginal participants with their power and by material gifts to make them see things their way. At annual meetings, Governor Macquarie imposed a hierarchical and patriarchal seating order, and through conferring rituals he attempted to elevate powerful men as "chiefs" or "kings" so as to ensure their cooperation in British efforts to open up the land. British officials did not properly enquire into what suited

Aboriginal people, nor what they most valued, and became disillusioned when the Aboriginal people refused to meet their expectations. (RCIADIC, 1991, Ch. 10.3.8)

The only historical example of a treaty is the Batman-Kulin treaty of 1835, an agreement between the grazier John Batman and a group of Wurundjeri elders for the rental of 600,000 acres of land around Port Philip near the current site of Melbourne. (Broome, 2005, pp. 10-14) It is significant because it records the only known occasion on which a colonist negotiated the occupation of Aboriginal land with the traditional owners to permit temporary access to their land in exchange for reciprocal rights to European resources. (Expert Panel, 2012, p. 191) The Batman-Kulin treaty was declared void by Governor Bourke on the basis that the Wurundjeri people did not have the right to negotiate with a private citizen in respect of land that belonged to the Crown. (National Archives of the United Kingdom, 1835)

In 1913, the High Court decision *Williams v Attorney General for New South Wales* (1913) 16 CLR 404 (*Williams*) confirmed the position that under British law, upon taking possession of the land, the Crown had acquired full legal and beneficial ownership of it. In that case, Justice Isaacs referred to Governor Bourke's proclamation of invalidity of the Batman-Kulin treaty as a "very practical application" of that doctrine. (*Williams*, p. 439)

In 1837, the first Attorney-General of New South Wales (who no longer held the office at that date), promoted the idea of a treaty with Aboriginal people in a submission to the Select Committee of the House of Commons on Aborigines appointed to inquire into the condition of Aboriginal people. (Expert Panel, 2012, p. 192) Governor George Arthur's experience in Van Dieman's Land (later Tasmania) also convinced him of the value of a treaty, as he explained in a letter to the committee:

> On the first occupation of this colony it was a great oversight that a treaty was not, at that time, made with the natives, and such compensation given to the chiefs as would have deemed a fair equivalent for what they surrendered.

Had this happened, he considered "that feeling of injustice which I have persuaded they have always entertained, would have no existence". (RCIADIC, 1991, Ch. 10.3.6-10.3.)

Protection and segregation

These submissions were to no avail. In 1837 the Select Committee of the House of Commons on Aborigines proposed the establishment of a protectorate system, recommending missionaries for Aboriginal people in Australia, protectors for their defence, reservation of hunting lands, schooling for the young and special codes of law to protect them until they learned to live within the framework of British

law. (Rowley, 1978, p. 20) Thereafter began a long era of control of Aboriginal peoples and, from the 1890s, Torres Strait Islanders.

Aboriginal survivors of frontier conflict were moved onto reserves or missions, away from their traditional country. Protectors were appointed in New South Wales, South Australia and Western Australia, to protect Aboriginal people from abuses and provide the remnant populations around towns with some rations, blankets and medicine. (ALRC, 1986, Ch.3 par. 22 citing Rowley, 1978, pp. 55-63, 66-8, 75-7, 83-4) By the mid nineteenth century, this protectorate experiment had failed and the very survival of Aboriginal people was being questioned. Forced off their land to the edges of non-Aboriginal settlement, dependent upon government rations if they could not find work, suffering from malnutrition and disease, their presence was unsettling and embarrassing to non-Aboriginal people. Governments typically viewed Aboriginal people as a nuisance. (HREOC, 1997, Vol. 2, Ch. 12)

The government responded with more formal and extensive policies of "protection", reserving land for the exclusive use of Indigenous people and assigning responsibility for their welfare to a Chief Protector or Protection Board. By 1911 the Northern Territory and every State except Tasmania had "protectionist legislation" (known as the "Aborigines Acts") giving the Chief Protector or Protection Board extensive power to control Indigenous people. The Aborigines Acts could require Aboriginal people to live on reserves run by governments or missionaries where their lives were closely regulated. Aboriginal people living outside reserves were spared the reserve regime but were subject to extremely restrictive protectionist legislation which permeated every aspect of their lives. (Expert Panel, 2012, p. 25)

In the name of protection, Indigenous people were subject to near-total control. Tasmania was the exception to this protectionist trend. By the turn of the century most Aboriginal families had been removed to Cape Barren Island off the north coast of the Tasmanian mainland where they were effectively segregated from non-Indigenous people. Until the late 1960s Tasmanian governments resolutely insisted that Tasmania did not have an Aboriginal population, just some "half-caste" people. (HREOC, 1997, Ch. 2.21)

Assimilation

Under "protectionist" legislation Indigenous children were often forcibly moved away from their families and communities, and placed in "training institutions" to prepare them to work for non-Indigenous people in the hope that this mixed descent population would over time "merge" with the non-Indigenous population. But a common feature of these settlements, missions and institutions was lack of funding; people forced to move to these places were likely to die prematurely. (HREOC, 1997, Ch. 2.21)

Continued difficulties with this "protectionist" approach and criticisms of the treatment of Aboriginal people led to demands by States for increased Commonwealth involvement in Aboriginal affairs. (ALRC, 1987, Para. [26]) In 1937, the first Commonwealth – State Native Welfare Conference was held, attended by representatives of all States (except Tasmania) and the Northern Territory. This conference officially sanctioned a policy of assimilation in these terms:

> [T]his conference believes that the destiny of the natives of aboriginal origin, but not of full blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to that end. (extract set out in (Expert Panel, 2012, p. 26))

From that time on, States began adopting policies designed to "assimilate" Indigenous people of mixed descent. Whereas "merging" was essentially a passive process of pushing Indigenous people into the non-Indigenous community and denying them assistance, assimilation was a highly intensive process necessitating constant surveillance of people's lives, judged according to non-Indigenous standards. (HREOC, 1977, Ch. 2.21)

By 1951 all Australian governments had adopted a policy of "assimilating" Aboriginal people into the wider society, but interpretations differed. (RCIADIC, 1991, Vol. 2. Ch. 20.3.3) In 1961 the Native Welfare Conference again endorsed the policy of assimilation with a common definition adopted:

> The policy of assimilation means that all Aborigines and part-Aborigines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, as other Australians. (ALRC, 1986, Ch. 3. para. 26)

Despite the mandatory way the definition was expressed, by the early 1960s it was clear that Indigenous people were not being assimilated. Standing in the way was discrimination by non-Indigenous people and the refusal of Aboriginal and Torres Strait Islander peoples to surrender their lifestyle and culture. Consequently, the definition of assimilation was further amended at the 1965 Native Welfare Conference to include an element of choice:

> The policy of assimilation seeks that all persons on Aboriginal descent will choose to attain a similar manner of living to that of other Australians and live as members of a single community. (HREOC, 1977, Vol. 2. Ch. 2)

The decision in the 1960s to give Aboriginal people the right to enrol to vote as electors of the Commonwealth was driven by assimilationist ideology. In 1961, the House of Representatives Select Committee on Voting Rights of Aborigines recommended that all Indigenous people should be entitled to vote but that enrolment should be voluntary. (House of Representatives Select Committee on Voting Rights of Aborigines, 1961, p. 8) The Chairman of the Select Committee reported to parliament that the Committee hoped the report would be "a large step forward in the assimilation and integration of the Aboriginal people in the Commonwealth of Australia". (Chesterman & Galligan, 1997, p. 161)

THE SLOW ROAD TO RECOGNITION OF INDIGENOUS RIGHTS

The journey to meaningful recognition of Indigenous rights in Australia has been slow. The 1960s marked the start of the land rights movement in Australia. Several events had significant impact on the struggle.

Yirrkala Bark Petition

In 1963, the Yirrkala elders of the Yolngu people in north Eastern Arnhem Land presented a bark petition to the Commonwealth Parliament in the English and Gumatj languages, protesting the Commonwealth Government's decision to grant mining rights in the Arnhem Land reserve and calling for recognition of Yolngu land rights as well as a parliamentary inquiry. (Expert Panel, 2012, p. 29)

A House of Representatives Select Committee on Grievances of Yirrkala Aborigines was established. The committee made a number of recommendations, including compensation to the Yolngu people for loss of their traditional occupancy of land and protection of sacred sites. (House of Representatives Select Committee on Grievances of Yirrkala Aborigines, 1963, p. 12, para. 76) The Select Committee acknowledged that the Yirrkala people's claim to land was felt by them to "constitute ownership", even though these rights "are not legally expressed under the law of the Northern Territory". (House of Representatives Select Committee on Grievances of Yirrkala Aborigines, 1963, p. 12, para. 70)

The recommendations of the Select Committee were ignored and the *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* NT was enacted, unilaterally revoking part of the Yirrkala Aboriginal Reserve in order to enable Nabalco to develop the mine. In response, the Yolngu clans mounted a legal challenge to the legislation. This was the first litigation on native title in Australia but it was unsuccessful. In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (*Milirrpum*) the claim was rejected by the court on the basis that native title was not part of the law of Australia, using the notion of *terra nullius* to justify this ruling. It took until 1992 for the High Court to overrule this approach in *Mabo.*

However *Milirrpum* led to the establishment of the Woodward Royal Commission and the eventual recognition of Aboriginal land rights in the Northern Territory by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)

Wave Hill Walk Off

In 1966, Vincent Lingiari led a walk-off of 200 Aboriginal stockmen of the Gurindji, Ngarinman, Bilinara, Warlpiri and Mudbara stockmen from the Wave Hill cattle station in the Northern Territory in protest at their pay and living conditions. Although initially about equal pay, the walk-off became the struggle for equal citizenship rights and recognition of distinct rights relating to culture, land and self-determination. (Expert Panel, 2012, p. 30) Ten years later the federal government passed land rights legislation for traditional owners in the Northern Territory.

1967 Referendum

In 1967, Australians voted overwhelmingly to amend the Australian Constitution to include Aboriginal people in the census and allow the Commonwealth to create laws for them. Of particular significance among the post-1967 legislation enacted by the Commonwealth Parliament is the *Aboriginal Land Rights (Northern Territory) Act 1976*. The Act provides for the strongest form of land rights in Australia,[1] and has resulted in almost half of the Northern Territory coming under Aboriginal ownership. (Expert Panel, 2012, p. 32) Other significant examples of legislation enacted by the Commonwealth Parliament since 1967 in reliance on the Commonwealth power to legislate in respect of Aboriginal people include:

- the *World Heritage Properties Conservation Act 1983*, sections 8 and 10 of which confer protection on sites of cultural significance to Aboriginal people;
- the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*;
- the *Native Title Act 1993* (NTA); and
- the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

Self-determination and Self-management

In 1972, the federal Labour Government led by Gough Whitlam was elected on a policy platform of Aboriginal self-determination and the policy of assimilation was abandoned. (Expert Panel, 2012, p. 38; McRae, Nettheim & Beacroft, 2009, para. 1.1590) This self-determination policy was described as

[1] Most states have some form of land rights legislation in place, although although the degree of control given to Indigenous peoples over the land in question differs significantly from state to state.

"Aboriginal communities deciding the pace and nature of their future development as significant components within a diverse Australia". (Roberts, 1994, p. 212, citing O'Donoghue, 1992)

The federal Coalition Government led by Malcolm Fraser, which came to power in late 1975, adopted the policy of "self-management" which focused on Indigenous communities managing government projects and funding locally but with little say in what projects would be created.

The Hawke and Keating Labor Governments from 1983-1996 used both self-determination and self-management as key principles in their Indigenous affairs policies. (Australian Human Rights Commission, 2008, p. 14) Initiatives included: the 1991 report of the Royal Commission into Aboriginal Deaths in Custody (established in 1987); the establishment in 1989 of the Aboriginal and Torres Strait Islander Commission (ATSIC)[2] and in 1994 of the Torres Strait Regional Authority;[3] the establishment in 1991 of the Council for Aboriginal Reconciliation;[4] the creation in 1992 of the Office of Aboriginal and Torres Strait Islander Social Justice Commissioner[5] within the Human Rights and Equal Opportunity Commission; the passage of the NTA in 1993; and the establishment in 1995 of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.

In 1996, the Howard Coalition Government reverted to a policy of self-management with an "emphasis on 'practical reconciliation', the concept of 'shared responsibility' and a commitment to address the profound social economic and social disadvantage of many indigenous Australians". (Expert Panel, 2012, p. 39 citing Howard. 2000)

Mabo v Queensland (No 2)

It took more than 200 years for Australian law to recognize that, at the time of colonization, there were existing indigenous owners of the land with their own legal systems and land tenure laws. Up until that point, the fiction of terra nullius and the assumption that the "waste lands" of the Australian colonies were

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[2] ATSIC was established in 1989 under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) with the following objectives (section 3): to ensure maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation; to promote Indigenous self-management and self-sufficiency; to further Indigenous economic, social and cultural development; and to ensure coordination of Commonwealth, State, Territory and local government policy affecting Indigenous people.

[3] The Torres Strait Regional Authority was established on 1 July 1994 under the *Aboriginal and Torres Strait Islander Commission Act 1989*, now known as the *Aboriginal and Torres Strait Islander Act 2005*. It is the leading Commonwealth representative body for Torres Strait Islander and Aboriginal people living in the Torres Strait.

[4] The Council for Aboriginal Reconciliation was established in 1991 as a statutory authority under the *Council for Aboriginal Reconciliation Act 1991* (Cth) "to improve the relationships between Aboriginal and Torres Strait Islander peoples and the wider Australian community".

[5] The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner was created by the Commonwealth Parliament in December 1992 in response to the findings of the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence.

in the exclusive possession of the Crown from settlement had been confirmed by the courts and was deeply ingrained in the mindset of most non-Indigenous Australians.

The 1992 decision of the High Court in *Mabo,* that the common law recognized and protected indigenous rights that existed at the time of British assertion of sovereignty was truly a watershed moment in Australian legal history, shaking the foundation of land law upon which British claims to possession of Australia were based. But the shift in the foundation of Australian land law did not come without its limitations. That limitation was the exposure of native title, which had survived British assertion of sovereignty, to extinguishment when the Crown grants rights to others, or appropriates land to itself. Thus, even though the High Court confirmed that native title existed after the time Australia was settled by the British colonists and that native title persisted after the assumption of sovereignty, the dispossession of Indigenous people from their land by the expanding settlement of the Australian continent was confirmed. (*Mabo*, pp. 68-69)

Despite this limitation, Pearson (1995) has described the *Mabo* decision as 'the most critical event in overturning racial discrimination in so far as indigenous people are concerned':

> The significance of the decision is that it recognizes Aboriginal law and custom as a source of law for the first time in 204 years of colonial settlement. For the great part, however, Aboriginal law remains unrecognized. Nevertheless, the breadth of the context of this recognition sets the stage for an interaction which has never before been possible. Colonial law has been a reality in Australia since 1788. Aboriginal law has always been a reality and we are unanimous in our resolve that it continue to be so. (Expert Panel, 2012, p. 35, citing Pearson, 1995)

The Commonwealth's response to *Mabo* came in three parts. The first was to enact the NTA as a legislative framework to deal with past and future implications of *Mabo.* The second part was the establishment of an Indigenous Land Fund and the third was the delivery of a "social justice package", which was never implemented

The NTA provides a national system for the recognition and protection of native title – and for its co-existence with the national land management system. It also provides a mechanism for determining claims to native title and compensation with a focus on resolving these matters by agreement, rather than litigation.

An Indigenous Land Use Agreement (ILUA) is a common type of agreement negotiated under the NTA. It is a voluntary agreement between native title groups and others about the use of land and waters. An ILUA must generally relate to native title but otherwise the NTA is non-prescriptive about content in order to promote flexibility. ILUAs can range from small-scale agreements with one Indigenous group over their traditional lands, to large-scale regional agreements involving a number of Indigenous groups, federal, state

and local government as well as private parties. Despite their flexibility, ILUAs are not a panacea for the lack of meaningful recognition of, and respect for, the rights of Indigenous people in Australia, and their special relationship with the land. One of the many difficulties still pertaining to any agreement making in Australia relating to land issues is the deeply ingrained view of non-Indigenous Australians that the land rights of Indigenous people are less meaningful than other forms of land tenure. Devaluing traditional land rights leads to poor land governance and is an underlying cause of conflict between Indigenous groups and third parties, backed by government, who seek to use the land for their own economic benefit.

Reconciliation

Before Australia can move forward and mature as a nation there must be a reciprocal reconciliation process. A reconciliation process formally commenced in 1991 with the establishment of the Council for Aboriginal Reconciliation in response to the report of the Royal Commission into Aboriginal Deaths in Custody. The charter of the Council was to raise public awareness and consult on a "Document of Reconciliation" within a 10 year legislated period.

In its final report to the prime minister and the Commonwealth Parliament in December 2000, the Council for Aboriginal Reconciliation made, among others, the following recommendation in relation to the manner of giving effect to its reconciliation documents:

> 3. The Commonwealth Parliament prepare legislation for a referendum which seeks to:
>
> - recognize Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution; and
> - remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race. (Council for Aboriginal Reconciliation, 2000, Ch. 10, para. 3)

Constitutional reform

The push for constitutional reform to recognize Indigenous people in the constitution had already begun began in 1995. In March 1995, each of ATSIC (O'Donoghue, 1995), the Council for Aboriginal Reconciliation (Council for Aboriginal Reconciliation, 1995) and the Aboriginal and Torres Strait Islander Social Justice Commissioner (Dodson, 1995) provided a report on the social justice package proposed to be implemented as part of the response to *Mabo*. Each of these reports raised the need for constitutional reform. It was reported by ATSIC that consultations across the country had found overwhelming support for the recognition of Indigenous Australians in the Constitution. (O'Donoghue, 1995, para. 4.15; Recommendation 19)

The idea of inserting a new constitutional preamble recognizing Australia's indigenous people emerged gradually as a significant issue in the republic debate of the 1990s, culminating in the Constitutional Convention held in Canberra in February 1998. In 1999, a new preamble was put to the people in a national referendum along with the question whether Australia should become a republic. Both proposals failed. In the lead up to the 2007 election, there was bipartisan support for a referendum on constitutional recognition for Indigenous Australians. Over the next 10 years, three bodies were established to consider and consult on the issues:

- The Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution was established in 2010 and reported in 2012.
- A Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was then established, reporting in June 2015.
- The Referendum Council was established in December 2015. The Final Report of the Referendum Council, building on the work of the Expert Panel and the Joint Select Committee, was delivered on 30 June 2017.

The role of the Referendum Council was to consult specifically with Aboriginal and Torres Strait Islander peoples on their views of meaningful recognition. Twelve First Nations Regional Dialogues culminating in the National Constitutional Convention at Uluru (Central Australia) in May 2017, empowered First Peoples from across the country to form a consensus position on the form constitutional recognition should take. (Referendum Council, 2017, Foreword iv) This is the first time in Australia's history that such a consultation process has been undertaken.

After the Convention at Uluru, attended by more 250 community leaders, the Uluru Statement from the Heart was delivered, rejecting the idea of mere constitutional recognition and instead asking for a constitutionally enshrined Indigenous voice in parliament and a Makarrata Commission to supervise a process of agreement making between governments and First Nations and truth telling about Australia's history.

The Indigenous focus is now moving away from symbolic constitutional recognition to a process of constitutional reform that seeks to empower Aboriginal and Torres Strait Islander peoples to have control of their own destinies. The Uluru Statement from the Heart refers to taking '*a rightful place in our own country'.* (Referendum Council, 2017, p. i) This statement emphasizes the gap between the aspirations of First Nations people who continue to see themselves as the owners of their traditional lands as their ancestors were at settlement, with obligations and responsibilities to it, and the mindsets of many non-Indigenous Australians still wedded to the colonial idea of Crown control over the use and distribution of

land. Land governance continues to be viewed as a matter for government policy, even in respect of traditional lands. This is a chasm which needs to be bridged before there can be any settled future for Indigenous people, and their land rights, in Australia.

MEANINGFUL REFORM THROUGH "MAKARRATA" OR TREATY

Australia does not have a history of treaty making. Elsewhere, treaties have been accepted as a way of reaching settlements between Indigenous peoples and colonizers. British and colonial governments made many treaties with Indigenous peoples in Canada (up to 1920), the United States (up to 1871) and in Aotearoa/New Zealand (1840). Modern treaties, and treaty-like agreements, are still being negotiated in Canada between federal and provincial governments and First Nations. The United States government continues to make "nation to nation" agreements with recognized Indian tribes. In New Zealand, Treaty of Waitangi principles apply to most aspects of the relationship between government and Maori. For an excellent summary of comparative experiences in agreement making between Indigenous people and different settler societies, see the report of the Expert Panel (2012, pp. 197-9).

As discussed above, the first idea of a treaty with Aboriginal people was raised in 1837 in a submission to the Select Committee of the House of Commons on Aborigines appointed to inquire into the condition of Aboriginal people, but it was rejected. It took over 140 years for the question of treaty to reach national prominence with some support from the Commonwealth government. (Expert Panel, 2012, p. 192) In 1979, the National Aboriginal Conference (NAC) called for a "Treaty of Commitment" to be negotiated between the Commonwealth and Aboriginal people, later adopting the term "Makarrata". (Expert Panel, 2012, pp.192-3; McIntosh, 2006, p. 154) "Makarrata" is a Yolngu word from north-eastern Arnhem Land sometimes translated as "things are alright again after a conflict" or "coming together after a struggle". (Hiatt, 1987) The Senate Standing Committee on Constitutional and Legal Affairs conducted an inquiry into the feasibility of a Makarrata between the Commonwealth and Aboriginal people. In its 1983 report, *Two Hundred Years Later…,* the committee recommended a constitutional amendment conferring "a broad power on the Commonwealth to enter into a compact with the representatives of the Aboriginal people". (Senate Standing Committee on Constitutional and Legal Affairs, 1983, p. 155)

A Constitutional Commission was established in 1985 to review the Australian Constitution. In its review, the Constitutional Commission also considered a proposal for constitutional backing for agreement making between the Commonwealth of Australia and representatives of Aborigines and Torres Strait Islanders. (Constitutional Commission, 1988, Volume 1, para 10.412) In its consideration, the Commission noted that the history of the gradual occupation of Australia was filled with examples of disregard for the interests of Aboriginal people dispossessed from their land. It also noted that in recent years attempts had been made

to formally recognize the fact that Australia was occupied before European settlement and that settlement had had adverse effects on the indigenous inhabitants of the land. During the period of the Commission's review there had been renewed interest in the possibility of some sort of formal agreement between the Commonwealth and Aboriginal and Torres Strait Islander representatives. (Constitutional Commission, 1988, Volume 1, paras 10.425, 10.428) Although agreeing that constitutional alteration to provide the framework for an agreement provided "an imaginative and attractive approach", the Commission concluded that any alteration should not be made until an agreement had been identified. (Constitutional Commission, 1988, Summary pp. 55-6; also Volume 1, para. 10.459)

A further call for an agreement or treaty in Australia came in December 2000 when the Council for Aboriginal Reconciliation presented its final report to Parliament, as discussed above.

Agreement making with with Aboriginal and Torres Strait Islander peoples has been a feature of the Australian policy landscape since the first agreements made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth): the Ranger Uranium Project Agreement and the Kakadu National Park Lease Agreement, which were signed on 3 November 1978. Since then, there has been a proliferation of agreements between Aboriginal and Torres Strait Islander peoples and resource extraction companies, railway, pipeline and other major infrastructure project proponents, local governments, State and Territory governments, farming and grazing representative bodies, universities, publishers, arts organisations and other institutions and agencies. (Expert Panel, 2012: citing Langton & Palmer, 2003)

Some of these agreements have statutory status, such as those concluded under the *Aboriginal Land Rights (Northern Territory) Act.* Some have been the subject of consent determinations under the NTA. Other agreements are registered as ILUAs under the NTA. An ILUA can be negotiated whether or not native title has been determined to exist, and once registered on the Register of Indigenous Land Use Agreements it will have contractual effect. An example is the 2005 Ord Final Agreement, which was entered into between the State of Western Australia, the Miriuwung Gajerrong people and other parties in relation to the proposed second stage development of the Ord River Irrigation Area Project (Ord Stage 2). The development of Ord Stage 2 for irrigated agriculture could not have proceeded without the agreement of the Miriuwung Gajerrong people. On 16 August 2006, the Ord Final Agreement was registered as an ILUA by the National Native Title Tribunal. The agreement contains an Aboriginal development package that provides a range of initiatives focusing on developing the capacity of the Miriuwung Gajerrong people to engage in the local economy, to participate in and benefit from the Stage 2 development and to participate in planning and management in the region. (Expert Panel, 2012, p. 195)

Other agreements have been negotiated outside the native title framework. For example, in 2004, the State of Victoria entered into a cooperative management agreement with the Yorta Yorta people to facilitate greater cooperation in the management of their country. In 2010, Victoria introduced an alternative system for resolving native title claims. The *Traditional Owners Settlement Act 2010* (Vic) provides for out-of-court settlement of native title. The Gunaikurnai settlement, formally recognizing the Gunaikurnai people as the traditional owners of much of Gippsland, was the first settlement in Victoria under that Act. (Expert Panel, 2012, p. 195)

The Commonwealth Government has also initiated a system of regional partnership agreements designed to establish a uniform Commonwealth Government investment strategy across a region with respect to Aboriginal and Torres Strait Islander affairs. These partnership agreements can also include State and Territory investment. For example, the Ngarrindjeri Regional Partnership Agreement was entered into between the Ngarrindjeri Regional Authority and the Commonwealth and South Australian governments in July 2008. The agreement establishes the Ngarrindjeri Regional Authority, which has engaged in a number of activities related to the representation of the Ngarrindjeri clans and the development of sustainable economic opportunities for the Ngarrindjeri people. (Expert Panel, 2012, p. 196)

The increase in agreement making in recent years is an important development in governing and building relationships between Aboriginal and Torres Strait Islander communities and organisations and the government and non-government bodies with which they engage. As the Expert Panel concludes (2012, p. 202):

> [A]greements that are negotiated on the basis of consent and that give rise to mutually binding obligations have a critical role to play in improving relations between Aboriginal and Torres Strait Islander peoples and the broader Australian community, and in providing more constructive and equitable relationships between Aboriginal and Torres Strait Islander peoples and Australian governments, local government bodies, non-government bodies and corporations.

The type of agreements discussed above can cover some of the same ground as treaties in other countries; they can acknowledge that the Indigenous peoples concerned were the prior owners and occupiers of the land, and establish structures of culturally appropriate governance, decision making and control. However, they cannot answer the overarching call for wider reform to empower Indigenous people to take "a rightful place in [their] own country".

At state and territory level, South Australia, Victoria and the Northern Territory have responded positively to the increasing Indigenous call for a treaty process. In December 2016, the South Australian

Government announced it would commence treaty discussions with the South Australian Aboriginal community. A Treaty Commissioner was appointed in early 2017, and treaty negotiations with three Aboriginal nations commenced in September 2017.

In February 2016 the Victorian Government committed to advancing self-determination for Aboriginal Victorians by working towards a treaty with First Nations Peoples. A Treaty Advancement Commissioner was appointed in December 2017 and the Victorian Treaty Advancement Commission commenced operation in January 2018.

The Northern Territory Government has committed to commencing discussion on developing a treaty in the Northern Territory with Aboriginal Territorians.

On October 2017, the Commonwealth government rejected the Referendum Council's recommendation of a constitutionally enshrined Indigenous voice in parliament. It is not clear whether it will also reject calls from the Uluru Statement from the Heart for a Makarrata Commission to supervise a treaty making process between Aboriginal and Torres Strait Islander peoples and governments, and a truth telling process.

RECONCILING INTERESTS - WHOSE LAND IS IT ANYWAY?

A treaty is a way to address the pervasive inequality still existing amongst the First Nations population in Australia as a result of colonization. Given the time that has elapsed since colonization, any treaty process will need to be truly collaborative and consultative to address entrenched and diverse views about Australia's past and the "ownership" of land. The importance of an open and transparent "truth telling" process should not be underestimated.

Settler colonial societies around the globe tend to rely on remarkably similar spatial constructs, power structures, and social narratives. Beginning with the perception that lands which have been in long term use by Indigenous peoples are empty (the myth of *terra nullius*) settler colonization proceeds to divide up Indigenous-held lands into discrete packets of private property for their own use and "ownership". By investing their identity and material belonging in these properties, settler collectives simultaneously create or empower a state to "defend" these properties from Indigenous peoples and First Nations who are seen as inherently threatening. Hence, the narrative develops which does not allow for the highly sophisticated and well-adapted practices of First Nations people.

It is this entrenched European view of land ownership, without regard for the special relationship of indigenous people with their land that stands in the way true reconciliation in Australia. The challenge ahead is to reconcile the concept of Crown Land with the property rights of Aboriginal and Torres Strait

Islanders that were legally recognized as continuing to exist by the *Mabo* decision in 1992 and are now recognized and protected by the NTA since 1 January 1994. To achieve this we must consider how property rights might be reframed in the absence of the Crown as the holder of the superior interest over land, and explore what this might look like. We must ask the questions: Who are the custodians of the land? Who has superior ownership of the land? Can the two concepts of ownership work together, and if so, how?

Exploring these questions in a treaty process based upon truth telling and which is "truthfully" open and consultative, will go a long way to answering the question asked by many Aboriginal and Torres Strait Islanders: *Are our rights as the continuing custodians of this land being recognized?'*

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